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Digital Advertising and State-Level Political Advertising Disclosure Schemes After McManus

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DIGITAL ADVERTISING AND STATE-LEVEL POLITICAL ADVERTISING
DISCLOSURE SCHEMES AFTER *McMANUS*

Tallman Trask *

ABSTRACT

Digital political advertising is a large and growing segment of political advertising. Despite this, it remains largely unregulated. Attempts to regulate digital political advertising have been state-based and have broadly fallen into two models: a candidate or committee-based disclosure model which demands disclosures from advertising purchasers, and a commercial-advertiser-based disclosure model which requires disclosures from advertising sellers. The former struggles to provide information to voters and advertising consumers that is not already otherwise available and provides little benefit to regulators and enforcers; the latter provides both additional information to voters and a clear enforcement benefit to regulators. In 2018, Maryland established a commercial-advertiser-based disclosure model; this iteration of the model was quickly declared unconstitutional on First Amendment grounds. However, applying the Supreme Court's campaign finance disclosure precedent to Washington's long-standing version of the commercial-advertiser-based disclosure model leads to a different outcome. While regulators and legislators should be conscientious when creating and enforcing commercial-advertiser-based disclosure models, these schemes appear to support the informational, enforcement, and anticorruption interests described in the Supreme Court's campaign finance precedent. The models thus appear to fit within the limits of constitutionally acceptable campaign finance disclosure laws.

* University of Washington School of Law, Class of 2022. Thanks to Professor Lisa Manheim for her thoughtful and insightful comments, and the editors who greatly improved this article with the suggestions.

The author filed a regulatory complaint with the Public Disclosure Commission which led to the Twitter case described in Part II.B. See Public Disclosure Commission Case 59521, <https://www.pdc.wa.gov/browse/cases/59521>. Similarly, the author filed one of the two complaints which led to the 2020 cases involving Facebook and Google described in Part II.B and discussed in other sections. See Public Disclosure Commission Case 55351, <https://www.pdc.wa.gov/browse/cases/55351> (complaint against Facebook involving alleged violations of RCW 42.17A.345 and WAC 390-18-050) and Public Disclosure Commission Case 59475, <https://www.pdc.wa.gov/browse/cases/59475> (complaint against Google involving alleged violations of RCW 42.17A.345 and WAC 390-18-050).

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INTRODUCTION

Online advertising has changed how advertisers reach potential customers. Where broad-based television advertising and print advertising once dominated, targeted online advertising has reimagined the way advertisers interact with consumers. Contextual advertising, such as search engine keyword advertising, allows advertisers to more efficiently reach consumers who may already be interested in their products; behavioral advertising, such as social media advertising, makes it simpler for advertisers to reach potential new customers at a lower cost; and microtargeted advertising allows advertisers to reach only those consumers whom they want to reach, and not the users who are unlikely to have an interest in their products.¹ Advertisers, seeing the potential benefits of new, more targeted advertising, have shifted spending to online outlets.² And advertisers expect the market to continue to grow.³

Behavioral advertising, unlike contextual advertising, “works by collecting data on a user's behavior on the Internet including browsing habits, search queries, and web site viewing history” and then using that data to develop user profiles. These use profiles can later be used to target advertising to specific consumers or consumer groups.⁴ In its simplest form, behavioral advertising allows sites and advertisers to reach users and consumers based on likely interests derived from information users have shared with the sites and advertisers; in more complex forms, it allows advertisers to reach users on one site or through one advertising channel based on the behavior of those users on other sites.⁵ Future versions of behavioral advertising could, in theory, target users based on the behavior of related users.⁶

These changes in advertising systems and the shift from offline to online

¹ For a more extensive discussion of forms of online advertising, see FTC Staff, *FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising: Tracking, Targeting, & Technology*, 2-10, <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadoreport.pdf>; see also NATIONAL ADVERTISING INITIATIVE, *Understanding Online Advertising*, <https://www.networkadvertising.org/understanding-online-advertising> (last visited Feb. 20, 2021).

² In 2016, online advertising surpassed television advertising as the top grossing advertising outlet, with more than \$72.5 billion in revenue. See INTERACTIVE ADVERTISING BUREAU, *IAB Internet Advertising Revenue Report: 2016 Full Year Results*, 19, https://www.iab.com/wp-content/uploads/2016/04/IAB_Internet_Advertising_Revenue_Report_FY_2016.pdf (last visited Feb. 20, 2021).

³ INTERACTIVE ADVERTISING BUREAU, 2021 Marketplace Outlook (Dec. 15, 2020), <https://www.iab.com/insights/2021-marketplace-outlook> (“buyers are optimistic about 2021 and expect a 6% overall increase in their 2021 budget”).

⁴ Steven C. Bennett, *Regulating Online Behavioral Advertising*, 44 J. MARSHALL L. REV. 899, 899 (2011); see also FTC Staff, *Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles*, 2 (2007) (defining behavioral advertising as “the tracking of a consumer’s activities online – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer’s interests”).

⁵ Bennett, *supra* note 4, at 901-902.

⁶ *Id.* at 903-04.

advertising have not gone unnoticed by political campaigns and advertisers. Early online advertising systems allowed candidates and campaigns to reach voters in new and unique ways.⁷ Contemporary online advertising has opened new doors to candidates, and it allows candidates and campaigns who previously may have been financially locked out of the advertising market to communicate with voters and constituents in effective, meaningful ways.⁸ Large-scale data collection practices and associated analysis practices appear to allow candidates and committees to more effectively microtarget voters through online behavioral advertising and predictive modeling, allowing campaigns to reach only those voters they believe are likely to support them or to be undecided.⁹ In some cases, candidates and campaigns may not even be fully aware of the targeting data used in relation to their advertising because the extent of data collection and use by online commercial advertisers is often opaque and buried under layers of algorithms and inaccessible corporate data.¹⁰ While online political advertising spending has not yet surpassed political television advertising spending, federal campaigns spent hundreds of millions of dollars advertising online in 2020 alone.¹¹ State and local races have seen similarly large spending.¹²

Online advertising, and particularly behavioral advertising, demands a significant amount of data about consumers and potential advertising viewers to be effective. For an advertising purchaser to reach desired customer demographics, either that purchaser or the commercial advertiser selling advertising needs to know the demographic characteristics of specific users. The extensive data collection required for effective online advertising has created notable privacy concerns

⁷ See Michael Cornfield & Kate Kaye, *Online Political Advertising*, POLITICKING ONLINE 163, 163-69 (Costas Panagopoulos ed., 2009) (describing the early forms and history of online political advertising).

⁸ Erika Franklin Fowler, Michael M. Franz, Gregory J. Martin, Zachary Peskowitz & Travis N. Ridout, *Political Advertising Online and Offline*, 115 AM. POL. SCI. REV., 130, 133-134 (2021) (noting that “the set of candidates who advertise on Facebook is much broader than those who advertise on TV” and that for lower-resourced candidates, the efficiency of online advertising is “the difference between advertising and not”); see also Barbara Ortutay & Amanda Seitz, *Online Political Ads: Cheap, Efficient and Ripe for Misuse*, ASSOCIATED PRESS (Jan. 31, 2020), <https://apnews.com/article/eef44be313efdefa959ec7d7200474cc> (targeted online political advertising is “helpful for lesser-known candidates or smaller local and statewide campaigns that can now spend as little as \$250 to reach hundreds or thousands of voters online”).

⁹ For a discussion of the power and ubiquity of large-scale data and microtargeting in political campaigns, see generally Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 WIS. L. REV. 861 (2014).

¹⁰ See, e.g., Sylvia Lu, *Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence*, 23 VAND. J. ENT. & TECH. L. 99, 103-105, 119 (2020) (describing opaque algorithms and applying concerns to circumstances where consumers “unknowingly trade their private information” in settings related to behavioral advertising and data collection).

¹¹ See *Presidential General Election Ad Spending Tops \$1.5 Billion*, WESLEYAN MEDIA PROJECT (Oct. 29, 2020), <https://mediaproject.wesleyan.edu/releases-102920>.

¹² In 2018, state-level and local candidates and committees in Washington State spent more than \$400,000 on Facebook advertising alone. See Washington State Public Disclosure Commission, *Expenditures*, <https://www.pdc.wa.gov/browse/more-ways-to-follow-the-money/advanced-search/expenditures> (choose “2018” from the dropdown labeled “Election Year”; enter “Facebook” in the field labeled “Recipient Name”; then click “Filter”).

among users and enforcers.¹³

Political advertising has not escaped the privacy concerns surrounding online advertising more generally. The Cambridge Analytica scandal, where an advertising and data firm accessed data about millions of Facebook users and used that data as part of a campaign's political advertising and communications efforts, highlighted these privacy struggles.¹⁴ The potential impact and power of privacy violations, which run alongside the online political advertising landscape, continues to impact online advertising and data collection.¹⁵ In the wake of the Cambridge Analytica scandal, privacy regulators imposed record fines on Facebook and required new privacy practices.¹⁶ However, the "unquenchable thirst for more and more data" that gave rise to the scandal remains, and data collection continues to sit at the core of online advertising.¹⁷ This data collection, in fact, allows online political advertising to engage in the kind of micro and hyper-targeted advertising which allows candidates and campaigns to reach constituents and targeted voters.¹⁸

Coexistent with the privacy concerns embedded in behavioral advertising, political advertising has legal transparency needs which simply do not apply to other forms of advertising. For decades, laws and regulations have required broadcasters to keep records of political advertising sales in publicly available "ad books."¹⁹ Online advertising is not automatically exempt from transparency concerns and, although online commercial advertisers have attempted to create internal or platform-specific transparency tools, these tools have sometimes struggled to provide the transparency required by political advertising laws and regulations.²⁰ As a result, online commercial advertisers have faced fines and legal

¹³ See, e.g., FEDERAL TRADE COMMISSION, *FTC Approves Final Settlement with Facebook* (Aug. 10, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook> (describing privacy settlement requiring major online commercial advertiser to change privacy practices).

¹⁴ For a description of the scandal, see Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html>; see also Patrick Day, *Cambridge Analytica and Voter Privacy*, 4 GEO. L. TECH. REV. 583 (2020) (describing the scandal, the fallout, and proposed measures to prevent similar future scandals).

¹⁵ See Day, *supra* note 14.

¹⁶ See, e.g., Tony Romm, *FTC Votes to Approve \$5 Billion Settlement with Facebook in Privacy Probe*, WASH. POST (July 12, 2019), <https://www.washingtonpost.com/technology/2019/07/12/ftc-votes-approve-billion-settlement-with-facebook-privacy-probe>.

¹⁷ Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.*, Fed. Trade Comm'n File No. 1823109 (July 24, 2019).

¹⁸ See Bennett, *supra* note 4.

¹⁹ 47 U.S.C.A. § 315(e); see also *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233-43 (2003) (describing the "longstanding" recordkeeping requirements). For a description of what this inspection looks like in practice, see Eli Sanders, *Big Tech Is Failing to Comply with Seattle's Law on Election Advertising Transparency*, THE STRANGER (Dec. 20, 2017), <https://www.thestranger.com/features/2017/12/20/25632083/big-tech-is-failing-to-comply-with-seattles-law-on-election-advertising-transparency>.

²⁰ See Laura Edelson, Shikhar Sakhuja, Ratan Dey & Damon McCoy, *An Analysis of United States Online Political Advertising Transparency*, 1-3 (New York University Working Paper, Feb. 12, 2019), <https://arxiv.org/pdf/1902.04385.pdf>. Note that, as a result of this research into political

struggles, and legislatures and regulators have attempted to refine and revise standards for the online era.²¹ These struggles have resulted in a fractured legal environment, with little federal guidance, no nationally applicable standards, and state approaches legal and regulatory structures which vary from laissez-faire approaches lacking oversight to more stringent efforts mirroring federal broadcaster recordkeeping and disclosure rules.

This fractured legal landscape creates the backdrop for two related state-level legal and regulatory struggles: Maryland's attempt to impose new standards on online commercial advertisers when they sell political ads, and Washington's attempt to enforce longstanding political advertising disclosure laws, which were originally drafted with more traditional commercial advertisers like newspapers or radio stations in mind, where the commercial advertiser is an online commercial advertiser with remarkably different practices from those more traditional commercial advertisers. This paper analyzes those struggles through the lens of campaign finance regulation.

Part I provides a brief history of the state-regulation of political advertising as applicable to political advertising disclosure. The section then proposes that advertising disclosure regulations fall into two categories: a candidate-based model or commercial-advertiser-based model. After defining the categories, the section argues that, based on the normative assumptions of advertising disclosure laws and campaign finance disclosure case law, the commercial-advertiser-based disclosure model is a better fit and better meets the needs of disclosure law. Part II looks at the state-level struggles in Maryland and Washington in more detail, and in the context of campaign finance disclosure case law. The section particularly focuses on the Supreme Court's approach to disclosure laws, attempts in Washington to enforce existing law against online commercial advertisers, and *Washington Post v. McManus*, which found Maryland's commercial advertiser disclosure law to be unconstitutional. Part III applies Supreme Court precedent and campaign finance case law to an analysis of Washington's existing commercial-advertiser-based disclosure model, arguing that the law is ultimately both constitutional and distinct from Maryland's more problematic approach.

I. BRIEF HISTORY OF STATE-LEVEL REGULATIONS

Following the Watergate scandal and associated revelations about campaign behavior, state and federal lawmakers, alongside citizen advocates, sought to address opaque campaign administration and campaign finance practices.²² The

advertising on Facebook and other research they carried out, Edelson and McCoy, potentially along with others, had their access to Facebook and data about political advertising on the platform suspended or revoked by Facebook on August 3, 2021. See David Gilbert, *Facebook Just Suspended the Accounts of Some of Its Biggest Critics*, VICE, Aug. 4, 2021, <https://www.vice.com/en/article/n7bkg8/facebook-just-suspended-the-accounts-of-some-of-its-biggest-critics>.

²¹ See discussion *infra*, Part I.A.

²² See, e.g., Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (creating the Federal Election Commission and further regulating federal campaign activities); Washington Initiative 276 (Wash. 1972) (creating the Public Disclosure Commission

history of efforts to increase transparency at the federal level is well-documented and studied by courts, academics, and journalists.²³ A limited number of states have undertaken regulatory efforts extending beyond the federal structure; other states, however, have not put limits in place and have left digital campaign finance regulation in the hands of industry self-regulation.²⁴ In the absence of comprehensive federal legislation addressing digital political advertising,²⁵ these state-level efforts have become the focus of attempts to reign in the excesses of digital political advertising spending. Broadly, the state-level models take one of two approaches: they either regulate candidate and committee practices, or they regulate commercial advertiser practices. Each model has benefits and drawbacks, and they have vastly different legal impacts and disclosure potential.

