ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5161

In The
United States Court of Appeals for the District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON;
NOAH BOOKBINDER,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal From The
United States District Court For The District Of Columbia,
Civil Action No. 1:18-cv-00076 (RC) (Contreras, J.)

AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT AND IN SUPPORT OF APPELLEE FEDERAL ELECTION COMMISSION

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December 2, 2019

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES[1]

Parties and Amici: "[A]ll parties, intervenors, and amici ... before the district court and in this [C]ourt are ... in the [b]rief[s] for" Appellants Citizens for Responsibility and Ethics in Washington and Noah Bookbinder ("CREW") ("BLUE"), Appellee Federal Election Commission ("FEC") ("RED"), and Amicus Campaign Legal Center. D.C.CIR.R. 28(a)(1)(A). These include CREW and the FEC. (*See, e.g.,* No. 1:18-cv-00076 (RC), D.CT. DOC. 23 at 1-2, 380 F.Supp.3d 30 (D.D.C. 2019) (summary-judgment order) ("ORDER"), *available at* http://fec.gov/law/litigation/crew_180076.shtml *and reprinted in* JOINT APPENDIX ("JA") at 139-161.)

Although this action addresses New Models ("NM"), NM is not a party to this action. *See, e.g.,* ORDER at 1-2.

Rulings under Review: "[R]eferences to the ruling[] at issue a[re] in the" BLUE and RED briefs. D.C.CIR.R. 28(a)(1)(B). The "ruling[] at issue," *id.,* is the ORDER. *Supra* at i.

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[1] D.C.CIR.R. 28(a)(1); 5TH CIR.R. 28.2.1, *available at* http://www.ca5.uscourts.gov.

Related Cases: This is the first action in which this challenge has been to the district court or the D.C. Circuit.

Amicus knows of no occasion on which "the [action] on review was previously before this [C]ourt or any other court" nor of "any [other action or] case involving substantially the same parties and the same or similar issues" "currently pending in this [C]ourt or ... any other United States court of appeals or any other court (whether federal or local) in the District of Columbia." D.C.CIR.R. 28(a)(1)(C).

/s/ *Randy Elf*
RANDY ELF

December 2, 2019

CIRCUIT RULE 29(D) CERTIFICATE

Amicus submits it is necessary for this brief—which flows from Amicus's experience, *infra* at iv n.2, 1—to stand on its own. *Cf.* D.C.CIR.R. 29(d). Whatever "on the same side" means, *id.,* and whatever arguments are made by any other non-government amicus "on the same side" as Amicus, *id.,* combining any such amicus's brief with this brief, *id.,* would be impractical, *cf. id.* It would (1) dilute this brief, and the benefit that the Court and the law in general can receive from this brief, (2) result in a combined brief that is confusing, or at best in one that is less clear than this one, or (3) do both. This would occur even if the Court allowed a combined brief to exceed the word limit, *cf. id.,* so that it included all of the text and footnotes in this brief. Neither (1), (2), nor (3) would serve the Court or the law well.

/s/ *Randy Elf*
RANDY ELF

December 2, 2019

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[2] For the readers' convenience, the thumbnail .pdf page numbers match the actual page numbers. 2D CIR.R. 32.1(a)(3), *available at* http://www.ca2.uscourts.gov/clerk/case_filing/rules/rules_home.html.

This copyrighted brief is based on copyrighted drafts of briefs at https://ssrn.com/abstract=2926067 (U.S.) (Track 2), https://ssrn.com/abstract=3234383 (D.C. Cir.) (Track 1), and https://ssrn.com/abstract=3329448 (U.S.) (Track 1), and the copyrighted filed brief at https://ssrn.com/abstract=3135458 (9th Cir.) (Track 1). This copyrighted brief as filed is at https://ssrn.com/abstract=3490175 (all Internet sites, except the one for this copyrighted brief as filed, visited November 25, 2019).

TABLE OF AUTHORITIES[3]

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[3] "Authorities upon which [this filing] chiefly rel[ies] are marked with asterisks." D.C.CIR.R. 28(a)(2), *available at* https://www.cadc.uscourts.gov/internet/home.nsf/Content/Court+Rules+and+Operating+Procedures; *accord* 11TH CIR.R. 28-1(e), *available at* http://www.ca11.uscourts.gov/rules-procedures.

This filing cites slip- or manuscript-opinion/order pages, rather than Westlaw star pages, where bound-volume pagination will later be available, because Westlaw removes star pagination when West issues bound-volume pagination.

LAW REVIEWS

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GLOSSARY[4]

BLUE	APPELLANT CREW'S BRIEF
CREW	Plaintiffs-Appellants Citizens for Responsibility and Ethics in Washington and Noah Bookbinder
FEC	Defendant-Appellee Federal Election Commission
JA	JOINT APPENDIX
NM	New Models
ORDER	D.CT. DOC. 23
RED	APPELLEE FEC'S RESP. BRIEF
Triggering	Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016)

[4] D.C.CIR.R. 28(a)(3); 10TH CIR.R. 28.2(C)(6), *available at* https://www.ca10.uscourts.gov/clerk/rules.

AMICUS CURIAE STATEMENT[5]

Amicus has practiced political-speech law, presented many briefs and oral arguments on the constitutionality of such law, and written a law-review article addressing much of what is at issue here. Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016) ("*Triggering*"), *available at* http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v29n1/10_Elf_vol_29_1.pdf.

Although *Triggering* particularly addresses state law, the same First Amendment principles apply to federal law. *Wallace v. Jaffree,* 472 U.S. 38, 48-49 (1985); *Triggering* at 55 & n.114, 63 n.154.

Since *Triggering* has analysis that applies here, Amicus summarizes and presents it in this brief. Where *Triggering* most

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[5] All parties consent to this filing. No party's counsel wholly or partly authored this brief. No such counsel, party, or other person—other than Amicus or Amicus's counsel—contributed monetarily to preparing or submitting this brief. Amicus has no members. *Cf.* FED.R.APP.P. 29(a)(2), 29(a)(4)(E).

efficiently makes points that apply here, this brief quotes *Triggering*. When this brief quotes *Triggering* text, some cites from corresponding *Triggering* footnotes are inserted into the text, and some cites remain in footnotes. *Triggering* cites are converted from law-review style to brief style, and many are condensed. Emphases are as they are in *Triggering*.

For all readers' convenience, a *Triggering* draft, with string cites not published in the law review, remains at https://ssrn.com/abstract=2713496.

