NORTH CAROLINA LAW REVIEW

Volume 87 | Number 4 Article 7

5-1-2009

Life after NCRL v. Leake: Can North Carolina's Disclosure Laws Survive a Constitutional Challenge

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Life After *NCRL v. Leake*: Can North Carolina's Disclosure Laws Survive a Constitutional Challenge?*

INTRODUCTION

Politics—especially electoral politics—is a dirty business. Part of this is certainly due to the nature of our political system: politicians raise money to win campaigns, and donors often give money to win on issues. Invariably, this leads to the exchange of money in hopes of currying favor. Some of this so-called "corruption" is ultimately just a part of the business of politics. Nevertheless, such an appearance of corruption—or actual corruption itself—has a destabilizing effect on our democracy and the functionality of our national institutions.[1]

To fight this evil, and to provide voters with information regarding sources of financial support, Congress and the states have passed tomes of campaign finance law in hopes that such regulation will ferret out corruption.[2] This legislative activity, however, conflicts with both the constitutionally protected right to free speech and the similarly protected right to freedom of association. Disclosure arguably places a cost on those speaking in the political forum by requiring them to identify themselves and their means. In the process, it also forces these participants to reveal those who have associated with them by way of contribution. Such infringement strikes directly at the heart of the First Amendment. Our political freedoms are "democracy's lifeblood"[3] and thus should be reasonably protected from such governmental intrusion. Yet, at the same time, courts have found that our government, at both the state and federal levels, should be allowed some measure by which to ensure that the seeds of corruption do not take hold and that our democracy is properly functioning.[4] Thus, our courts have regularly been

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1. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.").

2. *See generally* FED. ELECTION COMM'N, FEDERAL ELECTION CAMPAIGN LAWS (2008), http://www.fec.gov/law/feca/feca.pdf (compiling "[f]ederal campaign laws as an informative service to the general public").

3. N.C. Right to Life, Inc. v. Leake (*NCRL*), 525 F.3d 274, 284 (4th Cir. 2008).

4. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam) ("[T]here are governmental interests sufficiently important to outweigh the possibility of infringement,

summoned to help find the proper balance, ensuring that free speech is not "chilled,"[5] and requiring disclosure laws to be, at the very least, supported by important governmental interests furthered by substantially related means.[6]

With respect to North Carolina, the most recent example of this constitutional check came in the form of the Fourth Circuit's holding in *North Carolina Right to Life, Inc. v. Leake* (*NCRL*),[7] which struck down as unconstitutional several of the state's campaign finance laws.[8] N.C. Right to Life, Inc., brought a constitutional challenge against a state campaign finance law that allowed for the State Board of Elections to evaluate "contextual factors" in determining whether particular communications were regulable.[9] The state's definition of "political committee" and its contribution limit on independent expenditures were also challenged.[10] The court, in a 2–1 decision, found for N.C. Right to Life on all three issues, holding both that the state's definition of "express advocacy"[11] and its definition of "political committee" were overbroad,[12] and that it could not apply

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particularly when the 'functioning of our national institutions' is involved." (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961))).

5. *See, e.g.*, FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2665–66 (2007); FEC v. Colo. Rep. Fed. Campaign Comm., 533 U.S. 431, 471 (2001); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 n.20 (1982); *NCRL*, 525 F.3d at 279 n.2.

6. Buckley v. Valeo, 424 U.S. at 64–65.

7. 525 F.3d 274 (4th Cir. 2008).

8. *NCRL*, 525 F.3d at 274. For a discussion of North Carolina's other attempts at regulating political speech, see generally B. Chad Bungard, *You Can't Touch This: A Lesson to Legislators on Political Speech*, 1 FIRST AMEND. L. REV. 13 (2003).

9. *NCRL*, 525 F.3d at 281.

10. *Id.* at 278–79, 283. *NCRL* did not include any challenges to the disclosure laws discussed in this Recent Development. It did, however, lead to curative legislation that directly affects the applicability and constitutionality of the disclosure laws, as discussed later in this Recent Development. *See infra* notes 113–15 and accompanying text.

11. *Id.* at 283–84. "Express advocacy" is defined as communication that expressly supports or opposes a candidate for office, or is the functional equivalent of such communication. *Id.* at 281–82. "Functional equivalent" has been defined as being subject to no other reasonable interpretation than in support or opposition of a candidate. FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S.Ct. 2652, 2667 (2007). The difference between "issue" and "express" advocacy is detailed in the discussion of *WRTL*. *See infra* notes 100–07 and accompanying text.

12. *NCRL*, 525 F.3d at 286–90. The state had defined "political committee" as any committee with "a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." N.C. GEN. STAT. § 163-278.6(14) (2007). The court, however, held that only a definition that confined committees to those with "the major purpose" of such advocacy was allowable, as the switch in article ("the" to "a") broadens the definition to encompass organizations "primarily engaging in protected political speech." *NCRL*, 525 F.3d at 290.

contribution limits to independent expenditure committees.[13] Such regulations, the court opined, extended beyond the allowable limit, unconstitutionally burdening "the ordinary political speech that is democracy's lifeblood."[14]

It seems without fail that this dance—one featuring Congress or state legislatures passing campaign finance legislation, followed by constitutional challenges of such laws—will continue to force states such as North Carolina to find alternative, narrower means to tackle problematic political issues such as corruption and transparency. Interestingly, as part of its analysis in *NCRL*, the court noted such "narrower means [already] exist for North Carolina to achieve its regulatory objectives," namely, the state's disclosure laws.[15] The majority added that such laws or their equivalent can "produce the same benefits of transparency and accountability while only imposing regulatory burdens on communications that are *unambiguously campaign related.*"[16]

This Recent Development considers whether, in light of the changing landscape of campaign finance, certain North Carolina laws requiring disclosure of contributions and expenditures can survive a constitutional challenge. First, this Recent Development will offer a brief explanation of each of these disclosure laws[17]—North Carolina's independent expenditures disclosure law,[18] electioneering communications disclosure law,[19] and candidate-specific communications disclosure law.[20] Then, this piece will conduct an

13. *NCRL*, 525 F.3d at 291–95.

14. *Id.* at 284.

15. *Id.* at 290.

16. *Id.* (emphasis added) (internal quotation marks omitted). *Contra id.* at 331 (Michael, J., dissenting) ("[North Carolina's disclosure law constitutes] a minimalist approach for regulating organizations with a major purpose of electoral advocacy; it would significantly undermine the state's interest in data collection and deterrence because it would allow these organizations to avoid the careful accounting and regular reporting requirements that enable the state to undertake prompt investigation of incidents of potential misconduct.").

17. By "disclosure laws" I mean statutory requirements for reporting of contributions and expenditures, as opposed to disclaimer laws which require statements of endorsement from candidates or committees on campaign-related advertising.

18. N.C. GEN. STAT. § 163-278.12 (2007).

19. *Id.* § 163-278.81 (2007).

20. *Id.* § 163-278.101 (2007). Both sections 163-278.81 and 163-278.101 of the General Statutes of North Carolina have sister statutes with the exact same language that extend the regulation to mass mailings and telephone banks. *See id.* §§ 163-278.91, .111. While not discussed in this Recent Development, should these sister statutes be challenged, they would be subject to the same constitutional analysis applied to sections 163-278.81 and 163-278.101 of the General Statutes of North Carolina.

analysis of previous scrutiny decisions, concluding that recent Supreme Court and Fourth Circuit decisions suggest an application of intermediate scrutiny to such disclosure laws. These decisions, however, also indicate a willingness—if not an eagerness—to strike down any law that steps one toe beyond the "express advocacy" line,[21] or any law in which governmental interests are lacking.[22] Following that analysis, this Recent Development will apply intermediate scrutiny to the North Carolina laws to conclude that North Carolina's independent expenditure disclosure law is constitutional, its electioneering communications disclosure law is constitutional but should be narrowed, and its candidate-specific communications disclosure law would fail a constitutional challenge.

