

CHASING THE SUNLIGHT: DISCLOSURE OF CORPORATE CONTRIBUTIONS TO POLITICAL ACTION COMMITTEES IN NEVADA AFTER *CITIZENS UNITED*

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INTRODUCTION

In 1913, US Supreme Court Justice Louis Brandeis wrote in Harper's Weekly that "[s]unlight is said to be the best of disinfectants."¹ While Justice Brandeis intended his words to be a metaphor for the positive effects that journalism and publicity could have in an American society under the control of an over-concentration of industrial wealth, academics and non-profit organizations have adopted the sentiment as a rallying cry for transparency in the new world of corporate election spending.²

Since 2010, when the US Supreme Court handed down its famous *Citizens United* decision allowing corporations to expend unlimited amounts of money to affect the outcomes of elections and ballot measures,³ many states have passed laws to address the effects of that influence on local elections. The legislative focus has frequently been on corporate contributions to the increasingly important "political action committees" (sometimes termed "PACs" or "Super PACs"), which use the funds received from corporate sponsors to influence the outcomes of elections.⁴ While the *Citizens United* decision clearly directs that it's unconstitutional for a state entity to *prohibit* corporate contributions to PACs, the Court also made it very clear that there remains constitutional room for states and the federal government to require PACs to disclose the amounts and sources of the funding they receive.⁵ In Nevada, registration and disclosure requirements for PACs have become the new front line of contention between

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¹ Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10.

² See, e.g., Sunlight Intern, *Brandeis and the History Of Transparency*, SUNLIGHT FOUND. (May 26, 2009, 10:47 AM), <http://sunlightfoundation.com/blog/2009/05/26/brandeis-and-the-history-of-transparency/>; Charles Kolb, *Campaign Finance Disclosure Sunlight Is Needed*, HUFFINGTON POST (Dec. 28, 2010, 9:57 AM), http://www.huffingtonpost.com/charles-kolb/campaign-finance-disclosure_b_801881.html.

³ See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁴ Mary Winter, *Super PACs at the State Level: A Different Story*, COLUM. JOURNALISM REV. (Apr. 16, 2012, 6:00 AM), http://www.cjr.org/the_kicker/super_pacs_at_the_state_level.php.

⁵ *Citizens United*, 130 S. Ct. at 915. See also *infra* Part II.

election overseers in the Secretary of State's Office and the managers and funders of PACs who would otherwise prefer to remain anonymous.

Nevada's campaign disclosure laws were amended in 2013 to clarify lingering issues in the State's registration and disclosure requirements.⁶ There are essentially two steps to determining whether a corporate contribution must be disclosed. First it must be determined if the receiving organization is classifiable as a "committee for political action" under NRS 294A.0055(b)(1) or NRS 294A.0055(b)(2).⁷ Second, it must be determined if the contributions were "received for the purpose of affecting the outcome of any primary election, primary city election, general election, general city election, special election or any question on the ballot."⁸

The Nevada Legislature's attempts to refine the state's registration and disclosure requirements are indications of progress in light of Nevada's significant interests in placing tight controls on in-state political expenditures. This Note will argue, however, that NRS 294A.230(2) should be further amended, replacing the language

When reporting contributions as required by this chapter, a person who qualifies as a committee for political action . . . is required to report only those contributions received for the purpose of affecting the outcome of any primary election, primary city election, general election, general city election, special election or any question on the ballot.

with

When reporting contributions as required by this chapter, a person who qualifies as a committee for political action . . . is required to report all contributions except where the contributor has explicitly designated that the contributed funds not be used for the purpose of affecting the outcome of any of the following in the State of Nevada: a primary election, a primary city election, a general election, a general city election, a special election or any question on the ballot.

This would place the burden on corporate donors to specifically earmark their contributions for purposes other than influencing elections in order to avoid having their contributions disclosed. Such a change would provide certainty in Nevada's disclosure scheme. The change also evinces the larger purpose of this Note—encouraging a progressive approach to independent spending disclosure in Nevada.

Part I of this Note provides relevant history and a brief discussion of the basic constitutional issues underlying campaign finance at both the state and federal level. Part II provides a look at some of the developing issues in election spending disclosure at the state level. Part III examines Nevada law with particular attention to exactly how far Nevada's disclosure requirements go. It also suggests that those requirements might constitutionally be extended. Part IV proposes and explains the above-described amendment to NRS 294A.230. Part V concludes that the State of Nevada should become a leader in enacting

⁶ S.B. 246, 77th Reg. Sess. (Nev. 2013) (deeming any organization a committee for political action that either has as its primary purpose the goal of affecting a Nevada election or ballot question, or any group that receives or makes expenditures in excess of \$5,000 a year for that purpose).

⁷ NEV. REV. STAT. § 294A.230(2) (2013).

⁸ *Id.* § 294A.230(2)(b).

new and effective election-funding disclosure requirements in order to serve traditional democratic interests, in addition to Nevada's unique interests as a growing and developing state.