STATUTES AND REGULATIONS

"All applicable statutes, etc., are ... in the" BLUE and RED briefs. D.C.CIR.R. 28(a)(5).

SUMMARY OF ARGUMENT

The Supreme Court has applied constitutional scrutiny and established the two-track system under which government may regulate—i.e., require disclosure of—political speech. *E.g.*, *Buckley v.*

Valeo, 424 U.S. 1, 63-64, 79-82 (1976) (per curiam); *Triggering* at 35-37 & nn.1-12.

This action does not address Track 2, non-political-committee disclosure requirements. Instead, this action addresses law triggering Track 1, political-committee(-like) burdens.

Government may trigger such burdens only for "organizations" that are "under the control of" candidates in their capacities as candidates, or for "organizations" having "the major purpose" under *Buckley,* 424 U.S. at 79; *Triggering* at 48 & n.84, and engaging in more than small-scale speech, *Sampson v. Buescher,* 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010); *Triggering* at 62-64 & nn.153-54.

One method of determining the *Buckley* major purpose asks whether an organization devotes the majority of its spending to contributions to, or independent expenditures for, candidates or ballot measures, *Triggering* at 60-61 & nn.147-50, with "independent expenditure" meaning *Buckley* express advocacy that is not coordinated with a candidate, *id.* at 36 n.9, 61 n.150, 67 & nn.168-71. No constitutional method of determining the *Buckley* major purpose

includes contributions other than contributions to candidates or ballot measures, or independent spending other than independent expenditures properly understood. *Id.* at 60-61 & nn.147-50. This excludes contributions to others. This also excludes the appeal-to-vote test. *Id.* at 60 n.148, 70 & n.184.

Indeed, "the appeal-to-vote test—once known as the 'functional equivalent of express advocacy'—no longer affects whether government may ban, otherwise limit, or regulate speech, and the appeal-to-vote test is vague. It has no place in law." *Id.* at 77.

ARGUMENT

The district court held the prosecutorial-discretion part of the FEC's prosecutorial-discretion-and-merits-based dismissal of this matter interprets no statutory/case law, so this matter is *un*reviewable. (ORDER at 17-18 (emphasizing "entirely").)

Amicus addresses neither this threshold issue (*id.*), nor whether reaching the merits now (BLUE at 10-11; RED at 52-57) is proper if they are reviewable, (RED at 50-51); *see Wis. Right to Life, Inc. v. Barland,*

751 F.3d 804, 830 (7th Cir. 2014) (reaching a merits-based final judgment on Track 1 law's constitutionality although the district court had not), nor what "contribution" or "expenditure" in the statutory political-committee definition constitutionally includes (JA at 120-122).

Instead, Amicus addresses other constitutional issues. Reaching the merits requires rejecting unconstitutional approaches, *compare, e.g.,* (RED at 6 (FEC's "case-by-case approach")) *with Triggering* at 59 n.144 (explaining its unconstitutionality), and affirming the judgment.

I. No deference applies.

The FEC held for NM and against CREW. (ORDER at 1-2.) The FEC urges deferring to the FEC. However, its premise that this action involves mere *statutory* interpretation (*e.g.,* RED at 5, 51) is false. This action involves *constitutional* law.

Even if the *Buckley* major-purpose test were a narrowing gloss for a statute (*e.g., id.*), the test would still apply as *constitutional* law. *E.g., Barland,* 751 F.3d at 811, 842; *Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 872 (8th Cir. 2012) (en banc) (collecting authorities); *Triggering* at 51 & nn.93-96 (collecting competing

authorities); *see Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010) (discussing *Buckley* (quoting *FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 392, 395-96 (D.C. Cir. 1981))).

Constitutional law determines whether an organization has the *Buckley* major purpose. *Compare, e.g., supra* at 1 (addressing *Jaffree*) *and infra* at 18-19 *with Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 583-84 (8th Cir. 2013), *and Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1153-55 (10th Cir. 2007).

All of this goes to *constitutional* scrutiny. *Infra* at 7, 15-16, 29-30.

Because *the Court*—not a designated hitter—decides constitutional law, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), CREW's conclusion—though not all of its reasoning—is correct that no deference applies (D.CT. DOC. 12 at 19-23).

Nevertheless, the FEC prevails. *Infra* at 14-15, 17-21.

II. The Supreme Court has applied constitutional scrutiny and established the two-track system under which government may regulate—i.e., require disclosure of—political speech.

Recognizing that political speech is at the "core" of what the First Amendment protects, *e.g., Buckley,* 424 U.S. at 44-45,

the Supreme Court has applied constitutional scrutiny and established the two-track system under which government may regulate political speech.[6]

Under "Track 1," government may under some circumstances—and subject to further inquiry, *see, e.g., id.* at 74 (addressing "threats, harassment, or reprisals")[7]—trigger political-committee or political-committee-like burdens, *see, e.g., id.* at 63, 79 (addressing "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates or have "the major purpose" under *Buckley*),

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[6] In other words, require disclosure of, which differs from "ban" or otherwise "limit." *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082 & n.9 (D. Haw. 2010) (distinguishing restrictions, i.e., bans or other limits, from regulation, i.e., disclosure). The umbrella term "disclosure" can cover registration, recordkeeping, reporting, attributions, and disclaimers in all their forms. *Barland,* 751 F.3d at 812-16, 836. *Barland* understands the difference between attributions and disclaimers. *Id.* at 815-16. By definition, an "attribution" attributes and says who *is* speaking, while a "disclaimer" disclaims and says who is *not* speaking. *Id.*

Triggering at 35 n.2. *Independence Institute v. Williams,* 812 F.3d 787, 795 & n.9 (10th Cir. 2016), frames this differently by applying the label "disclosure" only to Track 2 law, not Track 1 law. Either way, constitutional principles—not "mere labels"—are what matters. *NAACP v. Button,* 371 U.S. 415, 429 (1963); *Triggering* at 51 n.91, 52-53 n.103.

[7] *Compare Barland*, 751 F.3d at 816, 832 (striking down an attribution and disclaimer requirement), *with Gable v. Patton,* 142 F.3d 940, 944-45 (6th Cir. 1998) (upholding an attribution requirement for a political committee). *Triggering* at 35 n.3.