A. *Current State Approaches to Regulation*

Campaign finance regulations typically address candidate and committee behaviors. These laws generally impose specific disclosure and registration requirements or create limits on fundraising. The laws may apply to candidates, committees working in support of candidates and ballot measures, and outside independent expenditure spending. At the state-level, these structures share a common framework with federal campaign finance law.²⁶ Certain state-level regulatory frameworks require additional disclosures, and act on items beyond or outside the scope of the federal regime. Required commercial advertiser disclosures (that is, disclosures of political advertising required of advertising sellers, such as newspapers, television and radio stations, or websites) are one such approach and do not share a common core with the federal campaign finance system.

and regulating state campaign activities). *See generally* FEDERAL ELECTION COMMISSION, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974 (1977), https://transition.fec.gov/pdf/legislative_hist/legislative_history_1974.pdf. *See also*, JOHN C. HUGHES, JOLENE UNSOELD: “UN-SOLD”, 23-33 (2016), https://www.sos.wa.gov/_assets/legacy/who-are-we/jolene-unsoeld-pdf.pdf.

²³ *See, e.g.*, *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 115-132 (2003) (describing the history of federal campaign finance regulation); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585-91 (2011); and Jamie Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform*, WASH. POST: THE FIX (Apr. 3, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon>.

²⁴ *See* Robert Yablon, *Political Advertising, Digital Platforms, and the Democratic Deficiencies of Self-Regulation*, 104 MINN. L. REV., headnotes 13 (2020).

²⁵ Ellen Weintraub, *The Law of Internet Communication Disclosures* (Dec. 18, 2019), <https://www.fec.gov/resources/cms-content/documents/2019-12-18-The-Law-of-Internet-Communication-Disclaimers.pdf> (highlighting the lack of federal “disclaimer regulations specific to the internet” while noting that existing general disclosure requirements apply to online advertising).

²⁶ *Compare, e.g.*, 52 U.S.C. § 30103(a) (requiring committees to “file a statement of organization no later than 10 days after designation”), and 52 U.S.C. § 30104 (establishing a specific timeline for the filing of “reports of receipts and disbursements” by committees), with RCW 42.17A.205(1) (requiring committees to “file a statement of organization with the commission . . . within two weeks after organization”), and RCW 42.17A.235 (establishing a timeline for the filing of “report[s] of all contributions received and expenditures” and other reports by committees).

1. The Candidate-Based Model

The candidate-based disclosure model addresses online advertising by affirmatively including online advertisements within other advertising disclosure requirements. By affirmatively extending the requirements, legislatures have created a statutory structure that mirrors the federal disclosure requirements, while also avoiding the limitations of expanding a disclosure system through agency opinions, interpretations, and guidance.²⁷ However, the model has not typically been used to purely extend disclosure requirements to new forms of advertising; rather, the candidate-based disclosure model often imposes new requirements on candidates and limits the liability or responsibility of online commercial advertisers.

Candidate-based disclosure models specifically applicable to online advertising exist in at least five states.²⁸ While these disclosure requirements mirror requirements for other forms of advertising, they do not require affirmative disclosures of information from commercial advertisers and only mandate certain in-advertising disclosure practices by campaigns. That is, the requirements extend existing advertising requirements, like on-ad sponsorship and “top contributor” requirements to online advertising, but do not impose additional online-specific disclosure requirements.²⁹ Typical practices included as part of the candidate-based disclosure model involve notification requirements,³⁰ placing the responsibility of identifying political ads on the advertising purchaser,³¹ and “good faith” provisions which allow platforms to avoid liability where purchasers fail to satisfy notification requirements.³² In each state using a candidate-based disclosure model, commercial advertisers are not required to disclose information they collect and the candidates or committees purchasing political advertising are typically required to report their expenditures to state regulators.

States with candidate-based disclosure models include New York, Virginia, and California. Each state’s framework is a slight variation on the model described above, and the differences typically limit, rather than extend, the disclosure requirements associated with online political advertising. For example, while New York law requires a regulatory body to define “online platform” to limit the application of the law,³³ California law plainly exempts a large swathe of online

²⁷ See Weintraub, *supra* note 25.

²⁸ See Ashley Fox & Victoria Ekstrand, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 J. LEGIS. 74 (2021) (describing, in different terms than those used here, state-level campaign finance disclosure structures).

²⁹ See VA. H. 849 (2020) (explicitly extending existing requirements to online advertising). *But c.f.* Cal. Gov. Code § 84504.6(c) (allowing for hyperlinks and other “clickable” features that allow viewers to find sponsorship information on a different website).

³⁰ See, e.g., Code of Virginia § 24.2-960 (requiring candidate disclosure to commercial advertisers).

³¹ See *id.*; see also, Laws of New York, § 14-107-B (requiring commercial advertisers to collect state registration forms from committees).

³² See, e.g., Cal. Gov. Code § 84504.6(b)(1).

³³ N.Y. Elec. Law § 14-107-B(2).

political advertising from the limited disclosure requirements the law imposes.³⁴ Similarly, the legal structures within commercial-advertiser based models often limit any possible liability for disclosure issues to campaigns, allowing commercial advertisers to rely in “good faith” on the representations of advertising purchasers.³⁵ Notably, this “good faith” exemption does not exist for offline commercial advertisers in either California or Virginia, and the law therefore imposes more stringent requirements for commercial advertisers who run political advertisements offline than those who do so online.³⁶ While the New York law does not absolve online commercial advertisers of liability, the law does not require online-specific disclosures, or even disclosures containing information which is not otherwise available. Rather, the law requires online political advertising purchasers to merely supply the commercial advertiser from whom they are purchasing the advertising with the same registration form the purchaser has already filed with state regulators; even then, commercial advertisers are not required to disclose information on those forms available for public inspection or to disclose any information contained within them.³⁷ The candidate-based model thus creates a system which, while similar to offline advertising disclosure requirements, may often allow online commercial advertisers to escape liability and imposes disclosure requirements exclusively on candidates.

2. The Commercial-Advertiser-Based Model

A limited number of states have established a system which uses a commercial-advertiser-based disclosure model.³⁸ In contrast to a candidate-based model, a commercial-advertiser-based disclosure model puts the disclosure onus on political advertising sellers (newspapers, television and radio stations, websites and online advertising sellers).³⁹ These commercial advertiser disclosure requirements run in parallel to candidate disclosures; that is, in states using the model, commercial advertiser disclosures compliment rather than replace candidate disclosures.

Commercial-advertiser-based disclosure models rely on recordkeeping by commercial advertisers. New Jersey requires that commercial advertisers “maintain a record . . . [including] an exact copy of the communication and a statement of the number of copies made or the dates and times that the communication was

³⁴ CAL. GOV'T CODE § 84504.3(h).

³⁵ CAL. GOV'T CODE § 84504(6)(e); VA. CODE ANN. § 24.2-960(2).

³⁶ See CAL. GOV'T CODE § 84504; see VA. CODE ANN. §§ 24.2-955 – 24.2-958.

³⁷ N.Y. Elec. Law, § 14-107-B.

³⁸ Currently, New Jersey and Washington are the only states making use of this model; Maryland formerly and briefly made use of a model, but that law has since been declared unconstitutional (see discussion *infra.*, Part II.B.2); see also, Eli Sanders, *Obama Appointee Who Predicted Russian Interference Says Seattle Election Law Should Be National Model*, THE STRANGER (Jan. 7, 2018), <https://www.thestranger.com/slog/2018/01/07/25684407/obama-appointee-who-predicted-russian-interference-says-seattle-election-law-should-be-national-model> (former FEC chair and others describe the commercial-advertisers-based model used in Washington and Seattle as “unique” and suggest it should “be a model for other local governments”).

³⁹ New Jersey and Washington both impose disclosure requirements on commercial advertisers no matter the medium through which advertising is disseminated, while Maryland’s former law only imposed disclosure requirements on online commercial advertisers.

broadcast or otherwise transmitted, and the name and address of the committee, group or individual paying for the communication.”⁴⁰ Washington requires commercial advertisers to maintain records which include at least “[t]he names and addresses of persons from whom it accepted political advertising or electioneering communications [;] . . . [t]he exact nature and extent of the services rendered; and . . . [t]he total cost and the manner of payment for the services.”⁴¹ The disclosure model also relies on information about political advertisements being made available to the public by the commercial advertisers making records directly available for public inspection; New Jersey requires that records are “available for public inspection during normal business hours” and maintained for at least two years following an election,⁴² while Washington requires that advertisers’ records “shall be open for public inspection during normal business hours during the campaign and for a period of no less than five years after the date of the applicable election.”⁴³ Inspection of records is allowed either at the commercial advertiser’s place of business, or through another means provided for in the statutes or regulations.⁴⁴ Additionally, Maryland’s version of the commercial-advertiser-based disclosure model formerly required commercial advertisers to publish disclosures on their website; the law has since been declared unconstitutional (discussed in Part II.B below).⁴⁵ Unlike the candidate-based disclosure model, no state currently making use of a commercial-advertiser-based disclosure model has included “good faith” or notification provisions in its law; the responsibility of determining what is and is not political advertising subject to the state’s disclosure requirements thus sits exclusively with the commercial advertiser.⁴⁶

The commercial-advertiser-based model may require commercial advertisers to disclose information beyond that which is disclosed, or potentially even known, by candidates and advertising purchasers. For example, Washington’s disclosure regime requires a “digital communication platform” acting as a commercial advertiser to disclose a “description of the demographic information (e.g., age, gender, race, location, etc.) of the audiences targeted and reached, to the extent such information is collected by the commercial advertiser” alongside information about the cost of the advertisement and payment for it.⁴⁷ The regime, however, imposes no such requirement on candidates and committees purchasing online political advertising, instead only requiring them to disclose the “name and address of each person to whom an expenditure was made . . . the amount, date, and purpose of

⁴⁰ N.J. REV. STAT. § 19:44A-22.3(d) (2013).

⁴¹ RCW 42.17A.345(1).

⁴² N.J. REV. STAT. § 19:44A-22.3(d) (2013).

⁴³ RCW 42.17A.345(1).

⁴⁴ See WAC 390-18-050(3) (describing at least for acceptable forms of inspection); see also N.J. REV. STAT. § 19:44A-22.3(d) (requiring only that records are “available for public inspection during normal business hours”).

⁴⁵ S.B. 875 Enrolled, 2018 Leg., 438th Sess. (Md. 2018) (the “Online Electioneering Transparency and Accountability Act”).

⁴⁶ While neither New Jersey nor Washington includes either provision, Maryland’s former disclosure law included a requirement that purchasers notify commercial advertisers that the advertising was subject to the disclosure regime. See Md. S.B 875 Enrolled (2018).

⁴⁷ WAC 390-18-050 (describing commercial advertiser disclosure requirements).

each expenditure, and the total sum of all expenditures.”⁴⁸

3. The Costs and Benefits of the Two Models

Disclosure regulations are often imposed to inspire public trust by codifying the normative assumption that systems built on transparency and open public information ought to be part of elections laws.⁴⁹ Similarly, existing laws are built on a framework of enforceability and serve as tools to root out malfeasance and corruption.⁵⁰ In each case, these laws strive to create a disclosure structure which increases public trust in the fairness of elections through open and transparent disclosure and enforcement actions against bad actors. Further, in creating these structures, supporters have specifically and intentionally pointed to low “trust and confidence in government institutions” created by “secrecy in government and the influence of private money” as anathema to “our whole concept of democracy . . . based on an informed and involved citizenry.”⁵¹ Thus, when looking at the costs and benefits of the two models, the primary concern should be the ability of a model to provide information (particularly information which increases public knowledge and trust, and which provides additional actionable data to enforcers) and the ability of a model to sanction and penalize bad actors. On those terms, the commercial-advertiser-based model has clear advantages.

While the explicit extension of on-ad disclosure rules under the candidate-based model to online political advertising provides advertising consumers with an easy and consistent means of accessing information on political ad spending in a way which is familiar to those consumers, the model typically fails to provide additional information to voters and the public.⁵² The New York model, for example, simply

⁴⁸ RCW 42.17A.240(7).

⁴⁹ *See, e.g.*, MD. CODE ANN. ELEC. LAW § 1-201 (“the intention of this article is that the conduct of elections should inspire public confidence and trust by assuring that . . . full information on elections is provided to the public, including disclosure of campaign receipts and expenditures”); *See, e.g.*, RCW 42.17A.001 (“It is hereby declared by the sovereign people to be the public policy of the state of Washington . . . [t]hat our representative form of government is founded on a belief that those entrusted with the offices of government have nothing to fear from full public disclosure [,] . . . the public’s right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private [,] . . . [and] full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society”). Local and municipal campaign finance laws may extend beyond state and federal laws in their scope but seek to achieve similar enforcement and disclosure goals. *See, e.g.*, Seattle City Council Ordinance 126306 (2020) (disclosure of information about the sources of funding for communications “intended to influence legislation on political matters of local importance is vitally important to the integrity of local elections”).

⁵⁰ *Id.*; *see* N.Y. ELEC. LAW § 14-126 (defining disclosure law violations and penalties) and MD. CODE ANN. ELEC. LAW §§ 16-101-16-1004 (defining offenses and penalties under Maryland’s elections laws, including disclosure laws).

⁵¹ *Statement for Initiative Measure 276, in 1972 Washington General Election Voters Pamphlet*, at 10.

⁵² On-ad disclosure rules are those which require advertisers to include specific information, like payer or donor information, either in print on a visual advertisement or as part of the content of an audio advertisement.

requires collection of information which is already otherwise available to the public.⁵³ In all cases, the candidate-based disclosure model makes little to no additional information about election spending available to voters. The on-ad disclosure rules which describe information commercial advertisers are required to collect or candidates are required to provide only supply information already captured through existing direct disclosure requirements.⁵⁴

Similarly, the enforcement benefits of candidate-based disclosures are limited. While there is some additional certification or notification requirement, these requirements do little to encourage compliance from otherwise noncompliant candidates and committees and do not function as means to support enforcement because they provide no additional information to enforcers. The candidate-based model rather assumes that candidates will, at most, provide accurate information to commercial advertisers. However, enforcement efforts are unlikely to be furthered by candidate-based disclosure models because there seems to be no reason to believe that a candidate or committee, having already chosen to not disclose certain advertising spending to state campaign finance authorities, would disclose the political nature of advertising to a commercial advertiser. That is, disclosure structures are only enforceable to the extent that they can capture information, and where a model provides for no new information, it cannot provide for any meaningful new enforcement power.⁵⁵ In addition, candidate-based disclosure rules often limit enforcement power because they cede too much ground to the existing functional limits of online self-service advertising systems without considering the normative and disclosure-driven impacts of the functionality of those systems. This ceding often comes at the request of industry.⁵⁶ Despite these systems coming

⁵³ See N.Y. ELEC. LAW § 14-107-B.