I. NORTH CAROLINA'S DISCLOSURE LAWS

North Carolina's disclosure laws trigger reporting requirements for most expenditures that specifically name a candidate.[23] These laws and electioneering communication disclosure laws cover: (1) independent expenditures that support or oppose a candidate; (2) "electioneering communications," which are communications naming a candidate that are made thirty days before the primary and sixty days before the general election;[24] and (3) "candidate-specific communications," which are communications outside of the thirty- and sixty-day windows, made in an even-numbered year, that name a candidate.[25] Violation of the independent expenditures disclosure law can result in criminal penalties,[26] and violation of any of the disclosure laws can result in civil penalties.[27] Importantly, differences exist between the three laws—these differences are detailed below.

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21. *See, e.g.*, FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2764 (2007).

22. *See, e.g.*, N.C. Right to Life, Inc. v. Leake (*NCRL*), 525 F.3d 274, 295 (4th Cir. 2008) (finding that placing limits on independent expenditure spending failed to further the state's interest in preventing corruption).

23. N.C. GEN. STAT. §§ 163-278.12, .81, .101 (2007).

24. *Id.* § 163-278.80(2).

25. *Id.* § 163-278.100(1).

26. *Id.* § 163-278.27. Violation brings with it a "Class 2" misdemeanor charge. *Id.* § 163-278.83.

27. *Id.* §§ 163-278.34, .83, .102. These include daily penalties for lateness, up to three times the amount of a contribution or expenditure for which concealment or illegality is found, and various other civil remedies including, but not limited to, cease and desist orders and remedial actions. *Id.* § 163-278.34.

A. Independent Expenditures Disclosure Law

North Carolina's independent expenditures disclosure law requires reporting for any expenditure greater than one hundred dollars, made independent of a political committee, that supports or opposes a candidate.[28] An "independent expenditure" is defined as an "expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes."[29] Such disclosure must be made within thirty days of the expenditure or ten days prior to the election it seeks to influence, whichever occurs first.[30] The reporting requirements are left to the State Board of Elections.[31]

B. Electioneering Communications Disclosure Law

In addition to requiring disclosure for independent expenditures, North Carolina requires disclosure for a wider range of communications made within a certain proximity to an election. The state's electioneering communications disclosure law requires disclosure when an entity spends more than $10,000 either thirty days before the primary election or sixty days before the general election on "targeted" communications that name a "clearly identified candidate" for a state-level office.[32] A "targeted" communication is any communication that "can be received by 50,000 or more individuals in the State in the case of a candidacy for statewide office and 7,500 or more individuals in the district in the case of a candidacy for General Assembly."[33] The statute does contain exceptions from the definition,[34] such as "independent expenditures" or any communications that reference an issue before the General Assembly while it is in session.[35]

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28. *Id.* § 163-278.12.
29. *Id.* § 163-278.6(9a).
30. *Id.* § 163-278.12.
31. *Id.*
32. *Id.* §§ 163-278.80, .81.
33. *Id.* § 163-278.80(5). This disclosure law is modeled after its federal counterpart, as created by the 2002 Bipartisan Campaign Reform Act ("BCRA"). *See* 2 U.S.C. § 434(f) (2006).
34. N.C. GEN. STAT. § 163-278.80(3) (2007).
35. *Id.* § 163-278.80(3)(d). Thus, for example, a $50,000 expenditure on television ads that is "targeted" and falls within one of the election windows would not have to be reported if the advertisement called on citizens to contact Speaker Joe Hackney in support

Unlike the independent expenditures disclosure law, the electioneering communications disclosure law specifies the contents of the reports, which must be filed within twenty-four hours of the expenditure.[36] The name of the party or entity making the expenditure, its principal place of business, every expenditure greater than $1,000, the election and candidate of subject, and the names of all those that gave greater than $1,000 to the party making the expenditure must be included.[37]

C. *Candidate-specific Communications Disclosure Law*

The final relevant section is North Carolina's candidate-specific communications disclosure law, which is an extension of the electioneering communications law to the remainder of the election year. Any party that spends more than $10,000 in aggregate on "targeted" communications that name a candidate for state-level or General Assembly office during an even-numbered year and outside of the thirty- and sixty-day windows covered by the electioneering communications disclosure law is also subject to disclosure requirements.[38] Given that the deadline for filing is typically February of the election year for state-level offices, and the election is held on the first Tuesday of November, this statute's applicability is limited to six months out of the two-year election interval.[39] Similar to the electioneering communications disclosure law, all candidate-specific communications must be disclosed within twenty-four hours and include the name of the party or entity making the expenditure, its principal place of business, and every expenditure and contribution toward expenditures greater than $1,000.[40]

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of a particular bill before the House of Representatives. Interestingly, this exception applies only to communication that, "incidental to advocacy for or against a specific piece of legislation pending before the General Assembly, urges the audience to communicate with a member or members of the General Assembly concerning that piece of legislation." *Id.* Therefore, a similar ad that called on the Governor to sign a bill on his desk would not be subject to the exception and would require disclosure.

36. *Compare id.* § 163-278.12(c) (leaving determination of reporting requirements to the State Board of Elections), *with id.* § 163-278.91(b) (specifying the contents of the disclosure statement).

37. *Id.* § 163-278.81.

38. *See id.* §§ 163-278.100, .101.

39. Assuming a February 1 filing deadline, a May 1 primary, and a November 1 general election, the statute would only be applicable from February through March and from May though August, because it does not apply to odd-numbered years or to the thirty- and sixty-day windows covered by the electioneering communications statute. *See id.* §§ 163-278.80(2)b, .100(1)b.

40. *Id.* § 163-278.101.

II. SCRUTINY AND SUCCESS

The determination of whether a reviewing court would apply intermediate or strict scrutiny is paramount in determining whether these three disclosure laws would pass constitutional muster. This determination is not as simple as one would hope; both the Supreme Court and the circuit courts have vacillated between an application of strict and intermediate scrutiny with respect to disclosure laws.[41] Unclear language in precedential cases, as well as the application of reasoning from prominent cases in campaign finance that do not solely deal with disclosure laws,[42] are both potential culprits for this confusion. Arguably, the conservative evolution of the bench has also begun to play a role in analysis and outcome.[43] While a careful parsing of the Supreme Court's precedent seems to suggest application of intermediate scrutiny to disclosure laws, defenders of such laws should still be prepared for the possibility of a more exacting scrutiny.

Before examining the Court's handling of scrutiny determinations, a quick review of the levels of constitutional scrutiny is in order. The Supreme Court has traditionally used three different levels of scrutiny when determining the constitutionality of a law, two of which are particularly relevant: intermediate scrutiny and strict scrutiny.[44] Intermediate scrutiny, first appearing in 1976 in *Craig v.*

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41. This ambiguity has even left one Justice scratching his head. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 208 (1999) (Thomas, J., concurring).

42. *See generally* McConnell v. FEC, 540 U.S. 93 (2003) (reviewing several different provisions, including disclosure laws, of BCRA); FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238 (1986) (addressing the constitutionality of regulation of corporate expenditures and disclosure of those expenditures); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (addressing the constitutionality of contribution and expenditure limits, reporting requirements, and creation of Federal Election Commission).