> *followed in FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262 (1986), *and quoted in McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (*overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010)); *Sampson*, 625 F.3d at 1249, 1251, 1261 (addressing organizations with the *Buckley* major purpose but only small-scale speech). ...
>
> Under "Track 2,"[8] apart from whether government may trigger Track 1, political-committee(-like) burdens, government may—subject to further inquiry, *see, e.g.*, *Citizens United*, 558 U.S. at 370 (addressing "threats, harassment, or reprisals" (quoting *McConnell*, 540 U.S. at 198))—require attributions, disclaimers, and *non*-political-committee reporting for:
>
> - independent expenditures properly understood, *Buckley*, 424 U.S. at 63-64, 79-82;[9] *cf. McIntyre v. Ohio Elections*

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8 The *terms* "Track 1" and "Track 2" are [Amicus's], yet the *concepts* have been in the case law since the Supreme Court first distinguished what [Amicus] calls Track 1 law and Track 2 law in *Buckley*, 424 U.S. at 63-64.

Triggering at 36 n.7.

9 Under the Constitution, "independent expenditure" means *Buckley* express advocacy, *Buckley*, 424 U.S. at 44 & n.52, 80, that is not coordinated with a candidate, *id.* at 46-47, 78. Thus, *non*-coordinated spending for political speech that is not *Buckley* express advocacy is independent *spending* but not an independent *expenditure*. *See id.* at 44 & n.52, 80 (addressing express advocacy and thereby independent expenditures).

Comm'n, 514 U.S. 334, 354-56 (1995) (rejecting a Track 2, non-political-committee disclosure requirement for other[10] speech), and

- Federal Election Campaign Act electioneering communications, *Citizens United,* 558 U.S. at 366-71.[11]

Triggering at 35-36 & nn.1-4, 6-10; *accord* ADDENDUM.1.

III. The Supreme Court distinguishes Track 1 and Track 2 law. This action involves only Track 1 law, so only Track 1 analysis—not Track 2 analysis—applies.

CREW does not assert NM must *form or have* a separate political committee and let only the separate political committee speak. Rather,

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Triggering at 36 n.9; *infra* at 24.

[10] I.e., small-scale. 514 U.S. at 358 (Ginsburg, J., concurring).

[11] Federal Election Campaign Act electioneering communications (1) are broadcast, (2) run in the 30 days before a primary or 60 days before a general election, (3) have a clearly identified candidate in the jurisdiction, (4) are targeted to the relevant electorate, and (5) do not expressly advocate. *McConnell,* 540 U.S. at 189-94. To be a Federal Election Campaign Act electioneering communication, speech about presidential or vice-presidential candidates need not be targeted to the relevant electorate, *id.* at 189-90, yet it must meet the other criteria, *id.* at 189-94.

Triggering at 36 n.10.

CREW asserts NM itself must *be* a political committee and bear Track 1 burdens. (ORDER at 1); *cf. Triggering* at 43 & nn.56-59 (describing the difference).

The Supreme Court evaluates Track 1 and Track 2 law differently, *Mass. Citizens,* 479 U.S. at 262; *Buckley,* 424 U.S. at 79, because they are different. Track 1 law can trigger political-committee(-like) burdens, *Citizens United*, 558 U.S. at 338; *Buckley*, 424 U.S. at 63; *Triggering* at 43-44 & nn.60-62, including registration (including, in turn, treasurer designation, bank-account designation, and termination, i.e., deregistration), recordkeeping, extensive reporting, and ongoing reporting, *see, e.g., Citizens United*, 558 U.S. at 338 (describing such law); *Mass. Citizens*, 479 U.S. at 253-56 & nn.7-9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same); *Triggering* at 44 & nn.63-65. These are "onerous" burdens, *Citizens United,* 558 U.S. at 339; *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (citing *Mass. Citizens,* 479 U.S. at 253-55 (opinion of Brennan, J.)), particularly—yet not only—when law chills speech, i.e., when speech is "simply not worth it," *Mass. Citizens,* 479 U.S. at 255 (opinion of

Brennan, J.). *Triggering* at 44-45 & nn.66-70, 52 n.102, 57-58 & nn.129-37.[12] By contrast, Track 2, non-political-committee reporting—which *Buckley* and *Citizens United* uphold for particular speech, *supra* at 8-9—includes none of these Track 1 burdens. Instead,

> Track 2 reporting occurs only for reporting periods when the particular speech occurs,[13] and the reports are less

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[12] Law need not trigger all of these burdens to require Track 1 analysis. *See, e.g., Justice v. Hosemann,* 771 F.3d 285, 288-89 (5th Cir. 2014) (addressing law with extensive and ongoing reporting yet not recordkeeping as Track 1 law); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1013 (9th Cir. 2010) (addressing law with extensive but not ongoing reporting as Track 1 law); *Triggering* at 45-46 & nn.71-72. *But cf. Del. Strong Families v. Att'y Gen. of Del.,* 793 F.3d 304, 312-13 n.10 (3d Cir. 2015) (addressing law with extensive but not ongoing reporting as Track 2 law when the parties did so).

[13] This is what "one-time" and "event-driven" mean. *E.g.*, *Barland,* 751 F.3d at 824, 836, 841. It is time to abandon these confusing labels and simply say what one means. It is not clear from these labels what they mean. They do not reveal that "one-time" and "event-driven" mean the same thing.

As for "one-time," some understandably think it means speakers that are not political committees file only one Track 2, non-political-committee report *ever*; others understandably think it means such speakers file one such report every *time* they engage in regulable speech. Neither is right. *See Mass. Citizens,* 479 U.S. at 262 (describing Track

> burdensome than extensive or ongoing reporting. *See, e.g., Mass. Citizens,* 479 U.S. at 262 ("less than the full panoply of" Track 1 burdens); *Buckley*, 424 U.S. at 63-64 (describing Track 2, *non*-political-committee reporting); 52 U.S.C. 30104(c), (f)-(g) (same).

Triggering at 57 & nn.126-28 (ellipses omitted).

Thus, it contradicts *Buckley*, *Massachusetts Citizens, Wisconsin Right to Life,* and *Citizens United* to believe—as *SpeechNow.org v. FEC,* 599 F.3d 686, 690-92, 697-98 (D.C. Cir. 2010) (en banc), and opinions following it do—that Track 1 burdens are not that much greater than Track 2 reporting. *Triggering* at 58 n.131 (collecting authorities). And the Track 1 burdens discussion on *Citizens United* pages 337-40, *supra* at 10, which strike down a speech *ban,*

> appl[ies] not only to speech bans and other limits but also to burdens that law triggers for an organization itself when it must *be* a political committee/political-committee-like

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> 2, non-political-committee reporting); *Buckley,* 424 U.S. at 63-64 (same).
>
> As for "event-driven," it is not precise, because Track 1 reporting is also driven by events; they are just different events. *See Citizens United*, 558 U.S. at 338 (describing Track 1 burdens); *Buckley*, 424 U.S. at 63 (same).