⁵⁴ While on-ad disclosures serve an informative purpose, they do not make new information available to the public, and rather typically require only the disclosure of information already disclosed to regulators in candidate expenditure reports; that remains true in states with candidate-based models and commercial-advertiser-based models. See *id.*; see, e.g., RCW 42.17A.240 (defining required contents of expenditure and contribution reports); compare with RCW 42.17A.350 (defining on-ad contributor disclosure rules).

⁵⁵ Any enforcement powers built into candidate-based models simply empower regulators to enforce rules against candidates where candidates fail to follow technical requirements about the disclosure of information to advertisers, although any information candidates are required to provide to advertisers is already held by enforcers. See, e.g., N.Y. ELEC. LAW § 14-107 and VA. CODE ANN. § 24.2-960.

⁵⁶ See, e.g., Comments of Google LLC Regarding the Washington Public Disclosure Commission's Proposed Permanent Rules On Political Advertising, GOOGLE, Sept. 21, 2018, <https://www.pdc.wa.gov/sites/default/files/form-index/Google%20PDC%20Comments%209.21.18%20.pdf> (comments on a proposed Washington rule from Google, suggesting the burden of identifying political ads should be on the buyer, not the commercial advertiser); Letter from Christina Fisher, Exec. Director, TechNet Northeast, to Connecticut General Assembly Joint Committee on Government Administration and Election, March 6, 2020, <https://www.cga.ct.gov/2020/GAEdat/Tmy/2020HB-05410-R000306-Fisher.%20Christina,%20Executive%20Director,%20TechNet-TMY.PDF> (comments on a failed Connecticut bill from TechNet, suggesting commercial advertisers should be allowed to rely on information from ad buyers); Letter from John Olson, Director, State Government Affairs Northeast Region, Internet Association to Connecticut General Assembly Joint Committee on Government Administration and Election, March 6, 2020, <https://www.cga.ct.gov/2020/GAEdat/Tmy/2020HB-05410-R000306->

online years or decades after the creation of at least some commercial advertiser disclosure requirements which the systems are unable to appropriately manage,⁵⁷ industry efforts to limit applicability and avoid liability continue.⁵⁸

On balance, candidate-based disclosure models provide little public transparency benefit and struggle to support government and social interests in rooting out corruption through improper digital political ad spending because they primarily repeat information which has already been disclosed. Further, they provide no functional check on the accuracy of those disclosures. While extending disclosure rules which require certain information to be included on or in advertising to digital advertising certainly provides advertising consumers with easily accessible information, the requirements do not typically provide voters with new information or information which they could not otherwise access. Similarly, and in the specific context of digital advertising, candidate-based disclosure models are unable to provide enforcers, voters, and researchers with detailed information about advertising targeting and spending which can help uncover unlawful and improper attempts to target and influence specific constituent groups.⁵⁹ The candidate-based models are unable to provide that information because the information is not held by candidates, but rather is maintained by commercial advertisers.

In contrast, the commercial-advertiser-based model can provide the public with additional information beyond candidate disclosures.⁶⁰ The demographic and targeting information could serve an important and informative disclosure function; voters, typically unable to learn if candidates are engaging in objectionable advertising practices, are suddenly able to access specific information about not just what candidates and committees are saying to them, but what candidates and

Olsen,%20John,%20Director,%20Internet%20Association-TMY.PDF (comments on the same Connecticut bill from the Internet Association, suggesting again that the burden of identifying political ads should sit solely with the ad buyer). Indeed, the legislative history and testimony from the bill's patron suggests industry concerns were the driving motivations behind the substitute to the original bill which added the "good faith" provision and additional liability limits; *see* Testimony on Virginia House Bill 849 by Virginia Delegate Marcus Simon and a representative of Facebook, http://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=3105 at 2:24:24 – 2:31:27.

⁵⁷ Facebook, one of the largest online commercial advertisers, was founded in 2004. Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (Jul. 25, 2007), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia>. In contrast, commercial advertiser disclosure laws in Washington were created as part of Initiative 276, which passed in 1972. *See* "Election Search Results," https://www.sos.wa.gov/elections/results_report.aspx?e=41&c=&c2=&t=&t2=5&p=&p2=&y=; *see also* discussion *infra.*, Part II.B; *supra* note 12.

⁵⁸ *See* discussion *infra.*, Part II and *supra* note 12.

⁵⁹ For an example of the kind of digital advertising specific behavior which may be of interest to regulators and voters, *see* Katie Benner, Glenn Thrush & Mike Isaac, *Facebook Engages in Housing Discrimination with Its Ad Practices*, U.S. SAYS, N.Y. TIMES, Mar. 28, 2019, <https://www.nytimes.com/2019/03/28/us/politics/facebook-housing-discrimination.html>.

⁶⁰ *See, e.g.*, WAC 390-18-050(6)(g) (requiring digital commercial advertisers to disclose, in their publicly inspectable books, "[a] description of the demographic information (e.g., age, gender, race, location, etc.) of the audiences targeted and reached" and "the total number of impressions generated by the advertisement," information which is either unavailable to candidates and advertising purchases, not required to be disclosed by candidates and advertising purchases, or both).

committees are saying to other voters and who they are saying it to. This kind of disclosure serves a particularly important informative function for digital political advertising, where microtargeting is “wreaking havoc.”⁶¹ These microtargeted ads, which allow candidates and committees to segment audiences and “target based on people’s interests and demographics,”⁶² make it more difficult for the public to hold politicians accountable and access full information about advertising because microtargeting all but ensures that at least some voters will never see at least some ads purchased during an election. Similarly, journalists seeking to investigate claims made during campaigns and to inform the public about the veracity of those claims may find themselves struggling to access the ads and information about them.⁶³ This difficulty is particularly evident when microtargeted ads are compared to traditional ads in newspapers and on televisions, which do not allow candidates to exempt groups in the same way. Commercial-advertiser-based disclosure models tell the public about and allow the public to see advertising, including advertising that they might otherwise not be aware of. Candidate-based models do not and cannot replicate this.

Under the commercial-advertiser-based model, commercial advertiser disclosures also require disclosure of the cost of the advertising sold.⁶⁴ This cost requirement serves as an important check on candidate disclosures which can help regulators uncover bad acts and improper candidate disclosures.⁶⁵ Because commercial advertisers are required to disclose their records about candidate spending under a commercial-advertiser-based disclosure model, and these disclosures sit alongside required candidate disclosures the public and enforcement bodies are able to confirm candidate disclosures and more fully track advertising throughout the election universe. Similarly, because commercial advertisers are required to disclose information about political advertising and in some cases to independently identify political advertising, commercial advertiser disclosure requirements enable the public and enforcers to identify political advertising purchasers who have failed to follow disclosure requirements, including failures to follow state-level registration and reporting requirements.

A hypothetical may be helpful to further highlight the difference between the two models and the benefits of the commercial-advertiser-based disclosure model over the candidate-based disclosure model. Imagine an election where there are two advertising purchasers: a candidate and an unrelated committee. Further, imagine that neither has fully disclosed its advertising expenditures to state regulators, and

⁶¹ Barbara Ortutay & Amanda Seitz, *How Microtargeted Political Ads are Wreaking Havoc on Our Elections*, L.A. TIMES (Feb. 1, 2020), <https://www.latimes.com/business/technology/story/2020-02-01/how-microtargeted-political-ads-are-wreaking-havoc-on-our-elections>.

⁶² Kail Lembe & Becca Ricks, *The Basics on Microtargeting and Political Ads on Facebook*, MOZILLA FOUNDATION (Jan. 14, 2020), <https://foundation.mozilla.org/en/blog/basics-micro-targeting-and-political-ads-facebook>.

⁶³ See Ortutay & Seitz, *supra* note 61.

⁶⁴ E.g., RCW 42.17A.345(1)(c); WAC 390-18-050(5)(c).

⁶⁵ See comments of Public Disclosure Commission Executive Director Peter Levelle at *Virtual Work Session: Online Political Advertising and Regulation of Contributions to SuperPACs Before the Washington State State Government, Tribal Relations & Elections Committee*, 2020 Leg., Dec. 2, 2020, <https://www.tvw.org/watch/?eventID=2020121010> (comments between 00:00:55-00:36:39).

the committee has failed to file any reports or to follow the applicable committee registration requirements. In a candidate-based model, the public and regulators would struggle to identify the deficiencies in the candidate's filings because the candidate's reported expenditures are the only evidence of any spending and there is no means to confirm the accuracy of those filings. In the same vein, the public and regulators may be entirely unable to easily access any information about the committee's purchases or to discover any information about the committee without extensive investigation. They would also almost certainly be unable to discover that information prior to election day. In a commercial-advertiser-based model, however, the public and regulators could easily discover the deficiencies in the candidate filings by simply comparing the candidate's filings with commercial advertiser records. Similarly, the public and regulators would be able to easily find information about the committee in a state using a commercial-advertiser-based disclosure model because specific information about the committee is held in the public records of the commercial advertiser.

The struggles in the committee example are even further highlighted by the ease of purchasing microtargeted digital advertising through self-service platforms like those offered by Facebook and Google. Unlike forms of advertising which necessarily require some personal interaction between purchaser and seller, self-service digital advertising requires no such thing. As a result, individuals seeking to influence elections can, if they so desire, purchase advertising and possibly avoid meaningful interaction with a representative of the seller, and thus avoid the kind of disclosure and record scrutiny involved in campaign finance disclosure systems. Self-service digital advertising systems make it simpler for bad actors to purchase political advertising, display it to a subset of the electorate, and avoid disclosure to regulators. Accordingly, commercial-advertiser-based disclosure requirements are the only way states have found to avoid the enforcement and compliance problems created by the ease of purchasing microtargeted digital political advertising, and thus have clear advantages over candidate-based disclosure requirements.

II. THE LEGAL FRAMEWORK SURROUNDING THE MODELS

Candidate disclosure requirements have been considered by courts for at least forty years, starting with *Buckley v. Valeo*.⁶⁶ The long-standing campaign finance disclosure case law shows that candidate-based disclosure requirements are constitutional. Commercial-advertiser-based models, however, have only rarely been considered, and there is only one appellate court decision on their constitutionality.⁶⁷ Even where the commercial-advertiser-based disclosure model has been used for decades, there are only a small number of state court decisions addressing the model and no state supreme court decisions directly on the constitutionality of the disclosure requirements and model.⁶⁸

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

⁶⁷ See *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019).

⁶⁸ See discussion *infra.*, Part II.B.1.

A. Courts and Campaign Finance Disclosure

Case law on campaign finance disclosure requirements, and particularly the kinds of third-party disclosure rules imposed by the commercial-advertiser-based disclosure model, is limited. However, campaign finance cases and the limited discussion of campaign finance disclosure within them helps define the confines of the law and legislative efforts to impose specific limits. While long-standing campaign finance case law at least suggests that many or most well-tailored, candidate-based disclosure requirements are constitutional, the same series of cases also suggests that, in at least some cases, commercial-advertiser-based disclosure requirements are constitutional.

1. *Buckley v. Valeo*

Buckley v. Valeo remains at the core of campaign finance conversations.⁶⁹ The *Buckley* Court's approach to campaign finance contribution and spending limits, under which contributions and expenditures are treated differently and the former is subject to both a less strict form of scrutiny and more closely related to the government interest in preventing corruption, continues to influence campaign finance cases.⁷⁰ While the disclosure portion of *Buckley* remains as much in place as the contribution and expenditure portions, it is less regularly the focus of campaign finance reform discussions.⁷¹

Buckley was the Court's first look at modern campaign finance disclosure rules.⁷² The *Buckley* approach to disclosure requirements demands viewing the requirement through the lens of "compelled disclosure, [which] in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."⁷³ While "significant encroachments" like disclosure requirements demand more than "a mere showing of some legitimate governmental interest," some interests are "sufficiently important to outweigh the possibility of infringement."⁷⁴ Disclosure requirements like those at question in *Buckley*,

⁶⁹ See Burt Neuborne, *Campaign Finance Reform and the Constitution*, BRENNAN CENTER FOR JUSTICE, at 18-19 (1998); Richard L. Hasan, *The Nine Lives of Buckley v. Valeo*, in ELECTION LAW STORIES (2016).

⁷⁰ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁷¹ But c.f., Trevor Potter, *Buckley v. Valeo, Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 78-83 (1999) (describing campaign finance disclosure cases after *Buckley*).

⁷² *Buckley v. Valeo*, 424 U.S. at 62, 80 (describing how the statute required committee registration and imposed contribution and expenditure "reporting obligations on 'political committees' and candidates" alongside certain requirements on "individuals and groups that are not candidates or political committees," upholding the later (not discussed above) only after construing the requirements as limited to "contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and . . . expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate").

⁷³ *Buckley v. Valeo*, 424 U.S. at 64 (referencing, among others, *NAACP v. Alabama*, 357 U.S. 449 (1958)).

⁷⁴ *Id.* at 67-66.

however, are substantial.⁷⁵

While *Buckley* provides that corruption prevention is the only valid justification of contribution limits,⁷⁶ there are three “sufficiently important” government interests which can justify disclosure requirements. First, disclosure serves an informative function which can empower voters and provide them with information, relevant to voting, which may not otherwise be accessible.⁷⁷ Second, disclosure requirements serve to further the anticorruption and anti-appearance-of-corruption interests of contribution limits by exposing those contributions to the public.⁷⁸ Third, disclosure requirements like those in *Buckley* “are an essential means of gathering the data necessary to detect violations” of the contribution limits which serve to more directly prevent corruption and the appearance of it.⁷⁹ As a result of these three sufficiently important and substantial interests, disclosure rules generally serve important government interests.⁸⁰

The burdens imposed, however, are “not insignificant . . . and they must be weighed carefully against the interests” advanced and supported by the disclosure rules.⁸¹ The Court, in examining three specific burdens, found “no constitutional infirmities in the recordkeeping, reporting, and disclosure” requirements.⁸² Specifically examining non-candidate and committee reporting requirements, the Court pointed out once again that “disclosure serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations” and held that these interests justify the burdens imposed on contributors.⁸³ Similarly, “the substantial public interest in disclosure identified” outweighs any potential disclosure-based harm to minor parties despite the potential “damage done by disclosure to the associational interests.”⁸⁴ And, where non-candidate and committee disclosure requirements are “reasonable and minimally restrictive,” not only do they not violate the First Amendment interests of the discloser, but they “further[] First Amendment values by opening the basic processes of our federal election system to public view.”⁸⁵ Thus, the “disclosure

⁷⁵ *Id.* at 66, 68.