43. *See* Jonathan D. Salant, *Republicans File Suit to Overturn McCain Finance Law*, BLOOMBERG NEWS, Nov. 13, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=asHJmtlINmzo. Not only will the Court hear Republicans' challenge to BCRA provisions that prohibit contributions from corporate and union money, but it has also agreed to hear challenges to BCRA in regard to *Hillary: The Movie*, and whether BCRA covers feature length films under its express advocacy provisions. *See* Adam Liptak, *Justices Agree to Hear Case on Anti-Clinton Film*, N.Y. TIMES, Nov. 15, 2008, at A10, *available at* http://www.nytimes.com/2008/11/15/washington/15scotus.html. Irrespective of the subject matter of a challenged election law, deference to state interests in regulating elections may also affect the decisions rendered by a conservative bench. *See* Meredith Hattendorf, *Theoretical Splits and Consistent Results on Anonymous Political Speech:* Majors v. Abell *and* ACLU of Nevada v. Heller, 50 ST. LOUIS U. L.J. 925, 936 (2006) (citing Seymour v. Elections Enforcement Comm'n, 762 A.2d 880 (Conn. 2000), as an example of the role of such deference).

44. The third level of scrutiny is the rational basis test, which, when applied, typically means a law is constitutional if there is a plausible justification behind the law that is

Boren,[45] requires that a law "serve important governmental objectives and must be substantially related to those objectives"[46] in order to survive a constitutional challenge. Strict scrutiny, on the other hand, requires that a law be supported by a compelling governmental interest and be "narrowly tailored to achieve that interest."[47] Strict scrutiny, the most exacting standard applied by the courts, has been dubbed the "kiss of death," because it is almost always fatal when applied.[48] As such, the determination of the appropriate level of scrutiny plays a significant role in whether a law will survive a constitutional challenge. Typically, when a law affects a fundamental right protected by the Constitution, such as free speech, courts will apply strict scrutiny.[49] In regards to free speech, however, if the regulation is not prohibitive or "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue," a court will apply intermediate scrutiny.[50]

The starting point of any scrutiny analysis with respect to campaign finance disclosure laws is the seminal case of *Buckley v. Valeo*.[51] *Buckley* involved a challenge to the Federal Election Campaign Act's contribution limits, disclosure laws, and public financing scheme.[52] The Court, in its evaluation of the disclosure laws at issue, noted that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[53] As such, the Court stated that it had long "recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest."[54] Instead, the Court found that disclosure laws in general

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rationally related to a legitimate governmental objective. For a discussion of the rational basis test, see generally *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–16 (1993).

45. 429 U.S. 190 (1976).

46. *Id.* at 197.

47. FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2654 (2007).

48. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 870 (2006) (analyzing the application of strict scrutiny and concluding that "[s]trict scrutiny is not, generally speaking, fatal in fact").

49. *Winkler*, *supra* note 48, at 799.

50. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

51. 424 U.S. 1 (1976) (per curiam).

52. *Id.* at 1.

53. *Id.* at 64.

54. *Id.*

must pass an "exacting scrutiny,"[55] requiring "*relevant correlation or substantial relation between the government interests and the information required to be disclosed.*"[56] The Court endorsed this level of review because "disclosure requirements 'appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.' "[57]

Yet, just as *Buckley* served as an important starting point for a scrutiny determination with respect to disclosure laws, it also served as a starting point for thirty years of confusion. Not more than ten pages after setting what seemed to be an intermediate scrutiny standard for disclosure laws, the Court, in its review of the federal independent expenditure disclosure law, stated it was applying a "strict standard of scrutiny."[58] This has led some commentators to believe *Buckley* indeed espoused strict scrutiny for disclosure laws.[59] Nevertheless, in its analysis of that provision, the Court found the provision constitutional as it "[bore] a sufficient relationship to a substantial governmental interest,"[60] language suggesting an application of a more intermediate level of scrutiny.

The Court revisited the issue ten years later in *FEC v. Massachusetts Citizens for Life (MCFL)*,[61] striking down a state statute establishing detailed recordkeeping requirements and disclosure requirements for corporations making independent expenditures.[62] In doing so, the Court stated that "[i]ndependent expenditures constitute expression at the core of our electoral process and of the First Amendment freedoms. We must therefore determine whether the [statute at issue] burdens political speech, and if so, whether such a burden is justified by a *compelling* state interest."[63] Justice O'Connor concurred in the judgment, but explained that she

55. *Id.*

56. *Id.* at 64 (emphasis added) (citations omitted).

57. Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n, No. 2:08-cv-00492, 2008 U.S. Dist. LEXIS 79165, at *24 (S.D. Ohio Sept. 5, 2008) (quoting Buckley v. Valeo, 424 U.S. at 68).

58. Buckley v. Valeo, 424 U.S. at 75.

59. *See* Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1200 (2007); Rhodes Beahm Ritenour, *Federal Campaign Finance Reform Based on Virginia Election Law: The Carson Act as a Simple, Effective, and Constitutional Means to Curb Corruption in the Financing of Federal Campaigns*, 42 U. RICH. L. REV. 123, 136 (2007).

60. Buckley v. Valeo, 424 U.S. at 80.

61. 479 U.S. 238 (1986).

62. *Id.* at 262 (finding the state's interests could be met with less intrusive disclosure requirements than the "full panoply of regulations that accompany status as a political committee" imposed by the statute at issue).

63. *Id.* at 251–52 (emphasis added) (citations omitted).

feared the Court was moving away from the standard set forth in *Buckley*. She specifically criticized *Buckley* for failing to differentiate between the standards applied to disclosure laws as opposed to detailed recordkeeping requirements.[64] O'Connor believed disclosure laws—and specifically independent expenditure disclosure laws at issue in *Buckley*—constituted a "reasonable and minimally restrictive method of furthering First Amendment values"[65] and thus should be subjected to a lesser scrutiny.[66]

In 2003, the Court again reviewed disclosure laws in *McConnell v. FEC*[67] and reverted back to intermediate scrutiny. While the Court never explicitly stated the level of scrutiny with which it reviewed the disclosure requirements of the Bipartisan Campaign Reform Act ("BCRA") § 201, it made clear in finding BCRA's disclosure requirements constitutional that it was not heightening its level of review to that of strict scrutiny.[68] The Court's opinion, in as much as it dealt with disclosure requirements, did not contain any reference to strict scrutiny or to the phrase "compelling state interest." Instead the Court found that "the important state interests" sufficient in *Buckley* also applied to BCRA, supporting the "application of [the] disclosure requirements to the entire range of 'electioneering communications.' "[69]

Though it appeared the Court had finally returned to its original position—applying intermediate scrutiny for disclosure laws—it took only four short years (and two new justices) for the Court to return to its sweeping (and confusing) statements. In 2007, the Roberts Court

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64. *Id.* at 265 (O'Connor, J., concurring).

65. *Id.* (quoting Buckley v. Valeo, 424 U.S. at 82).

66. While it may seem odd to have a scrutiny determination turn on the burden created by the statute (as opposed to having the burden weighed in determining whether the statute meets the applicable level of scrutiny), O'Connor's concurrence is not alone. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997) ("Regulations imposing severe burdens ... must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.") (citations omitted); Elizabeth Garrett, *The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 689 (2002) ("[M]ore aggressive disclosure laws will receive more exacting scrutiny from courts.").

67. 540 U.S. 93 (2003).

68. *Id.* at 196. Another indication that the *McConnell* Court did not apply strict scrutiny to the disclosure laws at issue comes in its explicit statement that it would not apply strict scrutiny to the contribution limits at issue, which presumably must meet a higher burden. *Id.* at 137.

