

# THE CONSTITUTIONALITY OF STATE LAW TRIGGERING BURDENS ON POLITICAL SPEECH AND THE CURRENT CIRCUIT SPLITS

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## INTRODUCTION

Recognizing that political speech is at the “core” of what the First Amendment protects,<sup>1</sup> the Supreme Court has applied constitutional scrutiny and established the two-track system under which government may regulate political speech.<sup>2</sup>

Under “Track 1,” government may under some circumstances—and subject to further inquiry<sup>3</sup>—trigger political-committee or political-committee-like burdens.<sup>4</sup>

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<sup>1</sup> *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam).

<sup>2</sup> 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). See generally Larry Geller, *Definitive Paper on Free Speech in Campaign Spending Law Cases*, DISAPPEARED NEWS (Feb. 17, 2016), <http://www.disappearednews.com/2016/02/definitive-paper-on-free-speech-in.html> (recalling *Yamada* and endorsing this Article). The umbrella term “disclosure” can cover registration, recordkeeping, reporting, attributions, and disclaimers in all their forms. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 812–16, 836 (7th Cir. 2014). *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.*

<sup>3</sup> See, e.g., *Buckley*, 424 U.S. at 74 (allowing speakers to avoid Track 1 disclosure if they show a reasonable probability it would lead to “threats, harassment, or reprisals”). 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).

<sup>4</sup> See, e.g., *Buckley*, 424 U.S. at 63, 79 (allowing government to trigger Track 1 burdens only for “organizations” that are “under the control of a candidate” or candidates in their capacities as candidates or have “the major purpose” of “nominat[ing] or elect[ing] . . . a candidate” or candidates); see also *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262 (1986) (following *Buckley*); *Sampson v. Buescher*, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010)

While *Citizens United v. FEC*<sup>5</sup> strikes down a ban on spending for political speech, it does not change the *Buckley v. Valeo* tests, which address not a speech *ban* but instead whether government may trigger Track 1, political-committee or political-committee-like burdens when speech *occurs*.<sup>6</sup>

Under “Track 2,”<sup>7</sup> apart from whether government may trigger Track 1, political-committee(-like) burdens, government may—subject to further inquiry<sup>8</sup>—require attributions, disclaimers, and *non*-political-committee reporting for:

- independent expenditures properly understood,<sup>9</sup> and
- Federal Election Campaign Act electioneering communications.<sup>10</sup>

The Supreme Court has allowed government to regulate only these two types of political speech with Track 2 law.<sup>11</sup> If government, working

(addressing organizations with the *Buckley* major purpose but only small-scale speech). For ballot-measure speech, see *infra* text accompanying notes 84, 150, 169.

<sup>5</sup> *Citizens United*, 558 U.S. at 336–66. Full United States Reports pagination to *Citizens United* was first available in early 2013. See, e.g., Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 587–603 (8th Cir. 2013) (citing *Citizens United* in the United States Reports). Because this Article cites earlier opinions that cite *Citizens United* in the Supreme Court Reporter, this Article includes—when helpful for clarity—*Citizens United* cites to both the United States Reports and the Supreme Court Reporter as follows: *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010).

<sup>6</sup> Compare, e.g., *Citizens United*, 558 U.S. at 337–40 (describing Track 1 burdens), with *Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262 (addressing when government may trigger Track 1 burdens), and *Buckley*, 424 U.S. at 63, 79 (same).

<sup>7</sup> The terms “Track 1” and “Track 2” are the author’s, yet the *concepts* have been in the case law since the Supreme Court first distinguished what the author calls Track 1 law and Track 2 law in *Buckley*, 424 U.S. at 63–64.

<sup>8</sup> See, e.g., *Citizens United*, 558 U.S. at 370 (quoting *McConnell*, 540 U.S. at 198) (allowing speakers to avoid Track 2 disclosure if they show a reasonable probability it would lead to “threats, harassment, or reprisals”).

<sup>9</sup> *Buckley*, 424 U.S. at 63–64, 79–82; cf. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 354–56 (1995) (rejecting a Track 2, non-political-committee disclosure requirement for other speech). 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); *infra* text accompanying notes 168–71 (addressing express advocacy).

<sup>10</sup> *Citizens United*, 558 U.S. at 366–71. Federal Election Campaign Act electioneering communications (1) are broadcast, (2) run in the thirty days before a primary or sixty 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.

within Track 2, wants to regulate political speech beyond how current case law allows, government must prove the law survives scrutiny.<sup>12</sup>

Some law—such as state laws that *Wisconsin Right to Life, Inc. v. Barland*,<sup>13</sup> *Minnesota Citizens Concerned for Life, Inc. v. Swanson*,<sup>14</sup> and *New Mexico Youth Organized v. Herrera*<sup>15</sup> strike down—regulates spending for political speech only by triggering Track 1, political-committee(-like) burdens. States are free to make that choice, yet when they do, only Track 1 analysis applies.<sup>16</sup>

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens. This Article examines when it is constitutional for government—particularly state government—to trigger such burdens.