Triggering at 57 n.127.

> organization to speak, or when a fund/account that is part of the organization must *be* a political-committee-like fund/account. *Barland,* 751 F.3d at 840; *Sampson,* 625 F.3d at 1255.

Triggering at 53 n.103 (collecting competing authorities). Why? Because when law bans or otherwise limits an organization's speech, and the organization *forms or has* a separate political committee that speaks, Track 1 law can trigger Track 1 burdens for the separate political committee. *Citizens United*, 558 U.S. at 337-40; *Mass. Citizens*, 479 U.S. at 253-56 & nn.7-9 (opinion of Brennan, J.). These are the same "full panoply of" Track 1 burdens that Track 1 law can trigger for an organization itself when it speaks. *Mass. Citizens*, 479 U.S. at 262; *Buckley*, 424 U.S. at 63; *supra* at 10.

But even if any of Amicus's points in the previous paragraph were incorrect, this action involves *only* Track 1 law (ORDER at 3-4), so *only* Track 1 analysis—not Track 2 analysis—applies.[14]

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[14] *See Barland,* 751 F.3d at 841-42 (declining to apply Track 2 analysis to Track 1 law); *accord Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1280 n.6 (10th Cir. 2016) (considering Track 1 law and distinguishing *Independence*

Which brings us to *Buckley* and *Sampson*.

IV. Government may trigger Track 1, political-committee or political-committee-like burdens only for organizations that are under the control of candidates in their capacities as candidates, or for organizations having "the major purpose" under *Buckley* and engaging in more than small-scale speech.

Case law guarding against overbreadth, *Barland,* 751 F.3d at 839; *Triggering* at 48 & n.81; *see Mass. Citizens*, 479 U.S. at 252 n.6, 262,[15] permits government to trigger Track 1, political-committee(-like) burdens only for "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates, or for "organizations" having "the major purpose" of "nominat[ing] or

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> *Institute v. Williams,* 812 F.3d 787 (10th Cir. 2016), as considering "a different disclosure framework," *i.e.*, Track 2 law).

Triggering at 37 n.16.

> [15] Not vagueness. *Buckley,* 424 U.S. at 63, 79 & n.105,
>
> does not hold that the challenged political-committee definition *itself* is vague. Instead, it holds that the included terms "contributions" and "expenditures" are vague and limits these two federal-law terms accordingly.

Triggering at 48 n.81.

elect[ing]" a candidate or candidates or passing or defeating a ballot measure or ballot measures, *Buckley,* 424 U.S. at 79; *Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (applying the test pre-*Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1005-13 (9th Cir. 2010), to an organization engaging in ballot-measure speech (quoting *Mass. Citizens,* 479 U.S. at 252-53)); *Triggering* at 48 & nn.83-84, and engaging in more than small-scale speech, *Sampson,* 625 F.3d at 1249, 1251, 1261; *Triggering* at 62-64 & nn.153-54.[16]

Just as what government may regulate with Track 2 law, *supra* at 8-9, goes to the tailoring part of constitutional scrutiny, not the government-interest part, *see, e.g., Indep. Inst. v. Williams,* 812 F.3d 787, 791 (10th Cir. 2016) (addressing overbreadth); *Ctr. for Individual Freedom, Inc. v. Tennant,* 706 F.3d 270, 282-85 (4th Cir. 2013) (addressing underinclusiveness); *Triggering* at 50 n.87 (collecting competing authorities), the tests for the constitutionality of law

[16] This assumes government may trigger Track 1 burdens based on ballot-measure speech. *E.g., Cal. Pro-Life Council,* 328 F.3d at 1102-04. *Triggering* at 61 n.150 (collecting competing authorities).

triggering Track 1 burdens, *supra* at 7-8, go to tailoring, not the government interest, *e.g., Buckley v. Valeo,* 519 F.2d 821, 869 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd on other grounds*, 424 U.S. 1 (1976) (per curiam); *Barland*, 751 F.3d at 841-42; *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1032-34 (9th Cir. 2009); *Triggering* at 49-50 & nn.87-89, 64 & nn.155-56 (collecting competing authorities). A court does "not [look to a government interest and] truncate this tailoring test at the outset." *McCutcheon v. FEC,* 134 S.Ct. 1434, 1450 (2014) (opinion of Roberts, C.J.) (addressing another tailoring test). "Thus, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny." *Triggering* at 50 & n.89, 64.

And notwithstanding erroneous appellate-court discussions of disclosure/transparency/information under *Citizens United* pages 366-71, *e.g., Triggering* at 51-52 & nn.97-102 (collecting competing

authorities), *Citizens United* pages 366-71 do not apply here, because they address/support only Track 2 law, not Track 1 law.[17]

V. An organization has the *Buckley* major purpose if it says so in its organizational documents or public statements, or devotes the majority of its spending to contributions to, or independent expenditures properly understood for, candidates or ballot measures, or perhaps if the organization makes a massive amount—objectively and precisely defined—of contributions or independent expenditures properly understood.

The *Buckley* major-purpose test

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[17] *E.g.*, *Citizens United*, 558 U.S. at 369 (recalling that such Track 2 "disclosure is a less restrictive alternative to more comprehensive [Track 1] regulations of speech" (citing *Mass. Citizens,* 479 U.S. at 262 (holding that the "state interest in disclosure can be met in a manner less restrictive than imposing the full panoply of [Track 1] regulations that accompany status as a political committee" and that if an organization's "independent spending bec[a]me so extensive that the organization[] [had the *Buckley*] major purpose, the [organization] would be classified as a political committee" (citing *Buckley,* 424 U.S. at 79)))); *Indep. Inst.,* 812 F.3d at 795 & n.9; *Barland,* 751 F.3d at 824, 836-37, 839, 841, *followed in Del. Strong Families,* 793 F.3d at 312-13 n.10; *Minn. Citizens,* 692 F.3d at 875 n.9.

Triggering at 52 n.103 (brackets in original) (ellipses omitted).

> asks what *the* major purpose of the organization is, not whether something is *a* major purpose. *E.g., N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 287-89, 302-04 (4th Cir. 2008). And *major* is the root of *majority*, which means more than half. *Majority*, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, an organization can have only one major purpose. *See Mass. Citizens,* 479 U.S. at 252 n.6 (opinion of Brennan, J.) (referring to "the major purpose" of an organization and "its central organizational purpose," not purposes).