I. CONTEXT AND HISTORY OF LAWS AFFECTING CORPORATE SPENDING

A. *Two Key Distinctions*

1. *Independent Spending vs. Direct Contributions*

The law has evolved to distinguish between two major types of campaign spending: independent spending and direct contributions.⁹ Independent spending involves funds that groups or individuals spend, independently of candidates themselves, to advocate for the election or defeat of a particular candidate, or for the passage or defeat of a particular ballot measure.¹⁰ Direct contributions are funds that groups or individuals give to a particular candidate for his or her own campaigning.¹¹ Importantly, states and the federal government may constitutionally place limits on direct expenditures but, after *Citizens United* and predecessor case *Buckley v. Valeo*,¹² may not restrict independent expenditures without running afoul of the First Amendment. In general, this Note focuses on laws that affect disclosure of funding for independent expenditures—a major activity of PACs operating in Nevada.¹³

⁹ “Independent spending” is a term that conflates several types of spending, including “independent expenditures” and “electioneering communications.” Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 683 n.1 (2012). These types of independent spending each have distinct legal meanings but, for the purposes of this Article, fit within the broader category of “independent spending” as it is defined here. *See id.*

¹⁰ *Id.* Most people will be familiar with independent political spending by way of the now ubiquitous campaign advertisements during election cycles with no disclaiming endorsement by a particular candidate at the beginning or end. PACs running these ads should not be confused with campaign organization for individual candidates, which are directly authorized and controlled by individual candidates or political parties themselves. *See* NEV. REV. STAT. § 294A.0055 (defining “Committee for political action” as an organization not directly controlled by a political candidate).

¹¹ *See* Daaron Kimmel, *Public Corruption Concerns and Counter-Majoritarian Democracy Definition in Citizens United v. Federal Election Commission*, 87 CHI.-KENT L. REV. 265, 273 (distinguishing between independent contributions to parties or committees and contributions made directly to candidates—“direct contributions.” These types of donations are sometimes also referred to “soft” money and “hard” money, respectively).

¹² *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹³ It should be remembered, however, that PACs may legally contribute money received from corporations directly to campaigns. This is authorized both under federal law and under Nevada law. For federal law, see Prohibitions on Contributions, Expenditures and Electioneering Communications, 11 C.F.R. § 114.2 (2011); Separate Segregated Funds, 11 C.F.R. § 114.5 (2011); *Contributions Brochure*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/contrib.shtml#Corporations_Labor_Banks (last visited Apr. 30, 2014). Direct contributions by PACs and even corporations themselves are authorized under Nevada law, although subject to the same direct contribution limits applied to individuals—\$5,000. At least in Nevada, this low limit on direct contributions makes independent spending the clear choice for any corporation or PAC seeking to exert influence over elections and ballot measures.

2. *Associational Disclosure vs. Direct Disclosure*

Courts may also distinguish, for purposes of First Amendment analysis, between (1) disclosure requirements that call for an organization or association to report information about its donors (which I'll refer to as "associational" disclosure); and (2) those that force an individual or corporation to report its own spending independently (which I'll refer to as "direct disclosure"). This Note proposes an amendment to the Nevada statute requiring associational disclosure for PACs, although it is important to note that statutes mandating direct disclosure exist as well.¹⁴

B. *Federal Election Law*

Over the past fifty years, constitutional considerations at issue in state campaign finance law have been guided by the US Supreme Court's analysis of those same issues as they've arisen, bit by bit, in federal campaign finance law. As an understanding of those Supreme Court cases concerning federal law is essential to an understanding of *Nevada* election law issues, a basic history of federal election law is provided here.

The first federal campaign expenditure disclosure law was passed in 1910.¹⁵ The law contained a provision requiring "organizations which shall in two or more States influence the result . . . of an election" to disclose the names of contributors who had given over \$100.¹⁶ Spending that occurred outside the umbra of a committee or organization "for the purpose of influencing or controlling, in two or more states, the result of an election" had to be reported if it exceeded \$50.¹⁷ The law was soon expanded to include expenditures made relevant to nomination efforts, such as primary campaigns or party conventions.¹⁸ These laws were passed and expanded during the height of the Progressive Movement, a time when many in the US were crusading to improve citizen access to the lawmaking process and break the hold that concentrated industrial wealth had obtained on American politics.¹⁹

Federal disclosure requirements became even stronger with the passage of the Federal Corrupt Practices Act of 1925.²⁰ That act defined political committees as organizations that accept contributions or make expenditures "for the purpose of influencing or attempting to influence the . . . presidential or vice-presidential electors (1) in two or more States, or (2) . . . [as] a subsidiary of a national committee."²¹ It required such committees to report total contributions and expenditures, including the names and addresses of anyone who contrib-

¹⁴ See NEV. REV. STAT § 294A.210 (2013) (requiring persons and committees for political action to independently report their own political expenditures in excess of \$1,000).

¹⁵ Act of June 25, 1910, ch. 392, 36 Stat. 822.

¹⁶ *Id.* at 823.

¹⁷ *Id.* at 824.

¹⁸ Act of Aug. 19, 1911, ch. 33, 37 Stat. 25, 25–29.

¹⁹ THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 61–62 (Michael Kazin et al. eds., 2011).

²⁰ Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925).

²¹ *Id.*

uted \$100 or more or any individual or group being the recipient of \$10 or more in a calendar year.²²

The Federal Election Campaign Act of 1971 (FECA) and its amendments in 1974 constituted the next serious legislation on election financing and replaced all federal laws on the issue up to that time.²³ In relation to independent political spending, FECA limited expenditures by individuals or groups “relative to a clearly identified candidate” to \$1,000 per candidate per election.²⁴ FECA also required any individual or group, other than a candidate or political committee, to file a statement concerning those expenditures.²⁵ The statements were to be filed with the Federal Election Commission (“FEC”), also created by the act.²⁶ Compelling the disclosure of election spending information became one of the FEC’s major duties.²⁷

The effort to increase transparency was supplemented in 2002 by the Bipartisan Campaign Reform Act (“BCRA”), commonly known as the McCain-Feingold Act.²⁸ The act was passed in response to a proliferation of political issue advertising on television during federal campaigns.²⁹ Proponents of the act argued that corporations have a disproportionate ability to influence the decisions of voters by pouring thousands of dollars into advertising campaigns attacking or defending certain candidates.³⁰ Among other things, the Act amended federal law to create a ban on corporate-sponsored “electioneering communications,”³¹ within sixty days of a general election.³²

C. *Buckley v. Valeo and the Constitutionality of Required Disclosure*

Early in the history of the regulation of political expenditures, opponents of regulation sought to tie the right to spend money on politically motivated advertisements (and to be free from disclosing that spending) to the free speech guarantees of the First Amendment. The 1976 case *Buckley v. Valeo* is considered the first key case on this issue, and addressed the application of numerous

²² *Id.* at 1071.