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<sup>11</sup> *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016) (holding that “Supreme Court precedent allows limited [Track 2] disclosure requirements for certain types of” speech); *id.* at 795 (holding that Track 2 law may reach *some* speech beyond *Buckley* express advocacy); *id.* at 793 (addressing independent expenditures properly understood); *id.* at 789–90, 794–95, 797 (addressing Federal Election Campaign Act electioneering communications in state law); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836–37, 841 (7th Cir. 2014) (discussing Track 2 disclosure for independent expenditures properly understood and Federal Election Campaign Act electioneering communications).

<sup>12</sup> *See, e.g., Indep. Inst.*, 812 F.3d at 797–98 (addressing overbreadth); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 282–85 (4th Cir. 2013) (addressing underinclusiveness). *Citizens United* does not hold that all Federal Election Campaign Act electioneering communications, much less other forms of non-express-advocacy spending for political speech, are regulable under Track 2 now and forevermore. Instead, it rejects an as-applied challenge based on what the *Citizens United* plaintiff called the “functional equivalent of express advocacy,” *Citizens United*, 558 U.S. at 368–69, the former name of the appeal-to-vote test. *Id.* at 335 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.)). The possibility of other as-applied challenges—beyond “threats, harassment, or reprisals”—remains. *Supra* note 8; *see Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411–12 (2006) (per curiam) (holding that *McConnell*’s facial upholding of Federal Election Campaign Act electioneering-communication law does not foreclose as-applied challenges); *Indep. Inst. v. FEC*, 816 F.3d 113, 115–16 (D.C. Cir. 2016) (citing *Citizens United*, 558 U.S. at 368–69) (holding that *Citizens United* leaves the door open for future as-applied challenges and rejects “one particular as-applied challenge” and “one such as-applied challenge”).

<sup>13</sup> *Barland*, 751 F.3d at 836–37, 841.

<sup>14</sup> *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 871–77 (8th Cir. 2012) (en banc).

<sup>15</sup> *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676–79 (10th Cir. 2010).

<sup>16</sup> *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.) (considering Track 1 law and distinguishing the Tenth Circuit’s *Independence Institute* opinion, *supra* note 11, as considering “a different disclosure framework,” *i.e.*, Track 2 law), *cert. denied*, 85 U.S.L.W. 3143 (2016).

## I. FIRST PRINCIPLES

Political-speech laws<sup>17</sup> regulate speech at the heart of republican government.<sup>18</sup> Thus, it is useful to back up and recall the underlying principles.<sup>19</sup> First principles do not begin with the First Amendment.<sup>20</sup> Even before the First Amendment come the separation of powers<sup>21</sup> and the limited and enumerated powers of government.<sup>22</sup> Even before these principles come citizens' struggles to establish their sovereignty and restrain government's power to discourage—to put it mildly—speech criticizing government.<sup>23</sup> Centuries of history, including Western history,<sup>24</sup> are replete with ill-begotten efforts to ban, otherwise limit, or regulate political speech.<sup>25</sup> This is not a new problem: Moses confronted it when he said, “Let my people go,” and Pharaoh was none too pleased.<sup>26</sup>

Yet unlike in America's mother country, where government power flows from the Crown,<sup>27</sup> the framers established government with the consent of the governed,<sup>28</sup> and government has only those powers that

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<sup>17</sup> These are also known as campaign-finance laws, but they reach beyond candidate or ballot-measure campaigns. *See Citizens United*, 558 U.S. at 337–40 (addressing Track 1 law); *id.* at 366–71 (addressing Track 2 law); *Buckley v. Valeo*, 424 U.S. 1, 63–64 (1976) (per curiam) (addressing Track 1 law and Track 2 law).

<sup>18</sup> *E.g.*, *Buckley*, 424 U.S. at 14–15.

<sup>19</sup> *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481–82 (2007) (opinion of Roberts, C.J.) (“[A]s is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself . . .”).

<sup>20</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>21</sup> *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (addressing the separation of powers).

<sup>22</sup> *See, e.g.*, U.S. CONST. art. I, § 8 (limiting and enumerating powers).

<sup>23</sup> *See, e.g.*, THE DECLARATION OF INDEPENDENCE (1776) (articulating such a struggle).

<sup>24</sup> *See generally* RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER (1974) (chronicling Western history).

<sup>25</sup> A ban is a limit of zero. *Ala. Democratic Conference v. Strange*, No. 11-cv-02449-JEO, at 17 (N.D. Ala. Dec. 14, 2011) (Bloomberg Law, Dockets), *vacated on other grounds*, 541 F. App'x 931, 935–37 (11th Cir. 2013).

<sup>26</sup> *Exodus* 8:1, 8:15 (English Standard Version).