Triggering at 59 & nn.141-43 (brackets omitted).

The test asks whether an organization **(1)** says in its organizational documents, *Mass. Citizens,* 479 U.S. at 252 n.6, 262, or "public statements," *FEC v. GOPAC, Inc.,* 917 F.Supp. 851, 859 (D.D.C. 1996), that it has the *Buckley* major purpose, *Triggering* at 59-60 & n.146, or **(2)**

> devot[es] the majority of its spending to contributions to, or independent expenditures properly understood for,[18] candidates, *Iowa Right to Life,* 717 F.3d at 584 (quoting *Colo. Right to Life,* 498 F.3d at 1152); *N.M. Youth Organized v. Herrera,* 611 F.3d 669, 678 (10th Cir. 2010) (same); *see N.C. Right to Life,* 525 F.3d at 289 & n.6 (equating primary with major, which is incorrect, because what is primary can

[18] *Supra* at 8 n.9; *infra* at 24.

> be the plurality rather than the majority),[19] or ballot measures,

Triggering at 60-61 & nn.147-50, or perhaps, with sufficient notice *not* present here, whether the organization **(3)** "mak[es] a massive amount—objectively and precisely defined—of contributions or independent expenditures properly understood," with courts not "setting the 'massive' threshold so low that it in effect even begins to encroach on the just results to which the *Buckley* major-purpose test

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[19] *Massachusetts Citizens* states that "should an organization's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the organization would be classified as a political committee." 479 U.S. at 262. This statement—including the nebulous "campaign activity" phrase—does not contemplate looking beyond (1) the organization's central organizational purpose, or (2) whether the organization devotes the majority of its spending to contributions or independent expenditures properly understood, to determine whether the organization has the *Buckley* major purpose. *Colo. Right to Life,* 498 F.3d at 1152 (quoting *Mass. Citizens,* 479 U.S. at 252 n.6, 262), *followed in Iowa Right to Life,* 717 F.3d at 584, *and N.M. Youth Organized,* 611 F.3d at 678.

Triggering at 60 n.149 (brackets omitted).

leads," *id.* at 65-66 & nn.159-62 (explaining this proposal). *See generally id.* at 81-83 n.268 (discussing disclosure thresholds).

Under Methods 1 and 2, *supra* at 18-19, the record (*e.g.*, ORDER at 7, 9-10) lacks proof that NM has the *Buckley* major purpose. Indeed, since neither contributions to candidates or ballot measures, nor independent expenditures properly understood, arise here (*see id.*), this action—like *New Mexico Youth Organized,* 611 F.3d at 678—"present[s] the easiest case under Method 2," *supra* at 18-19, of determining the *Buckley* major purpose. *Triggering* at 61 n.150. Absent proof that NM otherwise falls under *Buckley, supra* at 14-15, government may not trigger Track 1 burdens for NM.[20] Absent proof that NM has the *Buckley* major purpose, *Sampson* is unnecessary to consider. *Supra* at 15; *Triggering* at 49 n.86, 62-64 & nn.153-56. And *SpeechNow,* 599 F.3d at 696-98, is distinguishable, because SpeechNow *has* the *Buckley*

[20] It is unnecessary to decide what time frame the Constitution requires using to determine the *Buckley* major purpose of an organization, because—under any time frame (ORDER at 7-8, 9-10, 12)—the FEC prevails. Alternatively, the two-year election cycle, U.S. CONST. art. I, §§ 2-3, is the constitutional time frame.

major purpose, *Triggering* at 80 n.253 (citation omitted), and raises no *Sampson*-like argument.

The only contributions or independent spending that *count toward* permitting government to trigger Track 1 burdens for an organization are its contributions to candidates or ballot measures, and its independent expenditures properly understood. *Supra* at 18-20. This excludes contributions to others. By seeking to include such contributions (*e.g.,* ORDER at 12), CREW seeks a split with the Fourth,[21] Eighth, and Tenth[22] circuits. *Supra* at 18-19.

Does this mean government may *never* regulate, with Track 1 law, contributions other than contributions to candidates or ballot measures, or independent spending other than independent expenditures properly understood? No. Instead, it means such contributions and spending do not *count toward* permitting government to trigger Track 1 burdens in the first place. *Supra* at 18-20. However,

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[21] As *Triggering* at 59 n.144, 73 & n.196, details, *North Carolina Right to Life* is the controlling Fourth Circuit opinion.

[22] As *Triggering* at 49 n.86 details, *Colorado Right to Life* and *New Mexico Youth Organized* are the controlling Tenth Circuit opinions.

> [o]nce it *is* constitutional to trigger Track 1 burdens for an organization, government may—subject to further inquiry, *supra* at 7-8—require disclosure of *all* income and spending by the organization, *see Citizens United,* 558 U.S. at 338 (describing Track 1 burdens); *Buckley,* 424 U.S. at 63 (same),

Triggering at 61 n.149, including contributions and independent spending. Whether government may trigger such burdens for an organization in the first place is a separate question. *Supra* at 7-8.

Along that line: Analyzing which *types of* independent spending the Supreme Court has permitted regulating, *Barland,* 751 F.3d at 834-38 (*discussed infra* at 23), is incorrect here, because it overlooks this distinction. More fundamentally, such analysis is Track 2 analysis, not Track 1 analysis. *Compare supra* at 8-9 *with Citizens United,* 558 U.S. at 368-69 (discussing *Buckley* express advocacy plus the appeal-to-vote test under Track 2, not Track 1) (*discussed in Triggering* at 37 n.12), *and* Randy Elf, *Track 2 Law* at 1-2 (May 25, 2017), *available at* https://ssrn.com/abstract=2925328. "Applying Track 2 analysis to Track 1 law makes it *less* difficult for government to trigger Track 1 burdens; it lowers the hurdle that government must clear to trigger Track 1 burdens." *Triggering* at 46 n.72.

Besides, the appeal-to-vote test never was a form of express advocacy, *infra* at 24-26, never was part of the major-purpose test, *infra* at 27, and no longer has any place in law, *infra* at 26-29.