²³ Federal Election Campaign Act of 1971 (“FECA”), Pub. L. No. 92-225, 86 Stat. 3.

²⁴ *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976) (quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1970)).

²⁵ Federal Election Campaign Act § 304.

²⁶ *Id.*

²⁷ FED. ELECTION COMM’N, THIRTY YEAR REPORT 9 (2005).

²⁸ Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81.

²⁹ *Administrative Law—Campaign Finance Regulation—D.C. Circuit Again Invalidates FEC Regulations Implementing Bipartisan Campaign Reform Act of 2002: Shays v. FEC*, 122 HARV. L. REV. 1541, 1541 (2009) (“BCRA was enacted in response to what had become a meltdown of the campaign finance system. Its aim . . . was to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called soft money, and the use of issue ads purportedly aimed at influencing people’s policy views but actually directed at swaying their views of candidates.”) (internal quotations omitted).

³⁰ *Id.*

³¹ See Bipartisan Campaign Reform Act § 201 (discussing “electioneering communications” as a subset of independent spending).

³² *Citizens United v. FEC*, 130 S. Ct. 876, 887, 897 (2010).

FECA provisions to individuals.³³ At over 170 pages, the *Buckley* decision reads like a treatise on the justices' views of the various legal consequences of campaign finance laws.³⁴ In the case, US Senator James L. Buckley of New York and a group of other politicians filed suit against Francis R. Valeo, the Secretary of the Senate and the federal government's representative for the FEC, alleging that certain provisions of FECA violated both the First Amendment right to free speech and the Fifth Amendment right to equal protection.³⁵ The plaintiffs challenged the validity of FECA's disclosure and reporting requirements with respect to independent expenditures and direct contributions by individuals,³⁶ as well as FECA's explicit limitations on those types of spending.³⁷

The Court applied strict scrutiny to FECA's associational disclosure provisions under a theory of First Amendment "associational privacy,"³⁸ a concept first articulated in the case of *NAACP v. Alabama*.³⁹ In *NAACP*, the compelled disclosure of the names and addresses of individual members of an organization was found to be a substantial restraint and a violation of the First Amendment right to privacy.⁴⁰ In *Buckley*, however, the Court reached the opposite result, upholding each of the FECA disclosure requirements.⁴¹ It identified the government's interests in disclosure generally as (1) providing the electorate with information "as to where political campaign money comes from and how it is spent by the candidate"; (2) deterring actual corruption and avoiding the appearance of corruption by exposing large contributors to the light of publicity; and (3) collecting data to ensure compliance with contribution limitations.⁴² The Court acknowledged that requiring disclosure even of names and addresses of contributors to political organizations appeared to be the least restrictive means possible to curb the "evils of campaign ignorance and corruption that Congress [has] found to exist."⁴³

³³ See Trevor Potter, *Campaign Finance Reform: Relevant Constitutional Issues*, 34 ARIZ. ST. L.J. 1123, 1125 (2002) (describing the *Buckley* opinion as the "seminal explication of basic campaign finance principals").

³⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976). See also Potter, *supra* note 33.

³⁵ *Buckley*, 424 U.S. at 7, 11.

³⁶ It should be noted that the disclosure provisions at issue in *Buckley* are split between the categories of disclosure described herein. See *supra* Part I.A. The requirements pertaining to independent spending involved "direct" disclosure, see *Buckley*, 424 U.S. at 74, whereas the requirements pertaining to direct contributions to candidates involved "associational" disclosure. *Id.* at 75. Ultimately, though, the Court applied the same type of First Amendment analysis to each type of disclosure, and upheld both, noting that "the right of associational privacy . . . derives from the rights of the organization's members to advocate their personal points of view in the most effective way." *Id.*

³⁷ *Id.* at 12-13, 60.

³⁸ *Id.* at 75.

³⁹ The theory of "associational privacy" is based on the idea that effective advocacy for public and private points of view, particularly in the case of controversial views, is enhanced by group assembly, and that invasive government actions constituting a substantial restraint on that group assembly run afoul of the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

⁴⁰ *Id.*

⁴¹ *Buckley*, 424 U.S. at 60-61.

⁴² *Id.* at 66-68 (internal citation omitted).

⁴³ *Id.* at 68.

The Court left future litigants with at least one caveat, however. It acknowledged the possibility that the type of associational disclosure at issue could conceivably be unconstitutional as applied to “minor parties.”⁴⁴ The concern, also at issue in *NAACP v. Alabama*, involved the possible exposure of contributors to unpopular organizations to physical and economic reprisal for their participation in supporting the organization or cause.⁴⁵ To address this concern, the Court in *Buckley* established a test whereby “minor parties” are exempt from compelled disclosure of contributors’ names if disclosure would reasonably subject them to “threats, harassment, or reprisals.”⁴⁶

However, while such a showing was certainly achievable for a civil rights organization in the 1950’s, as was the case in *NAACP*, the likelihood of such a showing by any of the Super PACs usually affected by contemporary state and federal disclosure laws is slim. *Buckley* continues to stand as strong support for the constitutionality of a wide variety of campaign disclosure laws. The Court’s reasoning would be further reinforced more than three decades later in *Citizens United v. FEC*.