⁷⁶ *Id.* at 25-29. For a proposed method of regulating campaign finance that seeks to avoid a corruption-based justification for regulation in the wake of *Citizens United* and the quid pro quo definition of corruption imposed therein, see Eugene D. Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 DUKE J. CONST. L. & PUB. POL'Y 259, 298-312 (2014).

⁷⁷ *Buckley v. Valeo*, 424 U.S. at 66-67.

⁷⁸ *Id.* at 67 (quoting Louis D. Brandeis, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT*, 92 (Fredrick A. Stokes Co., 1914) (1913) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”)).

⁷⁹ *Id.* at 67-68.

⁸⁰ *Id.* at 68.

⁸¹ *Id.* at 68.

⁸² *Id.* at 68-85 (discussing asserted burdens based on the impact on minor parties, non-candidate and non-committee aggregate disclosure rules, and overbreadth of the reporting requirements which, appellants claimed, extended to cover contributions so low that they could not relate to anti-corruption interests).

⁸³ *Id.* at 83.

⁸⁴ *Id.* at 71-72.

⁸⁵ *Id.* at 81-82.

requirements . . . in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption.”⁸⁶

Though the analysis in *Buckley* is limited to disclosure requirements imposed on political actors (that is, on candidates, committees, and people directly engaged in making expenditures and contributions) and not on third parties like commercial advertisers, the foundational framework can still provide guidance for commercial-advertiser-based disclosure requirements. There is not, for example, any indication that the informational interest furthered by disclosure rules is limited exclusively to direct disclosures; the interest is not in the source of the disclosure, but in the nature and publicity of the information itself.⁸⁷ In the same way, the enforcement interests described are not limited to enforcement against the party making the disclosure and rather the enforcement interests implicitly sit within “gathering the data” to uncover violations and enforce campaign finance against violators.⁸⁸ That enforcement interest has no logical core if it does not extend to enforcement against parties other than the discloser and at least part of the information necessary for enforcement can only be found in disclosures by other parties because some violations are contained within disclosure failures.⁸⁹

2. *McConnell v. Federal Election Commission*

Decades later, the Court returned to disclosure issues while examining the Bipartisan Campaign Reform Act of 2002 (BCRA) in *McConnell v. Federal Election Commission*.⁹⁰ Within a wide-reaching look at the constitutionality of campaign finance regulation, the Court closely approached consideration of

⁸⁶ *Id.* at 68.

⁸⁷ *See id.* at 67 (the informational value sits in “exposing large contributions and expenditures to the light of publicity” because a “public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return” and referencing *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (“informed public opinion is the most potent of all restraints upon misgovernment”). *See also* Lear Jiang, Note, *Disclosure’s Last Stand? The Need to Clarify the “Informational Interest” Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 491-500 (2019) (describing the informational interest and case law involving the interest).

⁸⁸ *See id.* at 67-68.

⁸⁹ In a concrete example, Washington initiative promoter Tim Eyman was recently found to have violated state campaign finance laws by failing to register as a political committee and arranging what amounted to a kickback scheme. Eyman’s violations were, at least in part, revealed through disclosures filed by political committees, and the enforcement interest in disclosures was not exercised purely against the committees who had filed the disclosures, but also against Eyman. While the specifics of state disclosure law differ somewhat from federal disclosure requirements, the framework of the law is similar and the interests at the core of the case are the same as the disclosure discussion in *Buckley*. *See* Court’s Findings of Fact and Conclusions of Law, *Washington v. Eyman*, No. 17-2-01546-34 (Thurston Co. Superior Ct., Feb. 10, 2021), Public Disclosure Commission Case #15-078, and David Gutman, *Tim Eyman Violated Campaign Finance Law, Judge Rules, is Barred from Controlling Political Committees*, THE SEATTLE TIMES (Feb. 10, 2021), <https://www.seattletimes.com/seattle-news/politics/tim-eyman-found-liable-on-campaign-finance-violations-barred-from-controlling-political-committees>.

⁹⁰ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

commercial-advertiser-based disclosure systems.⁹¹ While the statute and regulations were housed within the authority of the Federal Communications Commission, and not the Federal Election Commission or campaign finance and ethics regulators, the Court relied on the same kinds of interests as expressed in *Buckley*. The BCRA broadcaster disclosure requirements serve an enforcement interest as they “provide an independently compiled set of data for purposes of verifying candidates’ compliance with the disclosure requirements and source limitations.”⁹² The data-set contained within the records is “necessary to permit political candidates and others to verify that licensees have complied with their obligations.”⁹³ However, the Court left open the possibility that some forms of disclosures which go beyond the “disclosure of names, addresses, and the fact of a request” may raise constitutional questions beyond those raised by BCRA.⁹⁴

While *McConnell* significantly relies on the long-standing history of broadcaster regulation and related disclosure requirements and the broad powers of the Federal Communications Commission,⁹⁵ the case’s core is applicable to commercial advertiser disclosure rules more generally. It is difficult to see how, for example, agency rules imposed on a television station which require the station to maintain and make available certain records about political advertising are constitutional unless there is not at least the strong potential that other agency rules or statutes imposed on advertisers accepting political advertising more generally are also constitutional. That is, the logic of *McConnell*, in isolation, is the closest look at something similar to commercial-advertiser-based disclosure from the Supreme Court and it seems to suggest the commercial-advertisers-based disclosure structure, where properly designed and limited, may fit well within the limits of constitutionality.

3. *Citizens United v. Federal Election Commission*

BCRA’s disclosure requirements were again considered in *Citizens United v. Federal Election Commission*.⁹⁶ As in *Buckley* and *McConnell* before, the Court

⁹¹ See *id.* at 233-246 (opinion of Breyer, J.). The broadcaster disclosure statute considered in *McConnell* require broadcasters “keep publicly available records of politically related broadcasting requests,” where politically related broadcasting requests consist of advertising requests from candidates, requests involving messages referencing candidates, or requests about certain political issues. The implemented rules, at the time the Court considered them, required broadcasters keep the records along with information about if the request was granted and, if so, the cost of the advertising and information about when the advertising was broadcast. See and compare discussion *supra* Part I.A.2.

⁹² *McConnell*, 540 U.S. at 237.

⁹³ *Id.*

⁹⁴ *Id.* at 243; see also *id.* at 363 (Rehnquist, C.J., dissenting) (suggesting that BCRA’s disclosure rules may allow “candidates and political groups the opportunity to ferret out a purchaser’s political strategy” in such a way which “ultimately, unduly burdens the First Amendment freedoms of purchasers”).

⁹⁵ See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. at 236 (“Compared to these longstanding recordkeeping requirements” the requirements imposed by BCRA and the associated burdens are “a small drop in a very large bucket.”)

⁹⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. at 366-371.

found that the disclosure requirements are “a less restrictive alternative to more comprehensive regulations of speech.”⁹⁷ While these disclosure requirements may place some potential burden on speech, they do not themselves prevent speech.⁹⁸ Further, the “informational interest alone is sufficient” to justify the application of the disclosure requirements to Citizens United’s advertising.⁹⁹ That is, the transparency embedded in disclosures expresses an important interest in “enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁰⁰ As the BCRA disclosure requirements forward an important interest and present only a limited burden, the Court held the requirements were constitutional.¹⁰¹

Rejecting an argument that disclosure requirements may “chill donations to an organization by exposing donors to retaliation,” the Court reasoned that, while a disclosure requirement would “be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed,” there must be actual evidence of risk.¹⁰²

4. *Americans for Prosperity Foundation v. Bonta*

State efforts to regulate charitable disclosures also play a role in commercial advertiser disclosure rules. As considered in *Americans for Prosperity Foundation v. Bonta*, California statutes and regulations required that charitable organizations file copies of certain tax filings with the state’s attorney general.¹⁰³ The Court, in considering the requirement, addressed the standards for review of the constitutionality of compelled disclosures more generally, and the level of scrutiny applicable in that review. *Americans for Prosperity Foundation* meaningfully does not decide if the heightened or exacting scrutiny described in the *Buckley* line of cases applies universally to cases involving compelled disclosures.¹⁰⁴

⁹⁷ *Id.* at 369.

⁹⁸ *Id.* at 366 (referencing *Buckley v. Valeo*, 424 U.S. at 64 and *McConnell v. Fed. Election Comm’n*, 540 U.S. at 201).

⁹⁹ *Id.* at 369.

¹⁰⁰ *Id.* at 371.

¹⁰¹ *See id.* at 371. *But c.f.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. at 480 (Thomas, J., concurring in part) (“[t]he disclosure, disclaimer, and reporting requirements . . . are also unconstitutional”).

¹⁰² *Id.* at 370 (2010); *see also*, *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) (upholding disclosure of information about petition signatories where there is not direct proof of risk).

¹⁰³ *Americans for Prosperity Found. v. Bonta*, 594 U.S. ____ (2021); *see also* Cal. Govt. Code §12584 (describing statutory filing requirements); Cal. Code Regs., Tit. 11, §301 (describing a requirement for charitable organizations to file “Internal Revenue Service Form 990, 990-PF, 990-EZ, or 1120, together with all attachments and schedules as applicable, in the same form as filed with the Internal Revenue Service” in order to comply with Cal. Govt. Code §12584).

¹⁰⁴ *See Americans for Prosperity Found.*, 594 U.S. at 7 (Opinion of Roberts, C.J.) (describing a preference for holding *Buckley*’s exacting scrutiny to be applicable in all compelled disclosure cases), at 1 (Opinion of Thomas, J.) (describing, alone, a desire to find that strict scrutiny is applicable in all compelled disclosure cases), at 2 (Opinion of Alito, J.) (seeing “no need to decide” between strict and exacting scrutiny in this case), and at 8-9 (Opinion of Sotomayor, J., dissenting)

However, wherever exacting scrutiny does apply,¹⁰⁵ the law must be narrowly tailored to meet state interests.¹⁰⁶ The narrow tailoring requirement ensures that exacting scrutiny analysis has “real teeth.”¹⁰⁷ The requirement, however, does not “require that disclosure regimes be the least restrictive means of achieving their ends.”¹⁰⁸ Instead, the narrow tailoring requirement merely demands that “where exacting scrutiny applies [in compelled disclosure cases], the challenged requirement must be narrowly tailored to the interest it promotes.”¹⁰⁹ Because even an indirect chilling effect on First Amendment activity can imperil the “breathing space” necessary for the survival of First Amendment freedoms, the compelled disclosure laws must be narrowly tailored even where they bear a “substantial relation to an important interest.”¹¹⁰

5. Other Cases

In addition to cases directly considering campaign finance disclosure issues, courts have addressed related concerns both before and after *Buckley*. In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, the Court found that certain kinds of extensive corporate disclosure requirements may “impose administrative costs that many small entities may be unable to bear” while also requiring complex organizations to ensure obligations can be met, and thus could limit the political expression of smaller groups.¹¹¹ Comparing the benefits, the Court held that the burdens imposed on those organizations by the extensive and complex disclosure regime could not be justified where the “state interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of regulations.”¹¹² Similarly, disclosure requirements have failed to meet the standards required by exacting scrutiny where they are designed for some purpose outside the anticorruption, informational, and enforcement interests expressed in *Buckley*.¹¹³

Disclosure requirements have also been limited, on freedom of association grounds, where they present a risk to individuals whose information would be

(describing a preference for the “more flexible approach,” i.e. exacting scrutiny, without joining Roberts in preferring to hold it applicable in all compelled disclosure cases).

¹⁰⁵ *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (interpreting narrowly tailored to mean that a regulation is “not substantially broader than necessary to achieve the government’s interest” even if “government’s interest could be adequately served by some less-speech-restrictive alternative”).

¹⁰⁶ *Americans for Prosperity Found.*, 594 U.S. at 9.

¹⁰⁷ *Id.* at 1 (Opinion of Alito, J.)

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 9-10 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

¹¹¹ *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254-55 (1986).

¹¹² *Id.* at 262. *But c.f.*, *Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265-266 (1986) (O’Connor, J., concurring in part) (describing concerns the majority is moving away from *Buckley* and expressing view that any burdens here do not result from the disclosure requirements, but other portions of the law).

¹¹³ *See, e.g.*, *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008) (holding that disclosure requirements “designed to implement . . . asymmetrical contribution limits” violated the First Amendment).

disclosed. In *Brown v. Socialist Workers '74 Campaign Committee*, the Court considered a state law requiring “every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements” as applied to a minor political party.¹¹⁴ Describing “proof of specific incidents of private and government hostility toward the [minor party] and its members,” the Court pointed to *Buckley*’s proposed exemption for minor parties where disclosure may subject members and supporters “to threats, harassment, or reprisals from either Government officials or private parties.”¹¹⁵ Similarly, disclosure of members’ names may violate the right to freedom of association more generally. Indeed, “compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association” as more express limits.¹¹⁶ Demands and requirements for the disclosure of membership lists generally, therefore, fit within a “strict test” and the same “exacting scrutiny” as campaign finance disclosures, requiring a “relevant correlation” between the information to be disclosed and the state’s substantial interest in that information.¹¹⁷ The strictness does not result from the direct impact of the disclosure, but from the unintended yet inevitable impact of the disclosure, even where the government action may “appear to be totally unrelated to protected liberties.”¹¹⁸

Alongside these associational limits on disclosure, some bans on anonymous political speech have also been found to be unconstitutional. In *McIntyre v. Ohio Elections Comm’n*, the Court found the “simple” informational interest “in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.”¹¹⁹ Rather, the information interest was “plainly insufficient to support” the requirement that political handbills contain information about the sponsor.¹²⁰ Distinguishing *Buckley*, the Court found that the Ohio statute’s “infringement on speech [is] more intrusive” because “even though money may ‘talk,’ its speech is less specific, less personal, and less provocative than a handbill.”¹²¹

However, public disclosure of associational information related to political efforts is not entirely outside the scope of proper and constitutional disclosures. Information about ballot measure petition signatories may, for instance, be disclosed where public records laws apply.¹²² As “public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process” and related burdens are “only modest,” the disclosure of information about petition signers does not run counter to the First Amendment in general.¹²³

¹¹⁴ *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982).