Thus, applying the appeal-to-vote test, *e.g., Barland,* 751 F.3d at 834-38 (misstating some arguments and confounding vagueness/overbreadth)—even if *only* in as-applied/facial *vagueness* challenges, *e.g., id.* at 832-34 (referring nevertheless to vagueness/overbreadth)—is *in*correct. *Not* applying it in as-applied/facial *overbreadth* challenges, *e.g., id.* at 838-41 (addressing Track 1), or elsewhere is correct.

Furthermore, raising the appeal-to-vote test, *e.g., supra* at 23, or *genuine*-issue speech overlooks Fourth, Eighth, and Tenth circuit holdings. *Supra* at 18-19.

Besides, on Track 1, whether issue speech, *see generally Triggering* at 49 n.84 (addressing "issue discussion"), is *genuine*-issue speech is unnecessary to consider. Why? Because *genuine*-issue speech is not a perfect complement of the independent spending that *counts, supra* at 21, even if one also counted appeal-to-vote speech, *contra infra*

at 27. *See* Randy Elf, *Track 2 Law* at 2 (illustrating these); *Triggering* at 69 n.181 (addressing perfect complements).

VI. The appeal-to-vote test—once known as the "functional equivalent of express advocacy"—no longer has any place in law.

Although neither the parties nor the district court mention the appeal-to-vote test here, it has arisen elsewhere post-*Citizens United, e.g., supra* at 23, so it is important to understand *why* it no longer has any place in law.

> Under constitutional law, express advocacy—including independent expenditure—means *Buckley* express advocacy, i.e., "communications that in express terms advocate the election or defeat of a clearly identified candidate"—or the passage or defeat of a ballot measure—using terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley,* 424 U.S. at 44 & n.52; *see Cal. Pro-Life Council,* 328 F.3d at 1102-04 & n.18 (addressing "express ballot-measure advocacy"). To be *Buckley* express advocacy, speech need not include the specific *Buckley* words. Synonyms suffice. That is what "such as" means. *Buckley*, 424 U.S. at 44 n.52; *Elections Bd. v. Wis. Mfrs. & Commerce,* 597 N.W.2d 721, 730-31 (Wis. 1999). Nevertheless, *Buckley* express advocacy requires "explicit words of advocacy." *Buckley,* 424 U.S. at 43; *Wis. Mfrs.,* 597 N.W.2d at 737.
>
> Under constitutional law, the *Wisconsin Right to Life* "'appeal to vote' test"—once known as "the functional

> equivalent of express advocacy," *Citizens United,* 558 U.S. at 335 (quoting *Wis. Right to Life,* 551 U.S. at 470 (opinion of Roberts, C.J.))[23]—*cannot* be a form of express advocacy. Rather, ... the appeal-to-vote test[24] ... applied when there were no explicit words of advocacy and asked whether the *only reasonable interpretation* of Federal Election Campaign Act electioneering communications was as an appeal to vote for or against a clearly identified candidate. *Wis. Right to Life*, 551 U.S. at 469-70 (opinion of Roberts, C.J.). This test applied only to Federal Election Campaign Act electioneering communications, *id.* at 474 n.7 (opinion of

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[23] *Citizens United* "re-labels 'the functional equivalent of express advocacy' as the 'appeal to vote' test." *Wis. Right to Life, Inc. v. Barland,* No. 10-C-0669, at 5 n.23, 2015 WL 658465 (E.D. Wis. Jan. 30, 2015, as amended Feb. 13, 2015) (unpublished) (quoting *Citizens United,* 558 U.S. at 335) (declaratory judgment and permanent injunction following *Barland,* 751 F.3d at 844), *available at* http://elections.wi.gov.

Triggering at 67 n.172.

[24] *Wisconsin Right to Life* asked not whether speech was "express advocacy" but whether it was "the functional equivalent of express advocacy." 551 U.S. at 469 (opinion of Roberts, C.J.). Indeed, *Wisconsin Right to Life*'s repeatedly referring to "express advocacy" and its "functional equivalent" illustrated that the latter reached beyond the former. *Id.* at 465, 471, 476, 477 n.9, 479, 482 (opinion of Roberts, C.J.).

Triggering at 67 n.174.

Roberts, C.J.),[25] which by definition are not express advocacy, because they are not expenditures or independent expenditures, *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 311 (3d Cir. 2015) (quoting 52 U.S.C. 30104(f)(3)(B)(ii)).[26] Only expenditures/independent expenditures are express advocacy. *Buckley,* 424 U.S. at 44 & n.52, 80. Indeed, one point of regulating Federal Election Campaign Act electioneering communications was for Track 2 law to reach beyond express advocacy. *McConnell,* 540 U.S. at 189-94.

Furthermore, after *Citizens United,* the appeal-to-vote test no longer even affects whether government may ban, otherwise limit, or regulate speech. *See Citizens United,* 558 U.S. at 324-26, 365-66, 368-69 (holding that government may *not ban or otherwise limit* Federal Election Campaign Act electioneering communications even when they *are* the functional equivalent of express advocacy, and holding that government may *regulate* Federal Election Campaign Act electioneering communications even when they are *not* the functional equivalent of express advocacy).[27] *Citizens United* thereby "eliminated the context in which the appeal-to-vote test has had any significance" under the Constitution. *Nat'l Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 69 (1st Cir. 2011).

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[25] *Triggering* at 68 n.176 (collecting additional authorities).

[26] *But see Indep. Inst. v. FEC,* 816 F.3d 113, 116 (D.C. Cir. 2016) (implicitly and incorrectly believing such electioneering communications can be express advocacy (citing *Citizens United*, 558 U.S. at 368-69)). *Triggering* at 68 n.177.

[27] *Triggering* at 68 n.180 (collecting additional authorities).

Triggering at 67-68 & nn.168-81 (ellipsis omitted).[28]

> Alternatively, even if *Citizens United* pages 368-69 had appeal-to-vote-test dictum, *Barland,* 751 F.3d at 836, and the test therefore remained in constitutional law, *id.* at 838, the test would *still* be unnecessary and improper in the major-purpose test, because it is not a form of express advocacy. *Supra* at 18-20, 24-27.[29]
>
> In any event, *Citizens United* pages 368-69 have no appeal-to-vote-test dictum. *Indep. Inst.,* 812 F.3d at 794-95 & nn.8-9, 798 n.13 (holding that *Citizens United* has no appeal-to-vote-test dictum without mentioning *Barland,* and addressing Track 2 disclosure while acknowledging the difference between Track 1 and Track 2 disclosure); *Indep. Inst. v. FEC,* 70 F.Supp.3d 502, 507-08, 515 (D.D.C. 2014) (holding that *Citizens United* has no appeal-to-vote-test dictum while disagreeing with *Barland,* and addressing Track 2 disclosure without acknowledging either the difference between Track 1 and Track 2 disclosure or the correct *Barland* holdings on Track 1 disclosure), *vacated on other grounds*, 816 F.3d 113, 115-17 (D.C. Cir. 2016) (remanding for a three-judge district court).