D. *Citizens United v. FEC – Limitations Struck Down, Disclosure Upheld*

Much has been written about the reasoning and ramifications of the Court’s decision in *Citizens United*. For the purposes of this Note, however, the relevance of the case to Nevada campaign disclosure requirements is two-fold. First, concerns about the role of corporate contributions to PACs for the purposes of independent political spending are significantly magnified after the decision, as will be further illustrated later in this article. Second, the Court’s reasoning in the decision so strongly invokes the logic and practical use of disclosure requirements in addressing these concerns that state legislatures should feel encouraged to seek creative disclosure solutions in the future and still feel confident in the constitutionality of those measures. The pertinent facts of the case, as they relate to the foregoing points, are described below.

On December 13, 2007, a relatively unknown nonprofit corporation and PAC called Citizens United filed a complaint in federal court challenging the application of BCRA disclosure and disclaimer requirements to ads for a movie it had produced, *Hillary: the Movie*.⁴⁷ The organization also sought a ruling that federal bans on the use of corporate treasury funds for certain types of independent political expenditures were unconstitutional violations of the First Amendment.⁴⁸

The Court found that bans on corporate contributions to independent political speech were unconstitutional.⁴⁹ It determined that such bans were suppressions of political speech “on the basis of the speaker’s corporate identity,” and determined that “[n]o sufficient governmental interest justifies limits on the

⁴⁴ *Id.* at 68–69.

⁴⁵ *Id.* at 68; *NAACP*, 357 U.S. at 462.

⁴⁶ *Buckley*, 424 U.S. at 69, 74. *See also* Brown v. Socialist Workers ’74 Campaign Comm., 459 U.S. 87, 108 (1982) (describing and applying the “harassment” test in the context of campaign disbursements).

⁴⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 886–87 (2010).

⁴⁸ *Id.* at 892–93.

⁴⁹ *Id.* at 913.

political speech of nonprofit or for-profit corporations.”⁵⁰ The practical result of the Court’s decision was to explicitly invalidate federal statutes limiting or banning the use of corporate funds for independent political spending,⁵¹ while also implicitly invalidating as unconstitutional all similar state laws.⁵²

With respect to the issue of the disclosure and disclaimer requirements, *Citizens United* was less successful. The Court found both the disclaimer and the discloser requirements constitutional as applied to the ads and the movie.⁵³ Federal law after BCRA required that certain types of independent political communications include a disclaimer that “_____ is responsible for the content of [the] advertising.”⁵⁴ The law also required that any person (here construed to include corporations) spending more than \$10,000 a year on such independent communications identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.⁵⁵

Citizens United argued that the required disclosure of the identities of those who donated to support the movie project and the advertisements would subject its supporters to retaliation, and chill speech.⁵⁶ The Court used the as-applied test from *Buckley* to determine if there existed a reasonable probability that the group’s members would face “threats, harassment, or reprisals” if the members’ names were disclosed, and determined that no such evidence existed.⁵⁷ The Court also rejected arguments that the requirements were under-inclusive or that the disclaimer requirements decreased “both the quantity and effectiveness of the group’s speech by forcing [speakers] to devote four seconds of each advertisement to the spoken disclaimer.”⁵⁸

The Court, in fact, emphatically reiterated its endorsement of disclosure requirements as a “less restrictive alternative to more comprehensive regulations of speech.”⁵⁹ This nod to disclosure represents, perhaps, a prescient understanding of the dynamic changes states and the federal government would have to contend with in the aftermath of the Court’s decision—states’ new inability to restrict or ban unwanted contributions by corporations for the purposes of independent political spending.

II. STATE DISCLOSURE LAW AND CONSIDERATIONS, GENERALLY

As expected, the *Citizens United* decision had a damning effect on state prohibitions and limitations on corporate funding for political advertising.⁶⁰ In

⁵⁰ *Id.*

⁵¹ See 2 U.S.C. § 441b (2012).

⁵² Briffault, *supra* note 9, at 687.

⁵³ *Citizens United*, 130 S. Ct. at 914.

⁵⁴ *Id.* See also 2 U.S.C. § 441d(d)(2) (2012).

⁵⁵ *Citizens United*, 130 S. Ct. at 914; 2 U.S.C. § 434(f)(1).

⁵⁶ *Citizens United*, 130 S. Ct. at 915.

⁵⁷ *Id.* at 914.

⁵⁸ *Id.* at 915.

⁵⁹ *Id.*

⁶⁰ *Life After Citizens United*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/citizens-united-and-the-states.aspx> (last updated Jan. 4, 2011).

all, twenty-four states had such laws on the books at the time of the decision. Since then, nearly all have been explicitly repealed, with the rest being implicitly nullified.⁶¹

The new inability to control corporate political spending has caused an increasing focus on disclosure at the state level. In total, twenty-one states have changed their disclosure laws since *Citizens United*.⁶² Today, nearly every state has some form of disclosure requirement for independent political expenditures and contributions.⁶³

Of the states, Alaska, California, and North Carolina have perhaps the best examples of ambitious disclosure requirements. Alaska requires every PAC registered in the state to disclose all contributions made to it, as well as the “name, address, . . . principal occupation and employer of the contributor.”⁶⁴ Alaska defines a “contribution” as a payment being made “for the purpose of influencing the nomination or election of a candidate” or “for the purpose of influencing a ballot proposition or question.”⁶⁵ In addition, Alaska requires that all groups running independent political ads list the top three donors supporting the ad by name and address *in the ad itself*.⁶⁶

California requires committees to disclose the names and street addresses of each person “who has provided consideration for an independent expenditure of one hundred dollars (\$100) or more.”⁶⁷ California also requires individuals or corporations that make “contributions” in excess of \$10,000 a year to register as a “committee.”⁶⁸ The state defines a payment to a PAC as a “contribution” unless “it is clear from the surrounding circumstances” that it is not made for political purposes.⁶⁹

North Carolina requires individuals and entities to file statements reporting all independent expenditures over \$100.⁷⁰ The law also requires those entities to identify all individuals or entities contributing \$100 or more “if the donation was made to further the reported independent expenditure or contribution.”⁷¹

⁶¹ *Id.* Montana fought the nullification of state prohibition on independent expenditures all the way back to the US Supreme Court, which held that the state law was unconstitutional in light of *Citizens United* in 2012. See generally *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

⁶² ROBERT M. STERN, CORP. REFORM COAL., *SUNLIGHT STATE BY STATE AFTER Citizens United* 6–7 (2012), available at <https://www.citizen.org/documents/sunlight-state-by-state-report.pdf>.