69. *Id.* at 196. The Court did, however, analyze BCRA's prohibition of certain disbursements in the electioneering communications window. *See id.* at 203–04.

reviewed an as-applied challenge to BCRA's electioneering communication law in *FEC v. Wisconsin Right to Life (WRTL)*.[70] Chief Justice Roberts, writing for the majority, explained that as BCRA "burdens political speech, it is subject to strict scrutiny .... Under strict scrutiny, the Government must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest."[71]

Despite its use in *WRTL*, later decisions display a reluctance to use the strict scrutiny standard simply because the law at issue burdens political speech. Just a year later, the Supreme Court clarified in *Davis v. FEC*,[72] noting that it had

> closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech. To survive this scrutiny, significant encroachments cannot be justified by a mere showing of some legitimate governmental interest. Instead, *there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny.* That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.[73]

Other courts have criticized *WRTL*'s sweeping language, and have suggested that the Court's chosen level of scrutiny should be limited to that opinion.[74] Part of the reasoning behind this preference for a lesser scrutiny for disclosure laws results from the dichotomy detailed in *Buckley*. While compelled disclosure can infringe upon First Amendment rights, the state has a significant interest in preventing corruption or the appearance thereof and must be afforded some measure by which to fulfill that interest. *Buckley* found that disclosure laws were the "least restrictive" to meet that interest, and

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70. 551 U.S. ___, 127 S. Ct. 2652 (2007).

71. *Id.* at 2664 (citations omitted) (emphasis omitted).

72. 554 U.S. ___, 128B S. Ct. 2759 (2008).

73. *Id.* at 2775 (emphasis added) (citations omitted) (internal quotations omitted).

74. *See, e.g.*, Citizens United v. FEC, 530 F. Supp. 2d 274, 281 (D.D.C. 2008) (finding application of *WRTL*'s language to disclosure requirements cut against the Court's approving language of "disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment"); Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n, No. 2:08-cv-00492, 2008 U.S. Dist. LEXIS 79165, at *26 (S.D. Ohio Sept. 5, 2008) ("The *WRTL* Court made clear that the Court was only considering the constitutionality of the BCRA's federal electioneering funding prohibition .... The *WRTL* Court did not even mention disclosure requirements, much less their constitutionality.").

thus should be subject to a lesser standard than strict scrutiny, despite the Court's use of that phrase in its opinion.[75]

Buckley and its misuse of the words "exacting" and "strict" in describing the level of scrutiny it applied are not the only causes of the confusion. *MCFL*'s failure to distinguish its evaluation of disclosure laws from the "additional organization restraints imposed"[76] by the statute at issue arguably worsened the ambiguity. So too did subsequent courts' reliance on precedent either not involving or not limited to disclosure laws regarding contributions and expenditures.[77] *McIntyre v. Ohio Elections Commission*,[78] for instance, has been an underpinning of scrutiny determinations in disclosure cases,[79] despite being focused solely on review of a statutory prohibition of anonymous distribution campaign literature as opposed to finance disclosure issues.[80] Continuing this poor design, the *McIntyre* Court relied on *First National Bank of Boston v. Bellotti*[81] to inform its standard determination, notwithstanding the absence of *any* disclosure consideration in *Bellotti*.[82]

In addition, many cases involving disclosure laws, *Buckley* included, deal with campaign finance law issues beyond disclosure of expenditures and contributions. It is in these cases that we find many of the sweeping statements[83] that give rise to the application of an

75. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam). *Buckley* also found that, in some instances, where the level of potential corruption may not be sufficient to justify governmental intrusion, the "informational interest" may be sufficient if it "helps voters to define more of the candidates' constituencies." *Id.* at 81 (1976).

76. FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 265 (2006) (O'Connor, J., concurring).

77. *See, e.g.*, Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1101–02 (9th Cir. 2003) (relying on McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), in its scrutiny determination).

78. 514 U.S. 334 (1995).

79. *See, e.g.*, Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 788 (9th Cir. 2006) (applying *McIntyre*'s reasoning as basis for strict scrutiny analysis of disclosure laws); Cal. Pro-Life Council v. Getman, 328 F.3d at 1101 (citing *McIntyre* as precedent establishing that any law burdening political speech must be subjected to strict scrutiny). *But see* Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n, No. 2:08-cv-00492, 2008 U.S. Dist. LEXIS 79165, at *29–30 (S.D. Ohio Sept. 5, 2008) (finding *McIntyre* inapplicable to review of disclosure statute).

80. *McIntyre*, 514 U.S. 336. The Court decided "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347.

81. 435 U.S. 765 (1978).

82. *McIntyre*, 514 U.S. at 347 ("When a law burdens core political speech, we apply exacting scrutiny, and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." (citing *Bellotti*, 435 U.S. at 786)).

83. *See, e.g.*, FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2664 (2007) (requiring the government to show a compelling governmental interest which

overbearing standard by some lower courts.[84] Because these cases deal with more than one type of campaign finance law, they also deal with more than one type of scrutiny. This lack of distinction has served as another root of confusion.[85]

Arguably, the conservative evolution of the Supreme Court has also begun to play a role in scrutiny determination. While precedent reveals a willingness to apply intermediate scrutiny when reviewing disclosure laws, the addition of Chief Justice Roberts and Justice Alito could result in the Court heightening its scrutiny analysis.[86] Chief Justice Roberts made clear his preference for strict scrutiny in *WRTL*,[87] and Justice Alito has shown a steady skepticism for campaign finance law.[88] Neither, however, has joined in other justices' ongoing quest to overturn *Buckley*. While other members of the conservative bloc have shown some support of disclosure laws,[89] this does not necessarily reflect a disdain for a strict scrutiny analysis

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is narrowly tailored); *McIntyre*, 514 U.S. at 347 (holding that when laws interfere with "core political speech," then "exacting scrutiny" is applied); ACLU of Nev. v. Heller, 378 F.3d 979, 992 (9th Cir. 2004) (discussing how, under strict scrutiny, any "content-based limitation on core political speech" will be constitutional only if "it is narrowly tailored to serve an overriding state interest").

84. Cal. Pro-Life Council v. Getman, 328 F.3d at 1101 (requiring a compelling state interest to justify California campaign finance disclosure laws); Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1197 (10th Cir. 2000) (applying "exacting scrutiny" to a Nevada finance disclosure statute).

85. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 25, 64 (1976) (per curiam) (applying strict scrutiny to contribution limits and a lesser scrutiny to disclosure requirements).

86. *See generally* Daniel R. Ortiz, *A Symposium on Campaign Finance Reform: Past, Present, and Future, "The Difference Two Justices Make:* FEC v. Wisconsin Right to Life, Inc. II *and the Destabilization of Campaign Finance Regulation*, 1 ALB. GOV'T L. REV. 141 (2008) (arguing that the addition of Roberts and Alito to the Supreme Court has shifted the Court's purview with regard to campaign finance laws).

87. *WRTL*, 551 U.S. at ___, 127 S. Ct. at 2664; *see supra* notes 70–71 and accompanying text.

88. Adam Liptak, *Alito's Way: Changes on the Court Usher in a Reversal of Course on Campaign Reform*, COLUM. LAW SCH. MAG., Nov. 2008, at 44 (noting that, since his appointment, "[Justice Alito] has voted with the majority to strike down laws regulating money in politics"). However, Justice Alito authored the majority opinion in *Davis v. FEC*, 554 U.S. ___, 128B S. Ct. 2759 (2008), which seemingly reaffirmed the scrutiny preference laid down in *Buckley*: "[T]here must be 'a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed,' " and the governmental interest "must survive exacting scrutiny." *Id.* at 2775 (internal quotation marks omitted) (quoting Buckley v. Valeo, 424 U.S. at 64).

89. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting) (finding that a "more narrow alternative of recordkeeping and funding disclosure [was] available" and acceptable).

of those laws. Notwithstanding, defenders of campaign finance laws should beware of a more skeptical Court.[90]

While this evolution may affect the Court's scrutiny decision, both a careful parsing of the precedent and comparison to similarly restrictive laws provide strong, if not certain, grounds for the application of intermediate scrutiny. Despite the Court's vacillation, *Buckley* and its progeny suggest the application of a lesser standard than strict scrutiny when disclosure laws are at issue. This seems most predicated upon the idea that disclosure laws, such as those in North Carolina, impose a lesser burden than other campaign finance laws and thus should trigger a less exacting review.[91] As such, the "State's important regulatory interests [should] be enough to justify reasonable, nondiscriminatory restrictions."[92] Application of intermediate scrutiny to similarly restrictive laws also supports this contention. For instance, the Court has routinely found that disclosure requirements pertaining to lobbying activity are subject to intermediate scrutiny.[93] Nevertheless, it is well within reason that a court could find a disclosure law before it was not the least burdensome, and thus should be subjected to a strict scrutiny analysis. Just as likely, a court could take cues from more conservative members of the Supreme Court bench and find simply that the disclosure law before it "burdens political speech, [and thus] is subject to strict scrutiny."[94]

Part of both the scrutiny analysis detailed above and the result reached by a court will vary depending on the governmental interests supporting the law and the level of intrusion the law creates through its application. Once again, *Buckley* serves as the starting ground for

90. Arguably, this shift on the Court played a role in North Carolina's decision to simply redraft the laws at issue in *NCRL* to reflect the majority's opinion, as opposed to take the case to the Supreme Court. The considerable time the majority in *NCRL* spends refuting the dissenting opinion seems to suggest the State had a strong argument in support of the laws at issue, yet the State simply yielded in its defense.

91. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997); *see also* Elizabeth Garrett, *The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 689 (2002) ("[M]ore aggressive disclosure laws will receive more exacting scrutiny from courts.").

92. *Timmons*, 520 U.S. at 358–59 (quoting Burdick v. Takashi, 504 U.S. 428, 434 (1992)).

93. *See* United States v. Harriss, 347 U.S. 612, 625 (1954) (applying intermediate scrutiny and finding that the government had asserted sufficient interests in "maintain[ing] the integrity of a basic governmental process"). For a summary of circuit court application of intermediate scrutiny to lobbying disclosure laws, see *Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996).

94. FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2664 (2007).

the determination of the applicable governmental interests. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek . . . office."[95] Also, by exposing campaign activity, disclosure laws seek to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[96] Third, disclosure requirements "are an essential means of gathering the data necessary to detect violations."[97] This list, however, is by no means universally agreed upon, with some members of the Court believing only the second interest—preventing corruption or the appearance thereof—is of any merit.[98] Notwithstanding, each interest itself may be sufficient to pass constitutional muster.[99]

The degree of strength accorded to each of these interests varies based upon the disclosure law itself and the intrusion for which it calls. For instance, a law requiring disclosure irrespective of the political calendar may justify less intrusion than one mandating disclosure only in close proximity to elections, when the need for an informed electorate reaches its zenith. Other potential intrusions that may leave a court wanting for a less intrusive measure could include requiring disclosure of contributions or expenditures of insignificant sums or requiring some form of unnecessarily immediate disclosure.

While these intrusions could be the "kiss of death"[100] for disclosure laws—particularly if subjected to a strict scrutiny analysis—one other First Amendment issue looms large over a disclosure law's success. Namely, does the disclosure law regulate or affect more than express advocacy? In *Buckley*, the Court recognized the legislature's

95. Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam) (citing H.R. REP. NO. 92-564, at 4 (1971)).

96. *Id.* at 67; *see also* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 202 (1999) (finding the deterrence of corruption a legitimate government interest).

97. Buckley v. Valeo, 424 U.S. at 67–68; *see also* McConnell v. FEC, 540 U.S. 93, 196 (2003) (discussing weight given to data collection as state interest).

98. *See McConnell*, 540 U.S. at 291–92 (Kennedy, J., dissenting) (concluding that regulations must "advance the anticorruption interest" to survive a constitutional challenge). *But see id.* at 196 ("We agree with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA.").

99. *See, e.g.*, Buckley v. Valeo, 424 U.S. at 81.

100. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting).

power to "establish standards [governing] ... political campaigns," while simultaneously acknowledging that such restrictions "threaten to limit ordinary 'political expression.' "[101] As such, *Buckley* held that only activity that was "unambiguously [campaign] related" could be regulable, as only such activity could implicate the governmental interests that supported intrusions accompanying the regulation of political speech.[102] "In particular, *Buckley* delineated specific words that exemplify such 'express advocacy'—words such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.' "[103] If such words were missing, the communication was not express but issue advocacy, and thus unregulable given a lack of any sufficient governmental interest.

It became clear, however, that one could avoid these "magic words," and thus avoid regulation, despite the fact that such communications were expressly advocating the victory or defeat of a particular candidate. This concern for "sham issue ads" in turn gave rise to the recognition of a legislature's ability to regulate the "functional equivalent" of express advocacy.[104] One example of the regulation of functional equivalence is BCRA's definition and regulation of "electioneering communications," which are those made in the thirty- and sixty-day windows prior to primary and general elections.[105]

While such a standard initially provided a platform for legislatures to extend their regulations to encompass some issue advocacy, *WRTL* narrowed the definition of speech that could be considered the functional equivalent of express advocacy. Specifically, the court redefined the term such that it applied only to advocacy being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[106] In *WRTL*, this meant finding that BCRA could not constitutionally apply to the ads at issue, which asked citizens to call on Wisconsin's senators in regard to an abortion bill before Congress, even though Wisconsin Right to Life, Inc., planned to run the ads during BCRA's blackout period.[107] Despite never dealing with disclosure laws,

101. N.C. Right to Life v. Leake (*NCRL*), 525 F.3d 274, 281 (4th Cir. 2008) (quoting Buckley v. Valeo, 424 U.S. at 13–14).

102. Buckley v. Valeo, 424 U.S. at 80.

103. *NCRL*, 525 F.3d at 281 (quoting Buckley v. Valeo, 424 U.S. at 44 n.52).

104. *Id.* at 281–82.

105. 2 U.S.C. § 434(f) (2006).

106. FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2667 (2007).

107. *Id.* at 2663.

WRTL signaled a significant shift: laws regulating communication beyond "express" advocacy beware. As discussed below, application of *WRTL*'s limitation could be fatal for two of North Carolina's disclosure laws.

Depending on the construction of each disclosure law, each of the abovementioned governmental interests and intrusions could be implicated in a court's constitutional determination. Ultimately, under an intermediate scrutiny review, some intrusion will be tolerated in cases where governmental interests are substantial and sufficiently related to the disclosure sought. Where the intrusion becomes too great or the interest too attenuated, however, not even a lesser standard of review may save the law or requirement at issue. The result of such balancing may well spell the difference between success and failure for each of North Carolina's disclosure laws.

III. ANALYSIS OF NORTH CAROLINA'S DISCLOSURE LAWS

Applying this knowledge to North Carolina's disclosure laws, we now turn to the hypothetical constitutional challenge of those laws, beginning with North Carolina's independent expenditure disclosure law.