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[28] *Accord O'Keefe v. Chisholm,* 769 F.3d 936, Nos. 14-1822, 14-1888, 14-1899, 14-2006, 14-2012, 14-2023, AMICI BR. OF CAMPAIGN LEGAL CTR. & DEMOCRACY 21 at 23, 2014 WL 4402300 (7th Cir. Aug. 8, 2014) (stating that these *Citizens United* holdings "effectively mooted *WRTL* and its 'functional equivalent' test"), *available at* http://campaignlegal.org/sites/default/files/CLC__D21_OKeefe_Amici_Curiae_Brief_8-8-14_file_stamped.pdf *and* http://prwatch.org/files/8_8_clc_amicus.pdf.

[29] "As an aside: Including the appeal-to-vote test in the major-purpose test would *expand* when government may trigger Track 1, political-committee(-like) burdens." *Triggering* at 70 n.184.

Triggering at 70-71 & nn.182-89 (brackets omitted).[30]

> Moreover, under *Wisconsin Right to Life*, the appeal-to-vote test is vague as to speech other than Federal Election Campaign Act electioneering communications. *See* 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (answering a charge that "our test" is impermissibly vague partly by saying "this test is only triggered if the speech" is a Federal Election Campaign Act electioneering communication "in the first place"). Elsewhere the test "might create an unwieldy standard that would be difficult to apply" and unconstitutionally chill political speech. *Colo. Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1258 (Colo. 2012) (citing *Wis. Right to Life*, 551 U.S. at 468-69 (opinion of Roberts, C.J.)).[31] And after *Citizens United,* what remains from *Wisconsin Right to Life* regarding the test is the conclusion that the test is unconstitutionally vague, even vis-à-vis Federal Election Campaign Act electioneering communications. *Wis. Right to Life,* 551 U.S. at 492-94 (Scalia, J., concurring).
>
> How was anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech has no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate?

Triggering at 72-73 & nn.190-92 (brackets and ellipsis omitted).

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[30] For further explanation of how *Barland* is mistaken on this point, please see *Triggering* at 70-71 & nn.186-89.

[31] For further explanation of this, please see *Triggering* at 72 n.191.

Therefore, "the appeal-to-vote test—once known as the 'functional equivalent of express advocacy'—no longer affects whether government may ban, otherwise limit, or regulate speech, and the appeal-to-vote test is vague. It has no place in law." *Id.* at 77.[32]

VII. Strict scrutiny applies and the proper challenge is to the political-committee(-like) definition, yet the FEC would prevail even if substantial-relation exacting scrutiny applied or the Court considered the political-committee(-like) burdens.

As *Triggering* at 51-52 & nn.97-103, 56-57 & nn.123-28, and particularly *Triggering* at 77-80 & nn.236-56 (each collecting competing authorities), detail: In a challenge by an organization that—unlike the *Davis v. FEC,* 554 U.S. 724, 744 (2008), plaintiff—objects to law triggering Track 1 burdens for the organization itself in the first place, *supra* at 7-8, *strict* scrutiny applies, *e.g., Colo. Right to Life,* 498 F.3d at 1146, because such law substantially burdens speech, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 734 (2011) (applying strict scrutiny to burden, not a ban (citation omitted)); *id.* at 748

[32] For replies to five sets of possible responses to the foregoing, please see *Triggering* at 73-76.

(referring to both a "substantial burden" and a "compelling state interest" (citation omitted)), with onerous requirements extending beyond Track 2 law, *supra* at 8-9.[33] *Citizens United*'s applying substantial-relation exacting scrutiny to "disclosure" law, 558 U.S. at 366-67 (quoting *Buckley,* 424 U.S. at 64, 66), does not change this, because *Citizens United* pages 366-71 address/support only Track 2 law, not Track 1 law. *Supra* at 16-17 & n.17. Even if substantial-relation exacting scrutiny applied here, *SpeechNow,* 599 F.3d at 696-98, *discussed in Triggering* at 80 n.253, the tailoring analysis, *supra* at 15-16, and the result would be the same. *Minn. Citizens,* 692 F.3d at 872, 875.

Moreover, as *Triggering* at 77 & nn.233-35, 80-81 & nn.257-68 (collecting competing authorities), details: The proper challenge to law triggering Track 1 burdens is to the political-committee(-like) *definition.*

[33] It is incorrect to lump into one "disclosure" discussion, claims by organizations that (a) challenge law triggering Track 1 burdens for an organization itself in the first place, *e.g., supra* at 9-10, (b) accept *being* political committees and then challenge particular Track 1 burdens one-by-one, *e.g., Davis, supra* at 29, and (c) challenge Track 2 law, *e.g., McIntyre, supra* at 8-9. *Triggering* at 45 n.71, 77-78 & nn.236-38, 79 n.247.

E.g., Mass. Citizens, 479 U.S. at 262 ("classified as a political committee"); *Buckley,* 424 U.S. at 79 (addressing how "'political committee' is defined" and holding what "the words 'political committee' ... need only encompass" to be constitutional); *Unity08,* 596 F.3d at 867 (quoting *Machinists,* 655 F.2d at 392, 395-96). Even if the Court considered the political-committee(-like) *burdens, Iowa Right to Life,* 717 F.3d at 588, the result would be the same.

VIII. Four Additional Points.

- As *Triggering* details,

> government's interest in preventing circumvention of law ... can apply only when the challenged law is valid in the first place, *Yamada v. Snipes,* 786 F.3d 1186, 1200 (9th Cir. 2015), ... because "there can be no freestanding anti-circumvention interest." *Republican Party of N.M. v. King,* 741 F.3d 1089, 1202 (10th Cir. 2013).

Triggering at 66 & nn.163-66.

- Pre- and post-*Citizens United,* speech burdens—not just speech bans and other speech limits—can violate the First Amendment. *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 565-66 (2011) (citations omitted). This includes political-speech burdens. *Ariz. Free Enter. Club's Freedom Club*

PAC, 564 U.S. at 732-35 & n.5 (striking down law not banning/otherwise limiting speech); *Triggering* at 47-48 & nn.74-78, 48-49 & nn.85-86 (addressing Track 1 law); *supra* at 7-8 (same). The Supreme Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe" First Amendment rights. *Buckley,* 424 U.S. at 64; *Triggering* at 58 n.131.