⁶³ *Id.* at 8–34. Even in states where there is no requirement that reports of expenditures or contributions be filed with a secretary of state’s office, there may be requirements that the names of persons or organizations funding the ads be disclosed within the ads themselves. See, e.g., IND. CODE § 3-9-3-2.5(d) (2013); S.C. CODE ANN. § 8-13-1354 (2013); WYO. STAT. ANN. § 22-25-110 (2013).

⁶⁴ ALASKA STAT. § 15.13.040(a)(1) (2013).

⁶⁵ *Id.* § 15.13.400(4)(A).

⁶⁶ *Id.* § 15.13.090(a)(2)(C).

⁶⁷ CAL. GOV’T CODE § 84203.5(b)(5) (West 2014).

⁶⁸ *Id.* § 82013(c).

⁶⁹ *Id.* § 82015(a).

⁷⁰ N.C. GEN. STAT. § 163-278.12(a) (2013).

⁷¹ *Id.* § 163-278.12(c).

Other states have passed legislation focused on fostering open relationships between the corporations funding speech and their own board members and shareholders. Iowa passed a law requiring, among other things, that corporate board members approve independent political spending by a corporation, although significant parts of this law were struck down as unconstitutional by the Eighth Circuit in 2013.⁷² Maryland requires that independent spending be disclosed directly to shareholders of a corporation.⁷³

In recent years, litigation over state disclosure requirements has frequently involved constitutional challenges to state definitions of “PAC” and “independent political expenditure.” In *Buckley*, the US Supreme Court sought to clarify which organizations could constitutionally qualify as political committees for the purposes of entity-wide disclosure.⁷⁴ According to the Court, a political committee is any organization that is under the control of a candidate or the “major purpose” of which is the nomination or election of a candidate.⁷⁵ The definition of a “major purpose” would then turn on the amount of an organization’s expenditures that are made for the purpose of influencing elections.⁷⁶ Organizations and donors seeking to avoid disclosure requirements have long sought to characterize their communications during election cycles as “issue advocacy” rather than “express advocacy”—communications of general opinions on public issues as opposed to explicit pleas for the election or defeat of a particular candidate. This distinction was recognized in *Buckley*⁷⁷ and survives today in challenges to state disclosure laws.⁷⁸

Despite these repeated (and usually unsuccessful) challenges, however, and despite several successful constitutional challenges to more creative disclosure approaches, as was the case in Iowa, states have generally been able to sustain meaningful disclosure regulation in the wake of *Citizens United*. States should continue to take progressive approaches to disclosure regulation when, as is the case in Nevada, the law is still in flux and the state has legitimate interests in managing the influence of Super PAC money in local elections.

III. NEVADA DISCLOSURE LAW AND CONSIDERATIONS

A. Nevada Disclosure Law

Nevada’s statutory scheme for regulating disclosure of election expenditures is scattered throughout NRS chapter 294A. The basic components involve:

⁷² IOWA CODE § 68A.404 (2013). See also *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013).

⁷³ MD. CODE ANN., ELEC. LAW § 13-306 (West 2014).

⁷⁴ *Buckley v. Valeo*, 424 U.S. 1, 78–79 (1976).

⁷⁵ *Id.* at 79.

⁷⁶ Briffault, *supra* note 9, at 692.

⁷⁷ See *Buckley*, 424 U.S. at 79–80.

⁷⁸ See, e.g., *Human Life of Wash. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012); *Alliance for America’s Future v. State ex rel. Miller*, No. 56283, 2012 WL 642540, at *1 (Nev. Feb. 24, 2012).

- Defining certain entities as “committees for political action” and requiring their registration with the Nevada Secretary of State’s Office (NRS 294A.0055; NRS 294A.230);
- Requiring self-disclosure of independent expenditures by committees and individuals (NRS 294A.210);
- Requiring entities and individuals making independent political expenditures to disclose contributions (NRS 294A.140); and
- Requiring entities and individuals who make independent political broadcasts costing over \$100, such as TV or radio ads to disclose “on the communication” the name of the entity or person paying for the communication (NRS 294A.348).

As described in Part I, this Note will not directly address Nevada’s scheme for requiring self-disclosure, or “direct disclosure.” Instead, it will focus on the requirements whereby committees for political action must disclose the names of contributors and the amounts of contributions. Two issues commonly arise from this scheme. First, when must a committee register as a committee for political action? Second, what types of contributions must they disclose?

Before 2013, the definition of “committee for political action” defined such entities as

any group of natural persons or entities that solicits or receives contributions from any other person, group or entity and . . . makes or intends to make contributions to candidates or other persons; or . . . makes or intends to make expenditures designed to affect the outcome of any primary, general or special election or question on the ballot.⁷⁹

That definition was amended and clarified during the most recent Legislative Session. NRS 294A.0055 now defines a “committee for political action” to include corporations with their “primary purpose” as affecting the outcomes of elections or questions on the ballot. It also includes corporations whose “primary purpose” *is not* affecting elections, but that receive contributions or make expenditures of more than \$5,000 in a given year.⁸⁰ This inclusiveness will likely serve to ensure that most, if not all, organizations functioning as PACs in all but name only will be forced to register and comply with the resulting requirements.