¹¹⁵ *Id.* at 93, 99 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

¹¹⁶ *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

¹¹⁷ *Buckley v. Valeo*, 424 U.S. at 64-66 (discussing and describing *NAACP v. Alabama*).

¹¹⁸ *NAACP v. Alabama*, 357 U.S. at 460-62.

¹¹⁹ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995).

¹²⁰ *Id.* at 349.

¹²¹ *Id.* at 355-56.

¹²² See *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010).

¹²³ *Id.* at 199-201 (leaving open the possibility that specific disclosure may violate the rights of specific signers).

Federal disclosure laws have also been upheld as they apply to lobbying activities.¹²⁴ In terms similar to existing campaign finance disclosure rules, the statute considered in *Harriss* demanded “reports to Congress from every person ‘receiving any contributions or expending any money’ for the purpose of influencing the passage or defeat of any legislation by Congress.”¹²⁵ Finding that these rules were intended to require “disclosure of . . . direct pressures, exerted by the lobbyist themselves or through their hirelings or through an artificially stimulated letter campaign,” the Court held that Congress is “not constitutionally forbidden to require the disclosure of lobbying activities.”¹²⁶ Rather, Congress is empowered to require disclosure of information about “the myriad pressures” with which they are presented in order to protect itself and “safeguard a vital national interest.”¹²⁷ The use of this power is not made unconstitutional simply because the particular form may, in some imaginable set of circumstances, have a limited deterrent effect on potential speech. That is, even where people may “remain silent because of fear of possible prosecution for failure to comply” with lobbying disclosure laws, Congress can act to require those disclosures even when doing so may create some “indirect [restraint] resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel law.”¹²⁸

State-level disclosure requirements about financial contributions to ballot measures have also been considered. For example, when considering small contributions and expenditures related to a ballot measure committee in *Sampson v. Buescher*, the 10th Circuit concluded that, where the cost of compliance exceeded the total contributions to the effort, “the governmental interest in imposing [the disclosure requirements within Colorado’s constitution and related statutes] is minimal, if not nonexistent, in light of the small size of the contributions.”¹²⁹ However, the holding was limited to the facts of the as-applied challenge and did not create a “bright line below which a ballot-issue committee cannot be required to report contributions and expenditures.”¹³⁰ Rather, wherever the point at which small contribution size ensured the burden exceeded the benefit sat, the contributions here were “well below the line.”¹³¹ In the same manner, the Ninth Circuit found that, where contributions and expenditures were solely small in-kind contributions to a ballot measure campaign, the benefits offered by disclosure could not overcome the burdens imposed by disclosure requirements.¹³² As in *Sampson*, the Court here was limited and did not “purport to establish a level above de minimis at which a disclosure requirement for in-kind expenditures for ballot issues passes constitutional muster” while holding the small contributions at question were below the limit at which disclosure did not impose burdens beyond the

¹²⁴ See *United States v. Harriss*, 347 U.S. 612 (1954).

¹²⁵ *Id.* at 614.

¹²⁶ *Id.* at 620, 625.

¹²⁷ *Id.* at 625, 626.

¹²⁸ *Id.* at 626.

¹²⁹ *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1030-34 (9th Cir. 2009).

benefits.¹³³

In neither case did the court express any view about the constitutionality of disclosure requirements in general, or even as they relate to ballot measure campaigns.¹³⁴ In examining the latter issue more assertively, the 9th Circuit found that, where the state has a “sufficiently compelling informational interest,” disclosure of information about ballot measure funding may be appropriate.¹³⁵ However, in more completely analyzing the issue nine years later in *Family PAC v. McKenna*, the court pointed to “an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions” in support of ballot measure disclosure requirements.¹³⁶ The modest burden disclosure requirements imposed on ballot measure committees and supporters are overwhelmed by the “interest in informing the electorate about who is financing ballot measure committees.”¹³⁷ Thus, the court held the disclosure requirements, as they apply to ballot measure committees, meet the exacting scrutiny standards.¹³⁸

The 2nd Circuit, in considering a novel Vermont disclosure regulation which required all individuals and groups sponsoring political advertising involving a candidate send that candidate (and only the candidate) a copy of the advertisement along with certain information about the advertisement, found the requirement supported the state’s informational interest.¹³⁹ The requirement, the court reasoned, furthers the informational interest by “encourage[ing] candidate response” and helping to “ensure that candidates are aware of and have an opportunity to take a position on the arguments being made in their name.”¹⁴⁰ While the court suggested the informational interest advanced by disclosure to candidates is analogous to the informational interest in disclosures to the public at large, it is not clear if this contention squares cleanly with the informational interest as expressed in prior cases.¹⁴¹

¹³³ *Id.* at 1034.

¹³⁴ Ballot measure campaigns are different than other political efforts; they do not fit neatly into the framework built around candidate disclosure requirements because quid pro quo corruption is impossible where there is no candidate. However, the difference is not applicable when considering advertising disclosure regulations because the difference sits within disclosures about donations and donors and not disclosures about advertising or expenditures. *See McIntyre v. Ohio Election Commission*, 514 U.S. at 356 (suggesting that the corruption interest relevant to candidate disclosures does not exist, or is at least lessened relative to candidate elections, in ballot measure and referenda elections).

¹³⁵ *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1107 (9th Cir. 2003).

¹³⁶ *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012).

¹³⁷ *Id.* at 808.

¹³⁸ *Id.* at 811.

¹³⁹ *Vt. Right to Life Comm., Inc. v. Sorrell (VRLC II)*, 758 F.3d 118, 134 (2d. Cir., 2014).

¹⁴⁰ *Id.*

¹⁴¹ *Id. But c.f.*, *Buckley v. Valeo*, 424 U.S. at 66-67 (describing the informational interest as resting within the provision of information to voters); *Citizens United v. Fed. Election Comm’n*, 558 U.S. at 369 (suggesting the informational interest exists because the “public has an interest in knowing who is speaking about a candidate shortly before an election”).

B. Courts and the Commercial-Advertiser-Based Disclosure Model

Case law on the commercial advertiser disclosure limits is significantly limited. The Supreme Court has never considered a case on commercial-advertiser-based disclosure models, and federal courts have only considered the requirements once. While state courts have considered the model, they have only done so rarely and recently. Even in the two states which currently impose commercial-advertiser-based disclosure requirements, case law is limited. Before 2018, there is no reported case on the requirements in Washington, and there is no record of a case considering New Jersey's requirements.

1. Recent Washington Cases

Following data privacy concerns and allegations of online interference with the 2016 election, Washington journalists and activists began to reexamine the power of the state's commercial-advertiser-based disclosure model and how it and laws related to it could be used to explore online political influence and advertising.¹⁴² These efforts have led to at least eight complaints addressed to state regulators each with an associated investigation; these investigations ultimately resulted in five lawsuits, and four settlements.¹⁴³ To date, no case involving the Washington requirements has been tried. However, a brief overview of the three settled lawsuits and one outstanding lawsuit helps clarify the kinds of allegations facing companies and the enforcement efforts involved.

a. The 2018 Cases

Following complaints against Facebook and Google, the State of Washington filed suit against the companies in June of 2018 alleging violations of state campaign finance disclosure laws and the state's commercial-advertiser-based disclosure model.¹⁴⁴ Neither case, however, made it to trial, with both companies settling prior. Facebook settled on December 14, 2018, agreeing to pay a total of \$238,500 while "not admitting to any violation of the law" and "expressing their

¹⁴² See, e.g., Eli Sanders, *We're Asking the Tech Giants to Comply with Seattle's Law on Political Ad Transparency. Will They?*, THE STRANGER (Dec. 4, 2017), <https://www.thestranger.com/slog/2017/12/04/25606100/were-asking-the-tech-giants-to-comply-with-seattles-law-on-political-ad-transparency-will-they>. See also Public Disclosure Case #34055 (Washington activist Connor Edwards' 2018 complaint against Facebook) and Public Disclosure Case #34060 (Edwards' 2018 complaint against Google).

¹⁴³ The complaints and cases are Public Disclosure Commission Cases #34055, #34060, #41024, #47572, #48424, #55351, #59475, #59521. The settled lawsuits were filed against Facebook, Twitter, and twice against Google. An additional lawsuit against Facebook is still outstanding as of July 1, 2021.

¹⁴⁴ *Washington v. Facebook*, King County Superior Court 18-2-14129-0 (2018), and *Washington v. Google*, King County Superior Court 18-2-14130-3 (2018). See also *Washington v. Facebook*, 2018 WL 5617145 (W.D. Wash. 2018) (remanding the case to state court following Facebook's attempt to remove the case on questionable diversity grounds).

commitment to transparency in campaign finance and political advertising.”¹⁴⁵ Similarly, on December 17, 2018, Google settled, agreeing to pay a total of \$217,000 while “expressly den[ying] all material allegations” involved in the case.¹⁴⁶

Notably, Google also amended its policies in June of 2018 to prohibit further political advertising in purchases related to Washington elections.¹⁴⁷ This prohibition mirrored a similar prohibition imposed by Google in Maryland.¹⁴⁸ Facebook also prohibited future political advertising purchases related to Washington elections, banning the purchases after the 2018 case settled.¹⁴⁹

b. *Washington v. Twitter*

Following the 2018 settlements, Washington’s 2019 local elections were the first major test of the state’s commercial-advertiser-based disclosure model now that it had become unambiguously clear that the disclosure requirements applied to online commercial advertisers.¹⁵⁰ Twitter escaped scrutiny the prior year, but faced a complaint filed on October 30, 2019,¹⁵¹ serendipitously the same day the company announced a platform-wide ban on political advertising.¹⁵² Like the prior Google and Facebook cases, the complaint alleged that Twitter had failed to comply with Washington’s commercial-advertiser-based disclosure model and had not made records of political ads available for public inspection.¹⁵³ And, like the previous cases, Twitter settled before the case went to trial, paying a total of \$100,000.¹⁵⁴ However, unlike prior settlements, Twitter did not deny the allegations in the state’s case.¹⁵⁵ In addition, through the course of its investigation, the Public Disclosure Commission discovered that Twitter had, following the company’s ban on political

¹⁴⁵ Stipulation and Judgement at 2, *Washington v. Facebook, Inc.*, King County Superior Court (Dec. 18, 2018).

¹⁴⁶ Stipulation and Judgement at 2, *Washington v. Google, LLC*, King County Superior Court (Dec. 18, 2018).

¹⁴⁷ Google, GOOGLE, *Updates to Political Content Policy* (June 2018), https://support.google.com/adspolicy/answer/9039396?hl=en&ref_topic=29265.

¹⁴⁸ See *infra.*, Note 183.

¹⁴⁹ Facebook, FACEBOOK, *New Rules for Ads That Relate to Politics in Washington State*, Dec. 27, 2018, <https://www.facebook.com/business/news/new-rules-for-ads-that-relate-to-politics-in-washington-state>.

¹⁵⁰ Along with the 2018 Facebook and Google settlements, Washington regulators amended disclosure rules to more clearly encompass online political advertising in 2018. See Engrossed Substitute House Bill 2938 (2018) and Public Disclosure Commission, *New Law Means Changes to Campaign Finance Requirements and Complaint Process*, https://www.pdc.wa.gov/ESHB_2938_news.

¹⁵¹ Public Disclosure Commission Case #59521. See *disclosure in star note*.

¹⁵² Kate Conger, *Twitter Will Ban All Political Ads, C.E.O. Jack Dorsey Says*, N.Y. TIMES, Oct. 30, 2019, <https://www.nytimes.com/2019/10/30/technology/twitter-political-ads-ban.html>.

¹⁵³ Public Disclosure Commission Case #59521.

¹⁵⁴ Stipulation and Agreed Judgement, *Washington v. Twitter, Inc.*, King County Superior Court 20-2-15134-3 (Oct. 12, 2020).

¹⁵⁵ Twitter, however, did not “waive for future contention its contention that RCW 42.17A.345 and WAC 390-18-050 are preempted by federal law,” a contention similarly raised by Facebook and Google.

advertising, apparently accidentally deleted key payment-related portions of its political advertising records,¹⁵⁶ an enforcement discovery which would not have been possible without the commercial-advertiser-based disclosure model.

c. The 2020 and 2021 Cases

In the lead up to the 2020 presidential election, 2019 local elections served as the first meaningful test of Facebook’s political ad ban in Washington. Despite their self-imposed ban, Facebook apparently continued to sell political advertising in Washington.¹⁵⁷ In April 2020, the Washington State Attorney General again filed suit against Facebook, alleging they had once again failed to meet the requirements of the state’s campaign finance disclosure laws.¹⁵⁸ As of this writing, the case is scheduled to go to trial in early 2022.¹⁵⁹

Alongside the case against Facebook, the Washington Attorney General’s office filed suit against Google in early 2021.¹⁶⁰ Like the prior suit against Google, described above, the suit here revolves around Google’s alleged failure to properly and fully disclose information related to political advertising sales in Washington.¹⁶¹ Specifically, the suit alleges that Google failed to maintain records of nearly \$500,000 in political advertising sales to more than 50 candidates and committees between 2018 and 2019.¹⁶² In June of 2021 Google agreed to pay more than \$420,000 to settle the case without conceding that Washington’s commercial

¹⁵⁶ See Public Disclosure Commission Twitter Referral Letter (noting that an “engineering issue” had caused Twitter to “destroy[] records relevant to the inquiry,” including billing information for political advertising purchases and “complete sponsor addresses, payment dates, and demographics of audiences targeted and reached” for the ads), https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/3349/PDC%20Case%2059521%20%28Twitter%20Inc.%29%20-%20Referral%20Letter%20to%20AGO_FINAL.pdf.

¹⁵⁷ David Gutman, *Facebook and Google Agreed to Stop Selling Political Ads in Washington State, But They are Still Doing It*, THE SEATTLE TIMES (Oct. 28, 2019), <https://www.seattletimes.com/seattle-news/politics/despite-promising-to-stop-facebook-and-google-are-still-selling-political-ads-in-washington-state>.