● For some, law unconstitutionally triggering Track 1 burdens chills speech. *Supra* at 10. Others engage in their speech and comply with such law. *E.g., Triggering* at 57-58 n.130 (citation omitted). However:

> That organizations are "*capable*" of complying with law—including "complicated and burdensome" law—does not make the law constitutional. *Minn. Citizens*, 692 F.3d at 874.

Triggering at 46 & n.73 (collecting competing authorities).

● Some who comply with law unconstitutionally triggering Track 1 burdens, and some others, can even *benefit* from such law. *Triggering* at 47 n.73 (listing them); ADDENDUM.1 (same).

> It is not necessary to question the motives or "the openness and candor of those on either side of the debate" to appreciate that it quite naturally may not occur to those who can benefit from law unconstitutionally triggering Track 1

> burdens to challenge its constitutionality. *Schuette v. Coal. to Defend Affirmative Action,* 134 S.Ct. 1623, 1639 (2014) (Roberts, C.J., concurring).

Triggering at 46 n.73. For example, such law

> often does *not* discourage the well-heeled few from engaging in political speech ... , because they can afford to hire professionals to help them comply with the law.
>
> When others cannot afford such help, such law often has the effect of shutting them out of—and leaving the well-heeled few with less competition in—the marketplace of ideas. Indeed, the most insidious aspect of such law is the extent to which it protects big players *at the expense of little players*. Those who advocate or defend such law beyond First Amendment boundaries are in effect protecting the well-heeled few. They are in effect protecting big players at the expense of little players. While big players and little players have the same First Amendment rights, big players have no right—none—to political-speech law protecting them at the expense of little players.

Triggering at 58 (citations omitted); *accord* ADDENDUM.1.

CONCLUSION

The FEC prevails on the merits.

Respectfully submitted,

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I certify that today I filed the **AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT AND IN SUPPORT OF APPELLEE FEDERAL ELECTION COMMISSION** with the Court's electronic-filing system, *see* FED.R.APP.P. 25(a)(2)(D), 25(b), 25(c)(1)(D), 25(c)(4), 25(d)(1)(B), 25(d)(3); D.C.CIR.R. 25(a), 25(f), which will serve:

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December 2, 2019

ADDENDUM

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ADDENDUM TABLE OF CONTENTS

OPINION: READERS HAVE THEIR SAY

ADDENDUM.1

"But big players have no right to law protecting them over little players."

Speech law benefits politicians, rich

Editor's note: This week's theme at Chautauqua Institution is "Money and Power" and includes the regulation of political speech. We present the following by the local resident who, since the U.S. Supreme Court's 2010 decision in Citizens United v. FEC, has presented more briefs and oral arguments to courts — from Maine to Hawaii — than anyone else in the country on how the First Amendment limits government's power to regulate political speech.

By RANDY ELF

CHAUTAUQUA — Political speech is at the core of what the First Amendment protects.

Applying the First Amendment, the Supreme Court has held that government may not ban or otherwise limit spending for political speech by non-foreign nationals.

But what about law not banning or otherwise limiting but instead regulating — that is, requiring disclosure of — political speech? Further applying the First Amendment, the court allows government to regulate such speech on two tracks.

Track 1 establishes when government may trigger political-committee burdens: Registration, recordkeeping, extensive reporting, or ongoing reporting. The court has recognized these are "onerous" burdens. Many organizations would rather forgo such speech than bear such burdens.

Thus, to protect such speech, the court — beginning with its 1976 Buckley v. Valeo decision — has limited when government may trigger such burdens.

In short, government may trigger such burdens only for organizations that:

• Are under the control of candidates in their capacities as candidates, or

• Have "the major purpose" of nominating or electing candidates or passing or defeating ballot measures, and engage in more than small-scale speech.

Meanwhile, under Track 2, the court has allowed neither registration, recordkeeping, extensive reporting, nor ongoing reporting. Instead, it has allowed non-political-committee reporting — which is neither extensive nor ongoing — for two particular types of speech. These holdings are in Buckley and Citizens United.

These constitutional-law principles apply to all organizations on all sides of all issues.

They apply to big players and little players alike, including to clubs, associations, houses of worship, groups of neighbors, unions, Mom and Pop businesses, and larger businesses, and regardless of whether any big or little players are incorporated.

After all, First Amendment rights are for everyone, not just those who can afford help to comply with speech law, particularly onerous speech law.

Sounds straightforward.

So what's the problem?

One problem is that appellate courts are split over what this part of Citizens United means. Some courts believe it allows government to trigger Track 1, political-committee burdens even for organizations not meeting the Track 1 criteria.

This is wrong, in part because this part of Citizens United addresses only Track 2 law, not Track 1 law. This misinterpretation of Citizens United makes it easier for government to place onerous Track 1 burdens on those engaging in political speech.

Yet does anyone benefit from this misinterpretation of Citizens United? Well, yes.

And it may not even occur to those benefiting from Track 1 law to challenge its constitutionality.

Among those benefiting are politicians who avoid criticism when such onerous law in effect silences political speech.

Also benefiting are those who earn their living off of such onerous law, such as by advocating or defending it, civilly enforcing it, criminally prosecuting it, or helping people comply with it so that they can exercise their First Amendment rights while avoiding civil enforcement and criminal prosecution.

Also benefiting are those who engage in political speech, can afford to hire help to comply with such onerous law, and face less competition, because others cannot afford such help and therefore are shut out of the marketplace of ideas.

That is the most nefarious effect of such law: It protects big players over little players.

Those advocating or defending such law beyond Track 1 boundaries are in effect protecting big players over little players. In other words, they are in effect protecting "the 1 percent" over everyone else.

True, big players and little players have the same First Amendment rights. But big players have no right to law protecting them over little players.

So when you hear that Citizens United allows government to regulate all political speech in almost any way it pleases, the short and simple answer is: Oh, no, it doesn't.

Randy Elf's law-review article on this subject is at <http://ssrn.com/abstract=2713496> and is set for publication in Volume 29, Number 1, the Fall 2016 edition of the Regent University Law Review, at <http://www.regent.edu/acad/schlaw/student—life/studentorgs/lawreview/issues.cfm>. Readers wanting a quick summary are encouraged to read the text — not the footnotes — through Part V.