Once an entity registers as a PAC, this registration triggers the contribution disclosure requirements of NRS 294A.140. This statute requires that

2. Every [committee] shall, not later than January 15 of each year . . . for the period from January 1 of the previous year through December 31 of the previous year, report each contribution in excess of \$1,000 received during the period and contributions during the period from a contributor that cumulatively exceed \$1,000.

. . .

10. The name and address of the contributor and the date on which the contribution was received must be included on the report⁸¹

⁷⁹ NEV. REV. STAT. § 294A.0055(1) (2007). Understandably, this definition was perceived by many as vague, prompting entities to avoid registration and disclosure and forcing the Secretary of State’s Office to initiate litigation in some cases. See *Alliance for America’s Future*, 2012 WL 642540, at *1–2.

⁸⁰ NEV. REV. STAT. § 294A.0055 (2013).

⁸¹ *Id.* § 294A.140.

NRS 294A.140 also requires disclosure of contributions in excess of \$1,000 in close proximity to elections.

While chapter 294A also contains a definition of “contribution” in NRS 294A.007, that definition is qualified in the statute requiring registration of committees for political action—NRS 294A.230. NRS 294A.230(2) states that

2. A person who qualifies as a committee for political action in accordance with [NRS 294A.0055] shall, not later than 7 days after [a qualifying event triggering the registration requirements] register with the Secretary of State on forms provided by the Secretary of State. When reporting contributions as required by this chapter, a [committee] is required to report only those contributions received for the purpose of affecting the outcome of any primary election, general election, special election, or any question on the ballot.

This language clearly operates to exclude contributions to PACs from reporting requirements wherever it can be argued that they were not explicitly “received for the purpose of” influencing an election. As described more fully in Part IV, this offers PACs and their contributors a loophole to avoid disclosure, a problem which should be addressed by amending NRS 294A.230.

While recent amendments to chapter 294A have improved Nevada’s ability to regulate independent political expenditures in its own elections, this particular area of law is still developing, and more improvements can always be made. The amendment to NRS 294A.230 suggested in Part IV should be a part of a more comprehensive plan to make Nevada’s election finance disclosure laws the most evolved and effective in the nation. As described below, Nevada’s significant interests in being on the cutting edge of this area of the law ensure that any laws passed will have a strong case for meeting even the stricter scrutiny applied where they implicate the First Amendment.

B. Nevada’s Substantial Interests in Progressive Campaign Finance Regulation

Nevada’s ability to manage and regulate spending in state elections must pass strict scrutiny as a restraint on First Amendment expression, but any challenge to a campaign finance law in the Silver State should take into account the unique local circumstances that make transparency in election financing an even more compelling state interest than it is at the federal level.

First, Nevada’s population is disproportionately small compared to its sizable political influence. Nevada’s population in 2012 was estimated to be 2,754,354.⁸² Between May 2012 and the presidential election in November 2012, two of the largest Super PACs in the nation, American Crossroads and Priorities USA Action, spent \$8,723,836 in Nevada seeking to influence the election.⁸³ These figures are in stark contrast to another “battleground” state, Pennsylvania, which had an estimated population in 2012 of 12,764,475, with

⁸² *Nevada*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/32000.html> (last visited Apr. 30, 2014).

⁸³ *Ad Spending in Presidential Battleground States – Nevada*, NAT’L J., http://assets.nationaljournal.com/gfx/Ad_spending_in_presidential_battleGround_states_iframe2.html (last visited May 3, 2014).

the same two Super PACs spending a combined total of only \$3,096,742.⁸⁴ Likewise, in Michigan, with a population of 9,882,519, those same two Super PACs spent a combined total of \$740,415.⁸⁵ When broken down to dollars per capita, Pennsylvania saw expenditures of just over 24 cents per person and Michigan saw expenditures of just 7 cents per person. Nevada, by contrast, saw \$3.16 spent per person.

This external interest will continue to be a factor as Nevada grows. In 2012, following the completion of the 2010 U.S. Census, the Silver State was awarded a new House of Representatives district.⁸⁶ This necessitated a redistricting of the State's federal congressional districts in 2011, a task which proved to be contentious and arduous, with the Legislature eventually proposing a map drawn by a Supreme Court of Nevada-appointed panel.⁸⁷ The redistricting process, while nominally left to state legislators, attracted national attention and interest for its effect on the political landscape in the house.⁸⁸ Said one representative of a national Hispanic lobbying group on his group's interest in the process, "Nevada is certainly a priority state for the Latino community."⁸⁹

As Nevada continues to grow, the likelihood that the State will gain even more representation at the national level is high. The determination of whether a seat will be safely Republican or Democrat may again come down to the votes of a handful of Nevada legislators. It is not difficult to imagine races for local seats, then, attracting national interest and the type of Super PAC independent spending that can dramatically sway an election one way or the other. Nevada's interest in maintaining its own autonomy through disclosure requirements is therefore very substantial.

Second, Nevada has a history of political corruption and outside influence, and strict disclosure requirements are necessary to reverse the long tradition of public distrust. Nevada was founded in 1864, shortly before the true national golden age of corruption in politics.⁹⁰ Popular belief has long held that Abraham Lincoln allowed the state to enter the Union during the heart of the Civil War so that he could gain access to the vast sums of wealth being taken out of

⁸⁴ *Wisconsin*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited Apr. 30, 2014); *Ad Spending in Presidential Battleground States – Pennsylvania*, NAT'L J., http://assets.nationaljournal.com/gfx/Ad_spending_in_presidential_battleGround_states_iframe2.html (last visited May 3, 2014).