A. Independent Expenditures Disclosure Law

Independent expenditures "constitute expression 'at the core of our electoral process and of the First Amendment freedoms.' "[108] The courts have dealt with independent expenditure disclosure laws on numerous occasions and have found that if the disclosure law "bears a sufficient relationship to a substantial governmental interest," then it can be found constitutional.[109] That interest in North Carolina's case could easily be any of the three laid down in *Buckley*.[110] As for bearing a sufficient relationship to that interest, independent expenditure disclosure laws allow "[t]he state interest in disclosure [to be] met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee."[111]

108. FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 251–52 (1986) (quoting Buckley v. Valeo, 424 U.S. at 39).

109. Buckley v. Valeo, 424 U.S. at 80. *But see* Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (applying strict scrutiny to California's independent expenditure disclosure laws).

110. *See supra* notes 95–99 and accompanying text.

111. Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1189 (9th Cir. 2007) (quoting *MCFL*, 479 U.S. at 262).

Importantly, even if the law is supported by a substantial governmental interest, it must also be limited in its application to express advocacy as defined by *WRTL* in order to survive a challenge. North Carolina's law has been sufficiently cabined to meet such a limitation, as it applies only to those expenditures that "support or oppose" a candidate.[112] The North Carolina General Assembly attempted to broadly define what it meant to "support or oppose" a candidate, providing examples of "[e]vidence that communications are 'to support or oppose the nomination or election of one or more clearly identified candidates,' "[113] which included variables the State Board of Elections could consider in their determination. This statutory provision, which had the potential to significantly broaden express advocacy, was one of those found unconstitutional by the Fourth Circuit in *NCRL*, and is therefore no longer applicable.[114] While the State could have appealed the ruling, it instead elected to remove the statutory test, thus limiting the definition of "support" and "oppose" to the tests dictated by the Supreme Court in *WRTL*.[115] As such, North Carolina's independent expenditure disclosure law is only applicable to express advocacy, and is thus constitutional.[116]

Other challenges could be raised against North Carolina's independent expenditures disclosure law, however. There are plausible facial challenges to the statute in regard to the threshold amount that triggers reporting[117] and the period in which the disclosure must occur.[118] Each of these has been a basis of

112. N.C. GEN. STAT. § 163-278.6(9a) (2007).

113. *See id.* § 163-278.14A(a)(2).

114. N.C. Right to Life, Inc. v. Leake (*NCRL*), 525 F.3d 274, 283 (4th Cir. 2008).

115. Senate Bill 1263 included, among its provisions, a repeal of the "context standard for express advocacy" found in section 163-278.14A(a)(2) of the General Statutes of North Carolina. *See* WILLIAM R. GILKESON, S. SELECT COMM. ON GOV'T AND ELECTION REFORM, SENATE BILL 1263: ELECTION LAW AMENDMENTS, 2007–2008 Sess., Reg. Sess., at 2 (2008). The final version of the bill, which retained this repeal, was signed into law by then-Governor Easley. *See* Act of July 18, 2008, sec. 6(b), 2008-3 N.C. Adv. Legis. Serv. 201, 211 (LexisNexis) (to be codified at N.C. GEN. STAT. § 163-278.14A(a)).

116. Disclosure laws that do not fit into this framework have failed. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355–57 (1995) (finding Ohio's independent expenditure disclosure law impermissibly overbroad due to, *inter alia*, its application beyond the support or opposition of a clearly identified candidate). Had the independent expenditure law applied to more than express advocacy, it may have also encountered due process concerns triggered by its enforcement via criminal penalties. *See, e.g.*, Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 664 (5th Cir. 2006).

117. N.C. GEN. STAT. § 163-278.12(a) (2007) (requiring disclosure of amounts in excess of one hundred dollars).

118. *Id.* § 163-278.12(d) (requiring disclosure within thirty days of crossing the threshold contribution amount or ten days before the election, whichever happens first).

constitutional challenges to disclosure laws in the past.[119] Neither of these, however, should be sufficient to invalidate the statute. Requiring reporting by those funding the independent expenditures helps the State detect possible violations,[120] including, but not limited to, campaigns routing contributions through independent expenditures to evade contribution limits applicable to the campaigns themselves.[121] While one hundred dollars is a relatively low trigger for the disclosure requirement, such a threshold has been sustained before.[122] Further, requiring disclosure within thirty days or prior to the election is certainly not overly burdensome, especially when compared with North Carolina's other disclosure laws, which require reporting within twenty-four hours.[123] None of these contentions seem sufficient to invalidate the statute, whether under *Buckley's* "exacting" scrutiny, or, for that matter, under a stricter standard.

A remaining option available to challengers would be an as-applied challenge, either based on the communication at issue being outside the scope of express advocacy, or due to a violation of freedom of association. Each of these requires a challenger to clear a high bar. First, the narrowing effect of *NCRL*[124] limits the likelihood that the disclosure law would require disclosure of independent expenditures constituting issue advocacy. Second, in order for a freedom of association challenge to succeed, the court would require a showing that reprisal or harassment was a reasonable probability.[125] Because the independent expenditure communications law has been

119. *See* Buckley v. Valeo, 424 U.S. 1, 82–84 (1976) (per curiam) (challenging monetary thresholds); Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1197–98 (10th Cir. 2000) (challenging twenty-four hour reporting requirement).

120. Buckley v. Valeo, 424 U.S. at 67–68.

121. In campaign finance cases, the Court has differentiated between contributions and expenditures limitations with respect to the right of freedom of association. These discussions, however, only regard limits, not disclosure. *See* Nixon v. Shrink Mo. Gov't Political Action Comm., 528 U.S. 377, 386–88 (2000); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 610 (1996); FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 259–260 (1986); Buckley v. Valeo, 424 U.S. at 20–21.

122. Buckley v. Valeo, 424 U.S. at 82–84 (finding that the determination of such a threshold was best left to congressional discretion).

123. Both the electioneering communications and candidate-specific communications disclosure laws require twenty-four hour reporting. *See* N.C. GEN. STAT. §§ 163-278.81, .101 (2007).

124. *See supra* notes 112–15 and accompanying text.

125. Buckley v. Valeo, 424 U.S. at 74; *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101–02 (1982) (finding reasonable probability of threats resulting from required disclosure and thus holding application of Ohio's disclosure law unconstitutional).

cabined by *NCRL* to apply only to express advocacy, absent such circumstances it should survive a constitutional challenge.

B. Electioneering Communications Disclosure Law

North Carolina's electioneering communications statute is also likely to survive a facial constitutional challenge under intermediate scrutiny. The strongest support for such a contention can be found in *McConnell*,[126] where the Supreme Court of the United States upheld the law's federal counterpart, BCRA § 201.[127] There, the Court held "the important state interests that prompted the *Buckley* Court to uphold [the Federal Election Campaign Act's] disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA."[128] The Court also went on to dismiss the facial challenge to BCRA's disclosure requirements despite the fact that it could encompass some issue advocacy.[129] Such reasoning should apply to North Carolina's electioneering communications disclosure law given that it is modeled on BCRA § 201. Moreover, these interests—providing information, deterring corruption, and deterring violations—arguably grow stronger in relation to the communication's proximity to the election.[130] Given that "electioneering communications" are defined as those made in the thirty- and sixty-day windows prior to the primary and general elections, the State has a heightened interest, and the disclosure law in turn has heightened support and should survive intermediate scrutiny.