¹⁵⁸ Jim Brunner, *Washington AG Ferguson Sues Facebook Again, Saying It’s Still Selling Political Ads without Adequate Disclosures*, THE SEATTLE TIMES (Apr. 14, 2020), <https://www.seattletimes.com/seattle-news/politics/washington-ag-ferguson-sues-facebook-again-saying-its-still-selling-political-ads-without-adequate-disclosures>.

¹⁵⁹ See Joint Stipulation and Order Amending Case Schedule, *Washington v. Facebook, Inc.*, King County Superior Court 20-2-07774-7 (Sept. 29, 2021). While the case is still outstanding, it is a fascinating combination of rejected settlements, allegations of intentional violations, claims of Section 230 immunity and federal preemption, and other issues that each sit at the center of the conversation about how we should and should not regulate large technology companies and how they influence politics and society. See Eli Sanders, *Welcome to Wild West!*, WILD WEST, Sep. 21, 2020, <https://wildwest.substack.com/p/welcome-to-wild-west> (announcing a new online publication dedicated to the case and issues related to it, and describing the case history and some of the intersections).

¹⁶⁰ Washington State Office of the Attorney General, “AG Ferguson Files Lawsuit Against Google for Repeatedly Violating Washington Campaign Finance Law,” Feb. 24, 2021, <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-against-google-repeatedly-violating-washington-campaign>.

¹⁶¹ *Id.*

¹⁶² *Id.*

advertiser statutes and regulations applied to the company.¹⁶³

2. *Washington Post v. McManus*

In 2018, Maryland legislators, concerned that foreign actors and others had improperly influenced the 2016 elections through digital advertising, decided to act.¹⁶⁴ By May of 2018, the legislature had passed Senate Bill 875, establishing a commercial-advertiser-based disclosure regime in Maryland.¹⁶⁵ On July 1, the law came into effect, and by mid-August a group of eight newspaper publishers and one press association had brought suit seeking to enjoin enforcement and unravel Maryland's new commercial-advertiser-based disclosure model.¹⁶⁶

Like other commercial-advertiser-based disclosure structures, Maryland's law required commercial advertisers to make records of ad purchases available to the public and regulators.¹⁶⁷ These required records included copies of advertising, costs of that advertising, purchaser information, and information about when the ad ran.¹⁶⁸ Maryland's law, however, varied in two important ways. First, unlike other versions of the commercial-advertiser-based disclosure model, Maryland's new law only required disclosure from sellers of "qualifying paid digital communications" rather than all commercial advertising.¹⁶⁹ Second, in what the District Court considering the law called the "publication requirement,"¹⁷⁰ the law obligated commercial advertisers to post copies of the required disclosures on their own websites.¹⁷¹

Newspaper publishers, concerned that the "publication requirement" was a form of compelled speech that infringed on the freedom of the press, brought a challenge to the law.¹⁷² The District Court agreed, finding that the law "compels online publishers to post state-mandated information on their own websites" in likely violation of First Amendment protections.¹⁷³ The court noted that even "[t]he

¹⁶³ Washington State Office of the Attorney General, "AG Ferguson: Google Will Pay More Than \$423,000 Over Repeated Violations of Washington Campaign Finance Law," June 17, 2021, <https://www.atg.wa.gov/news/news-releases/ag-ferguson-google-will-pay-more-423000-over-repeated-violations-washington>. See also Stipulation and Agreed Judgement, *Washington v. Google, LLC*, King County Superior Court 21-2-02549-4 (June 16, 2021).

¹⁶⁴ Maryland Senate Bill 875 Enrolled (2018). See also *Washington Post v. McManus*, 355 F. Supp. 3d 272, n. 6 (D. Md. 2019) (describing testimony on the purpose and intent of Senate Bill 875).

¹⁶⁵ Maryland Senate Bill 875 Enrolled (2018).

¹⁶⁶ See Complaint for Declaratory and Injunctive Relief, *Washington Post v. McManus*, 355 F. Supp. 3d 272 (D. Md. 2019).

¹⁶⁷ See Maryland Senate Bill 875 Enrolled (2018).

¹⁶⁸ *Id.*

¹⁶⁹ As enacted defines "qualifying paid digital communication" as "any electronic communication that: is campaign material; is placed or promoted for a fee; is disseminated to 500 or more individuals; and does not propose a commercial transaction." Maryland Senate Bill 875 Enrolled (2018) (internal formatting and punctuation omitted).

¹⁷⁰ *Washington Post v. McManus*, 355 F. Supp. 3d at 282-83.

¹⁷¹ See Maryland Senate Bill 875 Enrolled (2018).

¹⁷² See Complaint for Declaratory and Injunctive Relief at ¶ 3, *Washington Post v. McManus*, 355 F. Supp. 3d 272 (D. Md. 2019).

¹⁷³ *Washington Post v. McManus*, 355 F. Supp. 3d at 300.

veritable infiniteness of cyberspace does not cure this constitutional infirmity” presented by the law.¹⁷⁴ Holding that strict scrutiny applied and that, while the law involved a compelling state interest, the law was not narrowly tailored, the District Court enjoined enforcement of the law while also allowing for the possibility of an interlocutory appeal.¹⁷⁵

On appeal, the Fourth Circuit reconsidered the application of strict scrutiny and the constitutional implications of the “publication requirement.”¹⁷⁶ Describing the law as a “collection of First Amendment infirmities” and “a legislative scheme with layer upon layer of expressive burdens, ultimately bereft of any coherent connection to an offsetting state interest,” the court found that the law failed to survive constitutional scrutiny.¹⁷⁷ Crediting the aims of the Maryland legislature, the court nonetheless found the law did not appropriately strike a balance between free speech interests and transparency interests.¹⁷⁸

Rather, the Fourth Circuit supported the district court’s conclusion that Maryland’s law was a “content-based regulation on speech” that “singles out political speech.”¹⁷⁹ Describing the district court’s discussion of the issues as “lengthy and thoughtful,” the Fourth Circuit held that the law is “content-based, targets political expression, and compels certain speech.”¹⁸⁰ However, the court recognized, “Maryland’s law is different in kind from customary campaign finance regulations because the Act burdens platforms.”¹⁸¹ That is, in contrast to laws like the one in question in *Buckley*, Maryland’s law places the burden of disclosure on commercial advertisers rather than direct participants in the political process. Therefore, the law “creates a constitutional infirmity distinct from garden-variety campaign finance regulations” as “when the onus is placed on platforms, we hazard giving government the ability to accomplish indirectly via market manipulation what it cannot do through direct regulation—control the available channels for political discussion.”¹⁸² This potentially chilling control was not merely a theoretical risk either; at least some commercial advertisers had stopped accepting political advertisements in Maryland in the wake of the law coming into effect.¹⁸³

Throughout, however, the *McManus* court treats the commercial-advertiser-

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 293, 306.

¹⁷⁶ *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019) [hereinafter *McManus*].

¹⁷⁷ *McManus*, at 520, 523.

¹⁷⁸ *Id.* at 523 (describing the difficulty faced by states seeking to administer elections where “[o]n the one hand, the marketplace of ideas resists governmental regulation. The First Amendment guarantees that all citizens shall be free to speak their piece on the issues of the day, and that government cannot meddle in the debate that takes place among the governed. On the other hand, for a democracy to reach its full potential, intervention is occasionally necessary to promote transparency, facilitate an educated populace, and deter corruption.”)

¹⁷⁹ *Id.* at 513. *See also* *Washington Post v. McManus*, 355 F. Supp. 3d at 285-88.

¹⁸⁰ *Id.* at 513, 515.

¹⁸¹ *Id.* at 515 (emphasis omitted).

¹⁸² *Id.* at 517.

¹⁸³ *Id.* at 516-17 (“the short history of Maryland’s law shows that these chilling effects are not theoretical. Google, for instance, has already stopped hosting political advertisements in the state”) (referencing Michael Dresser, *Google No Longer Accepting State, Local Election Ads in Maryland as Result of New Law*, THE BALTIMORE SUN (June 29, 2018)).

based disclosures as if they were a form of political speech.¹⁸⁴ Describing the publication requirement as “aim[ed] directly at political speech,” the court found the regulations were “of political speech [and] therefore ‘trench upon an area in which the importance of First Amendment protections is at its zenith.’”¹⁸⁵ Describing political speech as occupying “a distinctive place in First Amendment law,” the court held the law failed to meet the needs of either exacting or strict scrutiny.¹⁸⁶ In finding the speech involved was political speech, the court points to the District Court’s “lengthy and thoughtful” analysis finding the Maryland statute regulated political speech.¹⁸⁷ However, the District Court simply assumed, without analyzing, that Maryland’s law regulated electioneering communications; further, the Court further assumed that regulation of electioneering communications through third-parties is subject to the same kind of scrutiny as regulation of electioneering communications when those communications are the typical political speech of candidates or committees, or that involved in contributions and expenditures.¹⁸⁸

III. APPLYING CASE LAW TO THE WASHINGTON STATE MODEL

Applying campaign finance disclosure precedent to Washington’s commercial-advertiser-based disclosure law shows that the law, and commercial-advertiser-based disclosure laws generally, fit squarely inside the constitutional limits on campaign finance disclosure rules. As described below, while it is unclear what kind of speech the laws implicate, it is clear a commercial advertiser model, properly understood, does not involve political speech by commercial advertisers and does not directly relate to political speech by advertising purchasers. Similarly, commercial advertiser disclosure laws do not place an unconstitutional indirect limit on the political speech of advertising purchasers; while *McManus* suggested Maryland’s iteration of the model placed some unconstitutional limit on speech,¹⁸⁹ long-standing Supreme Court precedent on disclosure law assertively suggests the opposite. Applying *Buckley* and related cases, it appears that commercial advertiser disclosure requirements fit within the constitutional limits described by the Supreme Court.

A. *The Model Does Not Directly Involve Political Speech*

Typical political speech involves the “discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”¹⁹⁰ Protections of

¹⁸⁴ *Washington Post v. McManus*, 944 F.3d at 513.

¹⁸⁵ *Id.* at 513-14 (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).

¹⁸⁶ *Id.* at 513, 520.

¹⁸⁷ *Id.* at 513.

¹⁸⁸ *Washington Post v. McManus*, 355 F. Supp. 3d at 287 (finding the Maryland law “plainly” implicates a form of speech which is “indisputably a form of political speech”).

¹⁸⁹ See discussion *supra* Part II.B.2.

¹⁹⁰ *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); see also, *Thornhill v. Alabama*, 310 U.S.

political speech allow political actors to “spread [their] message” and ensure “voters seeking to inform themselves about the candidates and the campaign issues” are able to do so.¹⁹¹ At its most basic level, political speech is “interactive communication concerning political change.”¹⁹² These discussions “‘of public issues and debate on the qualifications of candidates are integral to the operation’ of our system of government” and regulating such speech is thus necessarily difficult.¹⁹³ Political speech can also be symbolic.¹⁹⁴ This kind of expressive and symbolic political speech is applicable in campaign finance disclosure cases.¹⁹⁵

In all cases, however, political speech is expressive.¹⁹⁶ That is, for speech to be political speech, it must express some opinion or preference held by the speaker or symbolic speaker. That expressive, opinion-driven element of political speech is what differentiates political speech from other forms of speech; while a journalist’s expression of personal support for a candidate is surely political speech, the same journalist’s description in the local newspaper of that candidate’s positions on an important issue is does not have the expressive core of political speech.¹⁹⁷

Political speech is one of a number of categories defined in First Amendment jurisprudence.¹⁹⁸ This categorical approach requires courts to “distinguish among speech-suppressing regulations much the same way a biologist distinguishes among organisms, identifying their most distinctive features and slotting each new species into its proper genus.”¹⁹⁹ Slotting speech into the wrong genus can potentially lead to unanticipated restrictions on speech which ought to be allowed and protections of speech which ought not be protected.

Unlike the political speech addressed in *Buckley* and other campaign finance disclosure cases, the speech at question in commercial advertiser disclosures is not expressive. Where prior cases addressed the disclosure of contributions, the kind of

88, 101-102 (1940) (“freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment”).

¹⁹¹ *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

¹⁹² *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

¹⁹³ *Ark. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Buckley v. Valeo*, 423 U.S. at 14).

¹⁹⁴ *See Buckley v. Valeo*, 423 U.S. at 21 (describing financial political contributions in terms of a “symbolic expression of support”).

¹⁹⁵ *Id. See also McCutcheon v. Federal Election Commission*, 572 U.S. 185, 196-97 (2014) (describing *Buckley*’s symbolic expression); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (suggesting the core of First Amendment protections sit at the “free debate and free exchange of ideas” which ensures “that government remains responsive to the will of the people and peaceful change is effected”); *United States v. Int’l Union United Auto., Aircraft and Agric. Implement Workers of Am.*, 352 U.S. 567, 594 (Douglas, J., dissenting) (insisting that the expenditure of funds in service of speech does not itself “make the speech any the less an exercise of First Amendment rights”).

¹⁹⁶ *See Buckley*, 423 U.S. at 21 (describing contributions, as the act of symbolic speech, as “a general expression of support for the candidate and his views”).

¹⁹⁷ The description of the position may still deserve First Amendment protection, but that protection is not rooted in political speech.

¹⁹⁸ Other categories include, e.g., commercial speech and “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words” of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁹⁹ *Washington Post v. McManus*, 355 F. Supp. 3d at 285.

disclosures implicated in commercial advertiser laws involve only information about a commercial transaction between a commercial advertiser and an advertising purchaser where that purchaser is a political actor. And, unlike the symbolic speech in *Buckley* and related cases, the transaction does not flow from a supporter to a political actor. Instead, the transaction flows from a political actor to a “neutral third-party platforms rather than [a] direct political participant.”²⁰⁰

The commercial-advertiser-based disclosure rules considered here are fundamentally different from disclosure requirements imposed on candidates and committees. However, commercial advertiser disclosures are different from other requirements because they are further from the expressive core of political speech. That is, speech about political speech is less clearly within the bound of exacting scrutiny. Rather than regulations directly impacting the expressive core of political speech,²⁰¹ commercial-advertiser-based disclosure rules only directly involve speech about political speech and thus these laws do not easily fit within the same category as regulations more directly affecting candidates and committees or political speech. However, this tension and difference, itself recognized by the *McManus* court,²⁰² is not simply a minor shift from one kind of candidate disclosure requirement to another. Neither is it like the difference between expenditure limits and contribution limits. The difference arises because commercial-advertiser-based disclosure models do not directly implicate political speech at all. Implicitly, long-standing statutes and regulations on political advertising recognize that political advertisements sold and run by broadcasters are not themselves the political speech of the broadcasters.²⁰³ In the same way, commercial advertiser disclosures and the information contained in them simply are not expressive of any political position and are not a symbolic expression of support or opposition to any matter “relating to the political process.” Despite the close connection between commercial advertiser disclosures and the political advertising they relate to, the disclosures themselves are not and cannot be political speech.