⁸⁵ *Michigan*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/26000.html> (last visited Apr. 30, 2014); *Ad Spending in Presidential Battleground States – Michigan*, NAT'L J., http://assets.nationaljournal.com/gfx/Ad_spending_in_presidential_battleGround_states_iframe2.html (last visited May 3, 2014).

⁸⁶ Laura Myers, *Nevada Gains Seat in U.S. House*, LAS VEGAS REV. J. (Dec. 21, 2010, 8:28 AM), <http://www.reviewjournal.com/news/government/nevada-gains-seat-us-house>.

⁸⁷ Lois Beckett, *In Nevada, Opaque Groups Square Off Over Redistricting*, PROPUBLICA, (Nov. 9, 2011, 3:08PM), <http://www.propublica.org/article/in-nevada-opaque-groups-square-off-over-redistricting>.

⁸⁸ Ramsey Cox & Elsie Viebeck, *Nevada, Texas Illustrate Difficulties of 2012 Redistricting*, HILL (Oct. 24, 2011, 9:15 AM), <http://thehill.com/homenews/news/189275-nevada-texas-illustrate-difficulties-of-2012-congressional-redistricting>.

⁸⁹ *Id.*

⁹⁰ John Brant, *How Nevada Became a State*, HUMANITIES (May 2, 2010), <http://www.humanities360.com/index.php/how-nevada-became-a-state-25320/>.

Nevada's gold and silver mines.⁹¹ Stories of early Nevada politics are riddled with the examples of lavish spending by wealthy mine owners-cum-politicians and relative out-of-towners from California seeking to exert control over state legislation.⁹² A history of Nevada published in 1912 told the following story:

In the fall of [18]72 John P. Jones, who had been beaten in his fight two years previous when running as the Sheriff of Maraposa [sic] County, Cal., came into the fight for the United States Senatorship. Since his advent into Nevada he had succeeded in mining and had reaped a fortune from the Bonanza uncovered in Crown Point.

. . . .

When fairly in the campaign . . . he began scattering money with a lavish hand and inaugurated the system which for years ruled in Nevada whenever a man with political ambitions sought a seat in the Upper House of Congress.⁹³

In the same passage, the 1912 history describes a negative national reputation that evolved as the influence of money and politics in Nevada proved to be overwhelming: “[F]rom the beginning Nevada only sent its wealthy men to the Senate of the United States. This earned for the State the name of the ‘Rotten Borough’ and this name seems destined to cling to it.”⁹⁴

Nevada's unsavory reputation for corrupt politics continued into the middle of the Twentieth Century. Attracted to the Nevada by the allure of gambling deregulation, the rise of the Mob in Las Vegas during the 1950s did nothing to alleviate this problem. Las Vegas Sun editor, Hank Greenspun, famously wrote in 1950, “A sharp 10-year-old boy could have come to the conclusion that crime and politics in this state are on friendly terms.”⁹⁵

The statute requiring disclosure of campaign expenditures, NRS 294A.210, was passed in 1983, near what is commonly viewed as the end of Mob influence in Las Vegas.⁹⁶ Since that time, Nevada citizens have been able to access information about political spending in their own state and to weigh the competing messages accordingly. The damage done to a state's political reputation and own self-perception by a history of corruption is not undone overnight, however. The unique history of corruption in Nevada makes measures ensuring wide availability of information about political communications a necessity.

Third, political spending in Nevada has such a profound impact on the local economy that requiring disclosure of information relevant to different types of spending is compelling at an economic level, as well as a political level. Nevada is often held up as a cautionary example of why diversity in an

⁹¹ *Id.*

⁹² 1 THE HISTORY OF NEVADA 420–21 (Sam Davis ed., 1912).

⁹³ *Id.*

⁹⁴ *Id.* at 423.

⁹⁵ Ed Koch & Mary Manning, *Mob Ties*, LAS VEGAS SUN (May 15, 2008, 3:00 AM), <http://www.lasvegassun.com/news/2008/may/15/mob-ties/>.

⁹⁶ NEV. REV. STAT. § 294A.210 (2013); Richard N. Velotta, *Las Vegas According to Three Governors: The Fall of the Mob, a Land of Prostitutes and Potential Terrorism Risks*, VEGAS INC (Apr. 27, 2013, 2:00 AM), <http://www.vegasinc.com/business/real-estate/2013/apr/27/las-vegas-according-three-governors-fall-mob-land/>.

economy is essential to long-term success.⁹⁷ The State's failure to move beyond a one-dimensional, service-oriented casino and tourism industry has been cited as one of the key reasons that the Great Recession hit so hard in Nevada and one of the main reasons that the state maintains one of the highest unemployment rates in the nation.⁹⁸

The attention brought by the 2012 election cycle, however, generated sufficient ad revenue that it could arguably constitute an entire industry in and of itself. By the middle of October in 2012, the presidential campaigns had spent a total of \$49 million on advertising in Nevada.⁹⁹ Less data is available on the amount spent on state campaigning, but the point is clear—politics is big business. In a state still gasping for economic air, a new state interest in political spending arises. In addition to state interests in disclosure that have been listed by the Supreme Court in cases like *Buckley* (providing the electorate with information, deterring actual corruption and avoiding the appearance of corruption, and collecting data to ensure compliance with contribution limitations),¹⁰⁰ smaller states where political spending contributes to the health of the local economy may have an additional interest in disclosure driven by the need to track where money originates.

It could be argued that, by mandating disclosure of campaign expenditures, Nevada is advancing its economic interests by accumulating information that could later be used for the purposes of economic development. Perhaps, by learning where and how wealthy organizations or individuals spend their money, private advertising agencies in the state can create a better, more efficient, and more attractive industry where political advertisements are being financed.