However, as represented by *WRTL*, the Court has arguably shifted toward a more skeptical approach when laws encompass issue advocacy.[131] By definition, North Carolina's electioneering communications disclosure law does not encompass any "independent expenditure[s],"[132] which are defined by statute as those expenditures which support or oppose a candidate, or, in other words,

126. McConnell v. FEC, 540 U.S. 93, 189–200 (2003).
127. Bipartisan Campaign Reform Act of 2002 § 201, 2 U.S.C. § 434 (2002).
128. *McConnell*, 540 U.S. at 196.
129. *Id.* at 195–97.
130. *Id.* at 136–37.
131. *See* FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. ___, 127 S. Ct. 2652, 2659 (2007) (holding application of BCRA § 203 "unconstitutional as applied to the advertisements at issue" as they were not express advocacy or its functional equivalent).
132. N.C. GEN. STAT. § 163-278.80(3)(b) (2007).

are express advocacy.[133] As such, the disclosure law regulates any communication considered the functional equivalent of express advocacy, and most issue advocacy mentioning a candidate, during the relevant thirty- or sixty-day window. Considering the strong language of *WRTL* against the regulation of issue advocacy, and its acceptance by *NCRL*, it is likely the electioneering communications disclosure law would be narrowed to apply only to communications that are the functional equivalent of express advocacy.[134] As *WRTL* has redefined the "functional equivalent" of express advocacy as advocacy being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,"[135] the statute's application would be limited to a shadow of its former self.

Although it would seem that the inclusion of any issue advocacy would be fatal to the disclosure law, "[a] regulation may be struck down only if it is unconstitutional in a substantial number of applications or is too vague to provide notice."[136] Luckily for the electioneering communications disclosure law, it was written to exclude a certain amount of issue advocacy.

> One of the exceptions to all the NC definitions of "electioneering communications" ... is this: "A communication made while the General Assembly is in session which, incidental to advocacy for or against a specific piece of legislation pending before the General Assembly, urges the

133. Independent expenditure is defined as "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes." *Id.* § 163-278.6(9a).

134. While it would seem that an unconstitutionally overbroad law would be struck down, courts will first try to narrow the statute, following the principle that "[w]here the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." Buckley v. Valeo, 424 U.S. 1, 78 (1976) (per curiam); *see also* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld. The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements.") (citations omitted).

135. *WRTL*, 551 U.S. at ___, 127 S. Ct. at 2667.

136. N.C. Right to Life, Inc. v. Leake (*NCRL*), 525 F.3d 274, 314 (4th Cir. 2008) (Michael, J., dissenting).

> audience to communicate with a member or members of the General Assembly concerning that piece of legislation."[137]

Any communication or advocacy referring to an issue before the North Carolina General Assembly is exempted and hence no disclosure is required.[138] However, this does not preclude all issue advocacy from being subject to the reporting requirements, as this exception applies only to communication "incidental to advocacy for or against a specific piece of legislation pending before the General Assembly."[139] Therefore, for example, an ad that called on the Governor to sign a bill on her desk would not be subject to the exception and would require disclosure. Given that such an example would not fit under the constitutional definition of "functional equivalence," the statute's limitation seems insufficient. However, the *McConnell* Court, despite facing the same situation (inclusion of some issue advocacy), nevertheless upheld the BCRA electioneering communications law, stating, "[e]ven if we assumed that BCRA will inhibit some constitutionally protected ... speech, that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.' "[140] Thus, while a court should find North Carolina's electioneering communications disclosure law constitutional, it should also narrow the law's application while providing for as-applied challenges for situations such as that described above.

Another possible challenge to the electioneering communications disclosure law (and to the candidate-specific communications disclosure law) could be raised against the twenty-four hour disclosure requirement.[141] At least one circuit has found

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137. Memorandum from William R. Gilkeson, Staff Attorney, to H. Comm. on Election Laws and Campaign Finance Reform 2 (Mar. 7, 2007) (quoting N.C. GEN. STAT. § 163-278.80(3)(d) (2007)) (emphasis omitted) (on file with the North Carolina Law Review).

138. N.C. GEN. STAT. § 163-278.80(3)(d) (2007). Such an exception has helped other electioneering communication disclosure laws survive constitutional challenges. *See, e.g.*, Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 780 (9th Cir. 2006).

139. N.C. GEN. STAT. § 163-278.80(3)(d) (2007).

140. McConnell v. FEC, 540 U.S. 93, 207 (2003) (quoting Virginia v. Hicks, 539 U.S. 113, 120 (2003)).

141. "Disclosure date" is defined as "[t]he first date during any calendar year when an electioneering communication is aired after an entity has incurred expenses for the direct costs of producing or airing electioneering communications aggregating in excess of ten thousand dollars ($10,000)" or "[a]ny other date during that calendar year by which an entity has incurred expenses for the direct costs of producing or airing electioneering

such a requirement too onerous, as "such immediate notice severely burdens First Amendment rights, and the provision is a far cry from being narrowly tailored. None of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline."[142] However, in striking down the twenty-four hour requirement, the circuit applied strict scrutiny as opposed to intermediate scrutiny.[143] If a court were to accept that intermediate scrutiny was in fact the correct standard, a challenge to the twenty-four hour requirement may end in a different result. Moreover, the exact same twenty-four hour reporting requirement was before the Court in *McConnell*, yet the Court made no mention of it being onerous or overburdening.[144] Notwithstanding, a challenge to the twenty-four hour requirement raises the question of whether, if challenged and found insufficiently supported by governmental interests, a court would strike only this particular requirement of the disclosure law or the entire disclosure law itself.[145]

In sum, as the *McConnell* Court found the federal counterpart to North Carolina's electioneering communications disclosure law facially constitutional, it is hard to see how any of the aforementioned challenges would result in a different finding. However, a challenge to the statute would most likely result in a narrowing instruction such that the statute would no longer encompass any issue advocacy.

C. *Candidate-Specific Communications Disclosure Law*

Despite being fashioned as an extension of electioneering communications law, North Carolina's candidate-specific disclosure law would not likely survive a constitutional challenge. First, North Carolina's law has no federal counterpart. While introduced and passed on the premise that it would serve as an extension of the electioneering communications disclosure law, and thus should be

communications aggregating in excess of ten thousand dollars ($10,000) since the most recent disclosure date for that calendar year." N.C. GEN. STAT. § 163-278.80(1) (2007).

142. Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1197 (10th Cir. 2000).

143. *See id.* at 1196–97.

144. *McConnell*, 540 U.S. at 194–95. An imaginative plaintiff could argue the twenty-four hour reporting requirement was not directly before the Court. However, given the breadth of coverage by *McConnell*, such an argument would be unlikely to prevail.

145. *See Davidson*, 236 F.3d at 1198 (finding the twenty-four hour reporting period inseverable and thus holding the entire disclosure law unconstitutional).

subject to the same constitutional support,[146] such a contention is unlikely. The statute does contain the same limiting provision as the electioneering communications disclosure law for issues before the General Assembly[147] and thus seemingly could be narrowed in the same manner. However, a court could easily find the interests supporting electioneering communications disclosure—which mostly stem from its proximity to the election[148]—do not support similar disclosures during the remainder of the year. As the candidate-specific communications disclosure law does not cover the thirty- and sixty-day windows covered by the electioneering communications disclosure law, "the connection between the information sought and the governmental interest in promoting clean and well-informed elections 'may be too remote.' "[149]

More notably, in light of *WRTL*, it is hard to fathom how this law could withstand a constitutional challenge. Like North Carolina's electioneering communications disclosure law, this disclosure law does not apply to express advocacy, given that it excludes reporting on independent expenditures.[150] As such, it can only apply to issue advocacy and the functional equivalent of express advocacy. Again, it would seem that a court could simply narrow the statute to apply only to the functional equivalent portion. However, in its application of *WRTL*, *NCRL* held that in order to be the functional equivalent of express advocacy, the advocacy must be susceptible to no other reasonable interpretation than as express advocacy, and must qualify as an electioneering communication.[151] As the candidate-specific communications disclosure law applies only to communications

146. *See* WILLIAM R. GILKESON, S. JUDICIARY COMM., HOUSE BILL 966: CANDIDATE-SPECIFIC COMMUNICATIONS, 2005–2006 Sess., Reg. Sess., at 1 (2006).