B. The Model Does Not Infringe on the Political Speech of Advertising Buyers

Determining that commercial advertiser disclosure laws do not directly implicate political speech does not end an inquiry into their validity. There is still the potential that the laws may indirectly limit the rights of third parties, in this case including candidates, committees, and contributors. However, even to the extent that these laws have an impact on third parties, commercial advertiser disclosure laws do not present an unconstitutional bar on the political speech of third parties.

Like most campaign finance disclosure laws, commercial advertiser disclosure laws may involve information provided by or about third parties who have neither

²⁰⁰ *McManus* at 512 (describing the District Court’s finding that the law “burden[ed] ostensibly neutral third parties such as publishers of political advertisements.” *Washington Post v. McManus*, 355 F.Supp.3d 272, 293 (D. Md. 2019)).

²⁰¹ See discussion *supra* Part III.A.

²⁰² *Washington Post v. McManus*, 944 F.3d at 515 (“Maryland’s law is different in kind from customary campaign finance regulations because the Act burdens platforms rather than political actors”).

²⁰³ See, e.g., 47 U.S.C.A. § 315; 47 C.F.R. § 73.1943

played a part in making the disclosure nor who have, in at least some cases, directly consented to the disclosure. In the case of traditional campaign finance disclosures, this third-party information is about contributors and recipients of expenditures. Current federal law, for example, requires reports including information about any person who has made a contribution in excess of a certain amount.²⁰⁴ These requirements pose at least some hypothetical risk of creating an indirect limit on political speech because they demand information about individuals who may face some scrutiny as a result of the disclosure. This risk alone, however, does not present an unconstitutional limit.²⁰⁵

Commercial advertiser disclosure laws present a different issue. Rather than requiring information about the political speech of contributors, the disclosures only require information about the relationship between the advertiser making the disclosure and the candidate or committee purchasing the advertising.²⁰⁶ As described above, that kind of disclosure does not directly involve political speech. However, the *Buckley* line of cases does not limit itself to direct restrictions.²⁰⁷ Disclosure structures may also run up against constitutional limits where they indirectly limit the rights of third parties not involved in the disclosure itself. In more traditional disclosure models where candidates provide information to the public and regulators about contributions and expenditures, those third parties are individuals engaging in acts protected speech by making contributions. When considering commercial advertiser disclosures, however, the third parties are not individuals in general; instead, the third parties are the candidates and campaigns who purchased the advertising described in the disclosures.

The difference in the kind of concerns raised by commercial advertiser disclosure laws from the issues raised by disclosure laws in general is meaningful here. The shift, however, simply moves the potential harms from unrelated third parties to candidates. Or, in other words, the issues built into commercial advertiser disclosure requirements are not driven by the political speech rights of the commercial advertisers themselves, and they are not driven by the impact of the disclosures on anyone other than candidates. The impacts are on candidates themselves. There is already an easily available tool for exploring the impacts of disclosure itself: *Buckley* and its related cases.

C. *The Model is Constitutional*

If commercial advertiser disclosure laws do not implicate political speech and do not infringe on the political speech of advertising buyers and sellers, are there any constitutional limits on commercial advertiser disclosure laws? Instead of answering that question in the abstract, applying case law to an existing statute provides a clearer path. Washington's RCW 42.17A.345 and WAC 390-18-050

²⁰⁴ 52 U.S.C. § 30104(b)(3)(A).

²⁰⁵ See, e.g., *Buckley v. Valeo*, 424 U.S. at 64 (discussing third parties and the First Amendment risks embedded in disclosure requirements and concluding that these risks do not create a constitutional bar on disclosure rules); see also discussion *supra* Part II (discussing precedent on disclosure rules).

²⁰⁶ See discussion *supra* Part I.A (defining and describing disclosure models).

²⁰⁷ See *supra* note 194.

create the state's commercial advertiser disclosure system and, particularly given the limited number of states using a commercial advertiser disclosure model, are a good tool for analyzing the issues.

1. Applying *Buckley* to Washington's Law

In a general sense, Washington's commercial-advertiser-based disclosure rules bear a clear relationship to the "political file" disclosure rules considered in *McConnell v. Federal Election Commission*, although they extend to included clear requirements that commercial advertisers make a copy of the advertisement available.²⁰⁸ In *McConnell*, the Supreme Court examined a federal requirement that certain kinds of licensed broadcasters maintain public records containing information on political advertising run by those stations.²⁰⁹ There, the Court considered the constitutionality of a federal campaign finance regulation (alongside a similar communications regulation) which required records of requests to purchase political advertising by certain federal candidates, and where those requests were granted, information on the cost and airtime of the advertising.²¹⁰ In other words, the Court considered a federal law that, with the exception of the publication requirement, is almost directly analogous to a commercial-advertiser-based disclosure model. Examining the First Amendment implication of the record keeping requirement, the Court found that "any additional burden that the statute, viewed facially, imposes upon interests protected by the First Amendment seems slight compared to the strong enforcement-related interests that it serves."²¹¹ At the same time, the Court found that the disclosure requirements "must survive a *facial* attack under any potentially applicable First Amendment standard, including that of heightened scrutiny."²¹² While *Citizens United* later overruled portions of *McConnell*, the portion describing and upholding advertiser disclosure requirements remains good law.²¹³ The exacting scrutiny described in *Buckley* and *Citizens United*, or the similar heightened considered in *McConnell*, defines the *most stringent* applicable standard for analyzing commercial advertiser disclosure rules.

Applying the exacting scrutiny defined in *McConnell* requires an inquiry that asks "whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment

²⁰⁸ See *McConnell v. Federal Election Commission*, 540 U.S. at 234-36 (describing broadcaster regulations which require broadcasters to "'keep' a publicly available 'file of records of all requests for broadcast time made by or on behalf of a candidate for public office,' along with a notation showing whether the request was granted, and (if granted) a history that includes 'classes of time,' 'rates charged,' and when the 'spots actually aired'" (quoting 47 CFR § 73.1943(a)); *c.f. supra* notes 18-27 and accompanying text; see also discussion *supra* Part III.B.

²⁰⁹ *McConnell v. Federal Election Commission*, 540 U.S. at 234-36.

²¹⁰ *Id.* at 234-36.

²¹¹ *Id.* at 245.

²¹² *Id.* (define "heightened scrutiny" as a test which "ask[s] whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms"); see also *McConnell*, 540 U.S. at 232.

²¹³ See *Citizens United v. Federal Election Commission*, 558 U.S. at 366-71 (2010).

freedoms.”²¹⁴ These sufficiently important interests are most rationally understood as reaffirming the interests described in *Buckley*; that is, the set of “sufficiently important interest[s]” in *McConnell* must at least include the set of “sufficiently important” interests identified in *Buckley*.²¹⁵ When considering disclosure requirements, these interests include an informational interest, an anticorruption interest, and an enforcement interest.²¹⁶

Commercial advertiser disclosures forward an informational interest by ensuring voters have access to data about candidate and committee advertising. Similar to the disclosures in *Buckley*, commercial advertiser disclosures provide voters with information which is not otherwise accessible and also may provide voters with information relevant to their voting choices.²¹⁷ Commercial advertiser disclosures on digital and microtargeted advertising may even provide voters with information that is even less accessible and more relevant than the information disclosures considered in *Buckley* were able to provide. For example, as microtargeted advertising creates the potential that candidates could choose to purchase different kinds of advertising with vastly different messages for different constituent groups. Each of those groups would only ever see the limited advertising the candidate defined and created to appeal to that group and only that group, disclosures could provide information which could not be accessed in any other way. Imagine, for example, a candidate who sought to purchase advertising about policing policy and police violence within their community but was also aware that their constituency was evenly split on the appropriate response. In order to get the most possible votes, imagine the candidate creates and places two different ads, one intended for each constituent group. And, by using microtargeting and related advertising technology, the candidate tries to ensure that only constituents likely to respond positively to an ad sees that ad. Members of the constituent group likely to respond negatively to the ad are unlikely to ever see it.

Washington’s commercial advertiser disclosures, by requiring information about advertising targeting and a copy of the advertising, strongly support the voters’ informational interest, specifically as it relates to digital advertising and through tools that are highly relevant to voters and voter choices. At least some constituents would likely find the bifurcated advertising highly relevant to their voting choices; if nothing else, some voters are likely to be concerned that the candidate will not actually push for the policies they want the candidate to support. Also, the specific information within the commercial advertiser disclosures is not generally or readily available. Outside of the limited number of advertisers who maintain the “political file” required by the FCC and directly considered in *McConnell*, commercial advertisers do not typically furnish the kind of information required by Washington’s structure. For example, while WAC 390-18-050 requires digital advertisers to disclose information about the race “of audiences targeted and reached” by digital advertisers,²¹⁸ even relatively robust advertiser disclosure

²¹⁴ *McConnell*, 540 U.S. at 232.

²¹⁵ See discussion *supra* Part II.A.

²¹⁶ See *Buckley v. Valeo*, 424 U.S. at 66-68.

²¹⁷ See *id.* at 66-67.

²¹⁸ WAC 390-18-050(6)(g).

systems (like Facebook’s Ad Library) that exist outside of the required disclosure models fail to provide information about the race of individuals targeted by political advertising.²¹⁹ In providing significant and extensive data about advertising to voters, and particularly in providing voters with information about advertising which they have not individually seen and would not individually see absent commercial advertiser disclosures, Washington’s model furthers the *Buckley*’s informational interest.

Washington’s commercial advertiser disclosure model also assertively supports the state’s interest in enforcing campaign finance requirements, and particularly in enforcing candidate disclosure requirements.²²⁰ Because candidate and committee disclosures about advertising purchases operate as part of a system with only limited checks, the check provided by commercial advertiser disclosures containing additional information about all political advertising purchases, (even those not reported in candidate and committee disclosures) allows the state to more effectively enforce reporting and disclosure requirements. And, similar to how difficult accessing the information outside of commercial advertiser disclosures highlights the importance of those disclosures to the informational interest, the difficulty or impossibility of easily accessing information about advertising purchases absent required disclosure information highlights the importance of commercial advertiser disclosures to the enforcement interest. That is, at least some of the information necessary to enforce campaign finance and reporting requirements is only available from commercial advertisers and is only available to the degree that those advertisers are required to disclose it.

While the commercial advertiser model furthers the “significant” informational and enforcement interests articulated in *Buckley*, the model is less able to directly address the anticorruption interest. In the wake of *McCutcheon*’s unambiguous limitation of the anticorruption interest to “quid pro quo” corruption,²²¹ the connection between commercial advertiser disclosures and the anticorruption interest is even more tenuous. However, unlike contribution and expenditure limits, the anticorruption interest is not and has never been the exclusive or primary justification for the constitutionality of disclosure regimes. Rather, it has only served as one of a series of interests which each separately and individually articulate an important and potentially significant and substantial government interest. Yet the anticorruption interest is also present in commercial advertiser disclosure rules; just as the disclosure of contributions in *Buckley* helped to prevent “actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity,”²²² the disclosures in Washington’s model help prevent the appearance of corruption by ensuring that each contribution in support of a candidate is disclosed in at least some form. Washington’s model provides the kind of “full disclosure” that “tends ‘to prevent

²¹⁹ Facebook’s Ad Library currently supplies information about the age and gender of the audience reached by advertising, along with broad location data. See <https://www.facebook.com/ads/library>.

²²⁰ See discussion *supra* Part I.A.3.

²²¹ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 192 (2014).

²²² *Buckley v. Valeo*, 424 U.S. at 67.

the corrupt use of money to affect elections.”²²³

While candidate disclosure models serve a valuable role in furthering important interests, and particularly anticorruption interests, they cannot meet the same needs or support the same goals as commercial advertiser disclosures. Candidate disclosures cannot fulfil the enforcement role of commercial advertiser disclosures because commercial advertiser disclosures function, among other things, as enforcement checks on candidate disclosures. Candidate disclosures cannot meet the same informational needs because the kind of information provided by commercial advertiser disclosures is distinct from the kind of information available to candidates and committees, and because candidate disclosures cannot provide independent information about the accuracy of candidate disclosures, itself an interest within the informational interest. And candidate disclosures cannot fully meet the anticorruption interests furthered by commercial advertiser disclosures because both types of disclosures are part of the “full disclosure” structure which is most able to provide the public with the information necessary to detect and prevent any corruption in the form of “post-election special favors that may be given in return” for expenditures or contributions.²²⁴

Washington’s commercial advertiser disclosure structure fits neatly within the interest boundaries outlined by *Buckley* and supported in *McConnell* and *Citizens United*. This structure functions as a check on corruption and to provide voters with additional and important information about campaigns and candidates and their support. In this context, these commercial advertiser disclosure requirements “in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption.”²²⁵ However, supporting the aforementioned interests is not itself enough to meet the needs of the tests articulated in *Buckley* and *McConnell*. The law in question must also be crafted to “avoid unnecessary abridgment of First Amendment freedoms.”²²⁶ Because the potential abridgment typically closely approaches the kind of political speech that sits at the core of the First Amendment, potential burdens “must be weighed carefully against the interests.”²²⁷

In addressing potential burdens involved in disclosure regimes, the Court has not waived: there are “no constitutional infirmities in . . . recordkeeping, reporting, and disclosure” rules of the kind presented in *Buckley*.²²⁸ The commercial advertiser disclosure model is not, however, an example of these types of rules. As the *McManus* Court recognized, a commercial advertiser disclosure model is “different in kind from customary campaign finance regulations.”²²⁹

²²³ *Id.* (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1934) (describing the relationship between disclosure and corruption; “Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied”).

²²⁴ *Id.* at 67.

²²⁵ *Buckley*, 424 U.S. at 68.

²²⁶ *McConnell v. Federal Election Commission*, 540 U.S. at 232.

²²⁷ *Buckley*, 424 U.S. at 68.

²²⁸ *Id.* at 68-85.

²²⁹ *Washington Post v. McManus*, 944 F.3d at 515.