IV. A PROPOSED AMENDMENT TO NRS 294A.230(2)

In light of the foregoing, I propose an amendment to NRS 294A.230(2) in order to avoid one particularly glaring problem for Nevada disclosure requirements. This change should be considered a small component of what is intended to be the greater spirit of this Note—encouraging a progressive approach to independent spending disclosure in Nevada.

As described above, NRS 294A.230(2) requires political action committees to disclose contributions they receive for independent political spending. The specific language of the provision reads

When reporting contributions as required by this chapter, a person who qualifies as a committee for political action . . . is required to report only those contributions received for the purpose of affecting the outcome of any primary election, primary

⁹⁷ Richard N. Velotta, *State's Czar of Economic Diversification on Where we Were, Where We're Going and How We'll Get There*, VEGAS INC (July 30, 2012, 3:00 AM), <http://www.vegasinc.com/news/2012/jul/30/states-czar-economic-diversification-where-we-were/>.

⁹⁸ *Local Area Unemployment Statistics*, BUREAU LAB. STAT., <http://www.bls.gov/web/laus/laumstrk.htm> (last modified Apr. 18, 2014).

⁹⁹ Domenico Montenegro, *Ad Spending Tops \$800 million; on Pace to Reach or Come Close to \$1 billion*, NBC NEWS (Oct. 17, 2012, 9:35 AM), http://firstread.nbcnews.com/_news/2012/10/17/14511630-ad-spending-tops-800-million-on-pace-to-reach-or-come-close-to-1-billion?lite.

¹⁰⁰ *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976).

city election, general election, general city election, special election or any question on the ballot.

The problem with this language is that it would allow a corporation or individual to contribute money to a registered political committee and still avoid disclosure *so long as the committee can argue that the money was not explicitly received for the purpose of affecting the outcome of an election*. PACs conceivably have numerous functions outside of influencing elections in a particular state. They might lease or manage office space. They might run internship programs or employment drives. Under the law as it stands, a hypothetical corporation might make a donation to a PAC for “general support,” giving the committee the opportunity to argue that it need not disclose the contribution as it was not received for the particular purpose of influencing an election. The spirit of the law is clearly undermined by the fact that, in such a circumstance, the money might still be used for the purposes of influencing an election, so long as it was not “received” for that purpose.

In light of this potential problem, I propose the following change to the language of NRS 294A.230(2):

When reporting contributions as required by this chapter, a person who qualifies as a committee for political action . . . is required to report all contributions except where the contributor has explicitly designated that the contributed funds not be used for the purpose of affecting the outcome of any of the following in the State of Nevada: a primary election, a primary city election, a general election, a general city election, a special election or any question on the ballot.

The proposed change will ensure that corporations or wealthy individuals are not able to keep their contributions anonymous by earmarking those contributions for ambiguous purposes. Instead, it places the burden on the contributor to explicitly earmark the funds for a purpose other than influencing state elections if it wishes to avoid disclosure.

Such a change would put Nevada near the leading edge of states in this area. As described in Part II, Alaska defines a “contribution” as a payment being made “for the purpose of influencing the nomination or election of a candidate” or “for the purpose of influencing a ballot proposition or question.”¹⁰¹ This language suffers from the same defect as the current language in NRS 294A.230(2). The proposed change would put Nevada more in line with California’s approach, whereby the state defines any payment to a PAC as a “contribution” “unless it is clear from the surrounding circumstances that it is not made for political purposes.”¹⁰²

The problem of corporations seeking to avoid disclosure is a real one. Recent history has shown that corporations *want* to remain anonymous—in 2010, Target Corporation was forced to apologize to employees after it was revealed the corporation had donated \$150,000 to a Minnesota group supporting an anti-gay marriage candidate.¹⁰³ At the same time, corporations are also demonstrating an increased desire to get into the political arena. One report showed that corporate contributions to PACs in 2012 accounted for 23% of

¹⁰¹ ALASKA STAT. § 15.13.400(4)(A) (2013).

¹⁰² CAL. GOV’T CODE § 82015 (West 2014).

¹⁰³ Anna Palmer & Abby Phillip, *Corporations Don’t Pony Up for Super PACs*, POLITICO, (Mar. 8, 2012, 11:55 PM), <http://www.politico.com/news/stories/0312/73804.html>.

total funding for super PACs, already up 4% from 2010 numbers.¹⁰⁴ This tension between what corporations want to see and what they fear creates an incentive to find loopholes. Closing the loophole in NRS 294A.230(2) will better ensure that the disclosure regulations in place actually work. In this way, Nevada will be able to regain some of the control over corporate influence that it lost with *Citizens United*.

IV. CONCLUSION

While the area of law dealing with required disclosure of contributions towards independent political expenditures is still evolving to meet the modern election-spending landscape, Nevada should be taking the reins and continuously working to improve its existing state controls. Progressive action in the area of election spending is a necessity in today's world of broadcast political messages and big-money interests. Disclosure fulfills all of the substantial state interests advanced in cases like *Buckley*—providing the electorate with information, deterring actual corruption and avoiding the appearance of corruption, and collecting data to ensure compliance with state law—and may fill, perhaps, interests particular only to Nevada. As the state grows, and as the influence of intra-state organizations in political processes grows, Nevada owes it to its citizens to improve transparency both by fixing small problems and by working to develop a more effective scheme overall, one that gives individual voters the greatest amount of information possible about the political messages they receive.

¹⁰⁴ T.W. Farnam, *Corporations are Sending More Contributions to Super PACs*, WASH. POST (Feb. 2, 2012), http://www.washingtonpost.com/politics/corporations-are-sending-more-contributions-to-super-pacs/2012/02/02/gIQAL4dYIQ_story.html.