147. *See* N.C. GEN. STAT. § 163-278.100(2) (2007) ("The term 'candidate-specific communication' does not include ... [a] communication made while the General Assembly is in session which, incidental to advocacy for or against a specific piece of legislation pending before the General Assembly, urges the audience to communicate with a member or members of the General Assembly concerning that piece of legislation.").

148. *See McConnell*, 540 U.S. at 201.

149. Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 664 (5th Cir. 2006) (quoting Buckley v. Valeo, 424 U.S. 1, 80 (1976) (per curiam)).

150. By definition, the candidate-specific communications disclosure law does not apply to "independent expenditures," which are defined as those expenditures supporting or opposing a candidate. Thus, the disclosure law can only apply to those communications that *do not support or oppose a candidate*, i.e., issue advocacy. *See* N.C. GEN. STAT. § 163-278.100(2)(b) (2007).

151. N.C. Right to Life, Inc. v. Leake (*NCRL*), 525 F.3d 274, 282 (2008). *But see id.* at 315–17 (Michael, J., dissenting) (excoriating the majority's "bright line rule for facial challenges that divides acceptable regulations (covering express advocacy) from unacceptable regulations (covering issue advocacy)").

outside the "electioneering communications" window, it fails the *NCRL* test.

It is arguable that, although the candidate-specific communications disclosure law "encompass[es] more speech than that allowed by the [*WRTL*] test, the Supreme Court of the United States has not adopted [the *WRTL*] test for disclosure requirements and, indeed, has approved of disclosure requirements for otherwise constitutionally protected speech."[152] Indeed, it has even been suggested that *WRTL* technically does not apply to disclosure laws as only the ban on corporate money during the thirty- and sixty-day windows was at issue, not the disclosure requirements associated with the absence of that ban.[153] Such reasoning, however, runs counter to *WRTL*'s strong language and the Fourth Circuit's willingness to follow suit in *NCRL*. The disclosure law absolutely extends beyond the functional equivalent of express advocacy, at least as defined by *NCRL*.[154] And while the statute presumptively "insure[s] that the public knows who might be spending large amounts of money" on communications about a specific candidate,[155] such an interest is insufficient for constitutional survival given the law's extension beyond the bounds set by *NCRL*. Presumably, if given the chance, a court would follow the constrictions of both the Fourth Circuit and the Supreme Court and find this disclosure law unconstitutional.

One possibility remains that could save the candidate-specific communications disclosure law. Given North Carolina's unfortunate recent spat with corruption,[156] the State has a substantial—if not compelling—interest in deterring corruption or the appearance thereof, and thus the law arguably has sufficient support to survive a challenge under intermediate scrutiny review.[157] As deterrence of corruption or the appearance thereof is a clearly established

152. *Id.* at 324 (Michael, J., dissenting).

153. Memorandum from William R. Gilkeson, Staff Attorney, to H. Comm. on Election Laws and Campaign Finance Reform 2 (Mar. 7, 2007) (on file with the North Carolina Law Review).

154. *See NCRL*, 525 F.3d at 282.

155. N.C. Gen. Assemb., 2005–2006 Sess., Reg. Sess., Minutes of the H. Comm. on Rules, Calendar and Operations of the H. (July 26, 2006).

156. *See* Chris Kromm, *The Fall of a North Carolina Political Machine*, FACING SOUTH, Feb. 14, 2007, http://southernstudies.org/facingsouth/2007/02/fall-of-north-carolina-political.asp (detailing the guilty plea of Speaker of the House Jim Black to federal corruption charges).

157. *See, e.g.*, Nixon v. Shrink Mo. Gov't Political Action Comm., 528 U.S. 377, 390–95 (2000) (finding Missouri established a compelling interest in support of their strict contribution limits due to legislative testimony and newspaper records regarding the potential corruption involved in campaign contributions to candidates).

legitimate state interest, North Carolina has a heightened awareness and interest in such deterrence, and it should be afforded leniency in determining how best to achieve that interest.[158] *WRTL* and *NCRL* may stand as a barrier to this argument as they have narrowed functional equivalence such that it excludes candidate-specific communications. From *Buckley* to *NCRL*, the court has made clear that state interests such as informing the electorate, gathering data to detect violations, and deterring corruption only support regulation of that which is "unambiguously campaign related."[159] As such, even under an intermediate scrutiny review, the most likely outcome seems to be the candidate-specific communications disclosure law would be found unconstitutional.[160]

CONCLUSION

Disclosure laws clearly cross into First Amendment territory, chilling constitutionally protected speech. However, the courts have found reason to uphold their constitutionality, most notably stemming from government's interest in preventing political corruption. Analysis of past disclosure cases indicates disclosure laws are subject to an "exacting," yet intermediate, level of scrutiny. While cutting against precedent, there is some support for a higher level of scrutiny, both to disclosure laws in general, and for particular disclosure laws that may be atypically onerous. Assuming intermediate scrutiny applies, as long as these laws are tailored such that they regulate only express advocacy or its functional equivalent, thereby fitting within the lines drawn by *WRTL*, they clear the largest hurdle of their constitutional challenge. Other possible pitfalls remain where the governmental interest does not justify intrusion, as when laws require disclosure of insignificant dollar amounts or place immediacy requirements on disclosure well-removed from the campaign season. Both the Supreme Court, in the *Buckley* progeny, and the Fourth Circuit, as exemplified by *NCRL*, have shown no hesitancy in striking down campaign finance laws that stray from the acceptable state interests listed in *Buckley*, affect issue advocacy, or

158. In response to the growing concerns about corruption, North Carolina has also passed significant lobbying reform. *See* Press Release, Office of the Governor, Gov. Easley Signs Lobbying Reform Bill into Law (Sept. 30, 2005) (on file with the North Carolina Law Review).

159. *See supra* notes 16, 100–07 and accompanying text.

160. While not discussed in *NCRL*, a court could potentially subject the candidate-specific communication disclosure law to a strict scrutiny analysis given its inclusion of issue advocacy. This, however, would not seem to improve the statute's chances.

place too onerous a burden on the party of whom disclosure is required.

Of the three disclosure laws reviewed, North Carolina's independent expenditure disclosure law is most likely to survive a constitutional challenge. *NCRL*'s narrowing of related statutes sufficiently cabins the disclosure law to express advocacy. Conversely, due to *NCRL*, North Carolina's candidate-specific communications disclosure law regulates only issue advocacy. Given the Supreme Court's disdain for statutes that interfere with issue advocacy, the candidate-specific communications disclosure law would unlikely survive a facial constitutional challenge. So too could be the fate of the electioneering communications disclosure law. However, while it requires disclosure of some issue advocacy, it gains strength in having a federal counterpart and internal limitations as to how much issue advocacy it affects. As such, a court should be able to narrow the statute's application to a constitutionally permissible spectrum. Regardless, further clarification is needed in order to strike the proper constitutional balance between the benefits of these laws and their potential for chilling the constitutional rights of North Carolinians.

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** I thank my family and friends for their endless love and support. I also thank Bill Gilkeson with the North Carolina General Assembly and Professor Bill Marshall for their willingness to advise and direct my research, and the staff of the *North Carolina Law Review* for their meticulous work throughout the publication process.