Commercial advertiser disclosures are further away from core political speech than “customary” regulations. The connection between commercial advertiser disclosures and indirect infringements of First Amendment rights is more attenuated than the connection between “customary” regulations and indirect infringements.²³⁰ Where one connection is more distant and weaker than another, it only makes sense to consider the standards applicable to the less attenuated connection as the most stringent standards which apply to the more attenuated connection. Thus, the standards for evaluating burdens considered in *Buckley* are the strictest possible way to evaluate the burdens of Washington’s commercial advertiser disclosure law under federal constitutional jurisprudence. When addressing “reasonable and minimally restrictive” non candidate and committee disclosure requirements, the *Buckley* Court found that not only do they not violate the First Amendment interests of the discloser, but instead they “further[] First Amendment values by opening the basic processes of our federal election system to public view.”²³¹ Or, applying the finding to Washington’s commercial advertiser disclosure model, the model cannot present a burden on First Amendment rights because not only does “the substantial public interest in disclosure” outweigh harms,²³² but full disclosure is in fact supportive of the values underlying the First Amendment itself.

a. Narrow Tailoring and *Americans for Prosperity Foundation*

While *Americans for Prosperity Foundation* did not clearly hold that exacting scrutiny applies in all compelled disclosure cases, the Supreme Court did impose a narrow tailoring requirement on compelled disclosure laws wherever exacting scrutiny does apply.²³³ While it is not clear how the narrow tailoring requirement described in *Americans for Prosperity Foundation* differs in practice from the careful weighing of interests already applicable when considering political advertising disclosure cases, Washington’s commercial advertiser disclosure model is narrowly tailored to the informational, enforcement, and anticorruption interests described in *Buckley*. Unlike the California law addressed in *Americans for Prosperity Foundation*, Washington’s commercial advertiser disclosure regime does not impose a general filing or disclosure requirement, but instead only requires the same kind of recordkeeping and on-request disclosure requirements as in *McConnell*. The kind of data collection practices which created the “dramatic mismatch” between the interests the state sought to promote and the disclosure regime in *Americans for Prosperity Foundation*²³⁴ does not exist relative to Washington’s law. Quite simply, Washington’s commercial advertiser disclosure structure does not require (or even clearly allow) the state to collect any data from commercial advertisers, and the state currently does not collect any such data. Indeed, the “amount and sensitivity of the information harvested” by California was

²³⁰ See discussion *supra* Part III.A.

²³¹ *Buckley v. Valeo*, 424 U.S. at 81-82.

²³² *Id.* at 71-72.

²³³ See discussion *supra* Part II.A.4.

²³⁴ *Americans for Prosperity Found. v. Bonta*, 594 U.S. at 13.

particularly concerning to the Court.²³⁵ However, under Washington’s disclosure structure, the state neither harvests data nor is the data disclosed particularly sensitive.²³⁶ Instead of potentially sensitive information about donor identities collected as part of California’s scheme, Washington’s commercial-advertiser-based disclosure system exclusively reveals information about candidate spending. In place of the broad data harvesting in the California scheme, Washington’s commercial-advertiser-based disclosure system does not require or currently involve data collection by government officials or regulatory agencies. Unlike the California law considered in *Americans for Prosperity Foundation* (which required all charities to file reports with the state), Washington’s commercial advertiser rules do not apply to all advertisers, or even all commercial advertising sellers; rather, the disclosure requirements only apply to those commercial advertisers who have actually sold political advertising in the state. Similarly, Washington’s structure only demands that those commercial advertisers disclose information about political advertising they have sold and does not require them to disclose any information about non-political advertising. California’s efforts to collect donor information and the potentially chilling effects of that data collection, were particularly concerning.²³⁷ However, Washington’s commercial advertiser disclosure rules do not involve any disclosure of donor information; the requirements are, like the *McManus* court described Maryland’s law, “different in kind” from more traditional campaign finance or charitable disclosures in that they do not include or consider information about donors or their activities. Indeed, when looking at the specific concerns about the scope and tailoring of California’s law the Court pointed to in *Americans for Prosperity Foundation*,²³⁸ Washington’s commercial advertiser disclosure laws can easily be differentiated as more tailored: the commercial advertiser disclosure requirements do not involve broad data collection, the requirements only impose disclosure requirements on commercial advertisers who have sold political advertising, and the required disclosures do not involve information about donors.

2. Washington State Specific Concerns and Analysis

The Supreme Court of Washington has not directly addressed the commercial advertiser disclosure requirements in RCW 42.17A.345 and WAC 390-18-050. However, the Court has considered the constitutionality, both in state and federal terms, of Washington’s disclosure regime in general. In considering the constitutionality of the disclosure rules as applied to a political committee, the court affirmed the constitutionality of the Washington’s disclosure structure.²³⁹ In doing

²³⁵ *Id.*

²³⁶ See discussion *supra* Part I.A.2 (describing the commercial advertiser disclosure model) and Part III.A (describing the existing disclosure requirements as not involving disclosures which themselves include political speech).

²³⁷ *Americans for Prosperity Found.*, 594 U.S. at 13.

²³⁸ See, e.g., *id.*

²³⁹ *Washington v. Grocery Mfrs. Ass’n*, 195 Wash. 2d 442, 461 (2020). [hereinafter *Grocery Mfrs.*]. See also *Rickert v. Pub. Disclosure Comm’n*, 161 Wash. 2d 843 (2007) (applying the First

so, the court did not rely on a new or unique test; instead, the principles and interest versus burden balancing test articulated in *Buckley* and *Citizens United* defined the standards applicable when considering the constitutionality of disclosure rules in Washington courts.²⁴⁰ Though Washington-specific interests and ideas play a role in working through the test,²⁴¹ the test itself remains a requirement for “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”²⁴² These state-level interests include the “right of the electorate to know” information which may impact their voting decisions, a right “no less fundamental than the right of privacy.”²⁴³ Indeed, the Supreme Court of Washington has held that Article 1, Section 5 of the Washington State Constitution, its free speech clause, does not provide “greater protection against disclosure requirements than the First Amendment”²⁴⁴ and the “rights involved with respect to the [prior spending limits imposed by Initiative 276] are derived from the First Amendment.”²⁴⁵ In applying the *Gunwall* factors, the state’s interpretive tool for determining when it is appropriate to resort to separate and independent state constitutional grounds,²⁴⁶ the Supreme Court of Washington has regularly found no greater speech protection in the state constitution than in the federal constitution. Accordingly, the Court has applied the applicable federal analytical structure.²⁴⁷

Amendment of the United States Constitution, rather than Article 1 Section 5 of the Constitution of the State of Washington to evaluate the constitutionality of a portion of Washington’s campaign finance statutes and regulations); *see also* State *ex rel.* Public Disclosure Commission v. 119 Vote No! Committee, 135 Wash. 2d 618 (1998) (applying, again, the First Amendment of the United States Constitution to analyze the constitutionality of a state campaign finance statute).

²⁴⁰ *See Grocery Mfrs.*, 195 Wash. 2d at 462-69.

²⁴¹ *See id.* at 462-63 (quoting *Fritz v. Gorton*, 83 Wash. 2d 275, 296 (1974) (describing “the right to receive information” as “the fundamental counterpart of the right of free speech,” a corollary implied but not directly addressed in the binding federal case law on disclosure requirements)).

²⁴² *Grocery Mfrs.*, 195 Wash. 2d at 461 (quoting *Citizens United v. Federal Election Commission*, 558 U.S. at 366-67 (quoting *Buckley v. Valeo*, 424 U.S. at 64, 66)).

²⁴³ *Fritz v. Gorton*, 83 Wash. 2d at 298.

²⁴⁴ *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm’n*, 161 Wash. 2d 470, 497 (2007) (describing the interaction between the federal and state constitutions in the context of campaign finance disclosure). *But see* *Washington v. Coe*, 101 Wash. 2d 364, 373-381 (1984) (describing the state’s “duty to independently interpret and apply their state constitutions” prior to looking to federal grounds).

²⁴⁵ *Bare v. Gorton*, 84 Wash. 2d 380, 385 (1974) (declaring that campaign spending limits imposed by Initiative 276 violated the federal constitution).

²⁴⁶ *See* *Washington v. Gunwall*, 106 Wash. 2d 54 (1986) (describing the factors); *Washington v. White*, 135 Wash. 2d 761 (1998) (limiting the need to analyze the *Gunwall* factors to circumstances where prior cases have not already established that state protections extend beyond federal protections).

²⁴⁷ *See, e.g.*, *Washington v. Reece*, 110 Wash. 2d 766, 781 (1988) (finding Article 1 Section 5 provides no greater protection than the federal constitution in the context of obscenity); *City of Seattle v. Huff*, 111 Wash. 2d 923, 928 (holding that “the federal analysis for [regulation of protected speech in] a nonpublic forum is applicable” to state constitutional claims), *National Fed’n of Retired Persons v. Insurance Comm’r*, 120 Wash. 2d 101, 119 (1992) (applying the “interpretative guidelines under the federal constitution” to evaluate Article 1 Section 5 claims in the context of commercial speech); *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 116-22 (1997) (describing cases applying federal standards in the context of speech and applying the *Gunwall* factors to find the state constitution provides no greater protections than federal protections in the context of time,

Washington courts thus apply the same test as articulated in federal case law when considering disclosure rules as federal courts.²⁴⁸

3. Distinguishing Washington’s Law from *McManus*

The law in question in *McManus* is distinguishable from Washington’s commercial advertiser disclosure model. Maryland’s law involved a particularly troublesome compelled speech (specifically compelled *publishing*) issue, while Washington’s similar statutes and regulations compel no publication requirements and do not involve the same kind of compelled speech considered in *McManus*.²⁴⁹ The significant compelled speech concerns embedded in Maryland’s version of the commercial advertising disclosure models presented issues not present in an analysis of Washington’s law.²⁵⁰ These compelled speech and compelled publication issues in *McManus* are particularly potent and impactful because, as has been considered in disclosure cases since *Buckley*, disclosure requirements always and unavoidably run alongside compelled speech concerns. The compelled speech concern is particularly clear because, in *McManus*, the court (perhaps wrongly) considered the disclosure law as if it directly related to political speech. That is, *McManus* hinges on a law which the court considered as if it involved the compelled publication of political speech. With limited case law directly considering the commercial-advertiser-based model, *McManus* seems likely to draw outsized attention in future litigation about the model and related laws.²⁵¹ Most disclosure laws, and in particular Washington’s commercial advertiser disclosure law, do not include the kind of compelled speech key to *McManus* and should be distinguished from that case’s fact-driven and statute-specific outcome.

place, and manner restrictions on nude dancing); In re Marriage of Suggs, 152 Wash. 2d 74, 80-81 (2004) (evaluating prior restraints using the federal standards). *But c.f.*, *Bering v. SHARE*, 121 Wash. 2d 212, 234 (1986) (holding, without applying *Gunwall* factors, that Article 1 Section 5 requires that place restrictions on speech can only be imposed where there is a “compelling state interest” rather than the federal requirement for a “significant governmental interest”); *Collier v. City of Tacoma*, 121 Wash. 2d 737, 763-65 (1993) (Durham, J., concurring) (criticizing *Bering* and the majority in not applying the *Gunwall* factors). *But see* Robert F. Utter and Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION*, 30 (2013) (Article 1, Section 5, the state’s free speech provision, “is interpreted differently than the First Amendment of the U.S. Constitution” and free speech is a “preferred right” which can be limited through “reasonable time, place, and manner restrictions” that are “content neutral . . . narrowly tailored to serve a state interest, and . . . leave ample alternative channels of communication”).

²⁴⁸ *See, e.g.*, *Washington v. Grocery Mfrs. Ass’n*, 195 Wash.2d at 461-69.

²⁴⁹ *See* discussion *supra* Part I.A.2.

²⁵⁰ *Washington Post v. McManus*, 944 F.3d at 517-20.

²⁵¹ Indeed, it already has started to impact cases in other circuits. *See supra* notes 46-48 and Facebook Response to PDC Case #55351 at 5, <https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/3145/55351%20Facebook%2C%20Inc.%20%285%29%20Response.pdf>. *See also* Eli Sanders, *Washington Post v. McManus: Why a Case from Maryland Keeps Coming up in Washington State*, WILD WEST, Dec. 7, 2020, <https://wildwest.substack.com/p/washington-post-vs-mcmanus>.

CONCLUSION

Digital advertising is a growing part of the political advertising landscape, and online behavioral advertising allows campaigns and candidates to reach voters in unique ways. Regulation of digital political advertising typically follows one of two models: a candidate or committee-based disclosure model, and a commercial-advertiser-based-disclosure model. While the former fits neatly within long-standing campaign expenditure disclosure rules and requirements, the later “is different in kind from customary campaign finance regulations.”²⁵² It shifts disclosure requirements away from campaigns and candidates and to commercial advertisers. Commercial-advertiser-based disclosure models, however, provide significant benefits to constituents and other views of political advertising by providing additional information and transparency. Similarly, they benefit enforcers because commercial-advertiser-based disclosures provide confirmation of otherwise required candidate disclosures. Neither the constituent nor enforcement benefits of commercial-advertiser disclosures are available via a candidate and committee-based disclosure model. These benefits allow commercial-advertiser-based disclosure models to more effectively and fully match up with the state interests underlying campaign finance disclosure rules, particularly relative to candidate-based disclosure models.

Case law analyzing commercial-advertiser-based disclosure models is limited. Nonetheless, disclosure and campaign finance cases in general provide some guidance as to the constitutionality of the approach, and the Supreme Court’s limited look at more limited political advertising disclosures in *McConnell* offers some support for the constitutionality of the model in the abstract. In addition, while the recent *Americans for Prosperity Foundation* decision clearly requires narrow tailoring in compelled disclosure cases, Washington’s existing commercial advertiser disclosure laws appear to already meet those narrow tailoring requirements. Though a recent case addressing Maryland’s version of a commercial-advertiser-based disclosure model suggests that such models may, in at least some cases, be unconstitutional, that case also hinges on significant compelled speech and publication issues embedded in Maryland’s law. Applying existing campaign finance and disclosure precedent to Washington’s version of the commercial-advertiser-disclosure model, which does not include the compelled speech concerns present in Maryland, leads to a different outcome: one that is consistent with both federal and state Supreme Court precedent. Commercial-advertiser-based disclosure models are constitutional and can play a meaningful role in providing information to voters, particularly in the context of digital political advertising.

²⁵² *Washington Post v. McManus*, 944 F.3d at 515.