<sup>27</sup> *See, e.g.*, MAGNA CARTA (1215) (addressing this power).

<sup>28</sup> *See, e.g.*, U.S. CONST. pmb. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”). *See generally* RUSSELL KIRK, THE CONSERVATIVE CONSTITUTION (1990) (discussing the Constitution).

State constitutions have similar preambles. *See, e.g.*, WIS. CONST. pmb. (“We, the people of Wisconsin, grateful to Almighty God for our freedom . . . do establish this constitution.”); HAW. CONST. pmb. (“We, the people of Hawaii, grateful for Divine Guidance . . . reaffirm our belief in a government of the people, by the people and for the people, and . . . do hereby ordain and establish this constitution for the State of Hawaii.”).

the governed surrendered to it in the first place.<sup>29</sup> Although states “do not need [federal] constitutional authorization to act,”<sup>30</sup> they too have only limited and enumerated powers.<sup>31</sup>

The enumerated “constitutional power of Congress to regulate federal elections,”<sup>32</sup> and each state’s parallel enumerated power over its own, though not other states’, elections,<sup>33</sup> is self-limiting. Other parts of the Constitution further constrain this limited and enumerated power.<sup>34</sup>

Nevertheless, even today when some people advocate political-speech laws, they appear to presume government may ban, otherwise

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With circuit-splitting results, the constitutionality under the First Amendment of Wisconsin law and Hawaii law triggering Track 1, political-committee and political-committee-like burdens is at issue in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 838–41 (7th Cir. 2014), and *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1042–45, 1047–53 (D. Haw. 2012), *aff’d in part and rev’d on other grounds sub nom. Yamada v. Snipes*, 786 F.3d 1182, 1194–1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015). *Certiorari* denials carry no weight on the merits. *United States v. Carver*, 260 U.S. 482, 490 (1923).

<sup>29</sup> *See, e.g.*, *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577–78 (2012) (addressing limited and enumerated powers). In some instances, those powers may be large. Nevertheless, they are limited and enumerated.

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action [that] lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. . . . Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528–29 (1935) (footnote omitted) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934)).

Thus, courts—even federal courts with respect to state governments—start with the premise that government may do what the Constitution permits and not with the premise that government may do everything except what the Constitution forbids. *See, e.g.*, *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 281–82 (4th Cir. 2008) (applying this premise).

<sup>30</sup> *NFIB*, 132 S. Ct. at 2578.

<sup>31</sup> *See, e.g., id.* at 2577 (“[T]he National Government possesses only limited powers; the States and *the people* retain the remainder.”) (emphasis added).

The Supreme Court has noted that the “powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments [under the federal Constitution] are numerous and indefinite.” *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *THE FEDERALIST* No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)). However, state governments’ powers are still limited and enumerated. *See, e.g.*, U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively *or to the people*.”) (emphasis added); *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) (“[O]ur Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, *in the case of limit[s] upon both governments, to the people*.”) (emphasis added), *overruled on other grounds* by *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 75–77 (1964).

<sup>32</sup> *Buckley v. Valeo*, 424 U.S. 1, 13 & n.16 (1976) (per curiam).

<sup>33</sup> *See, e.g.*, *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (addressing such power); *N.C. Right to Life*, 525 F.3d at 281 (same).

<sup>34</sup> *See, e.g.*, U.S. CONST. amends. I, V, XIV (limiting this power).

limit, or regulate political speech however it likes, unless speakers can somehow swim to some small island where they are safe from the ocean of government power.<sup>35</sup> In the United States, this presumption has it exactly backwards: Freedom of speech is the norm, not the exception.<sup>36</sup> Government's limited and enumerated power to regulate elections is an exception to the norm of freedom of speech.<sup>37</sup>

Furthermore, under the Fifth and Fourteenth Amendments, law regulating political speech must not be vague.<sup>38</sup> Indeed, when law burdens free speech, courts apply "a more stringent vagueness test" than they apply to other law.<sup>39</sup> Political speech is at the core of what the First Amendment protects.<sup>40</sup> Law "so closely touching our most precious freedoms" must be precise.<sup>41</sup> Vague law threatens to "trap the innocent by not providing fair warning," gives reign to "arbitrary and discriminatory application," and forces "citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."<sup>42</sup> Vague law "puts the speaker[s] in these circumstances wholly at the mercy of the varied understanding of [their] hearers and consequently of whatever inference may be drawn as to [the speakers']

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<sup>35</sup> This presumption is often subtle. *See, e.g.*, 11 C.F.R. § 114.15 (2008) (post-*Wisconsin Right to Life* regulation saying what political speech is "permissible"); *cf.* *Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (criticizing this regulation).

<sup>36</sup> *See, e.g.*, *Citizens United*, 558 U.S. at 361 ("[M]ore speech, not less, is the governing rule."); *Buckley*, 424 U.S. at 14–15 (describing freedom of speech); *see also* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828–29 (2011) (quoting *Buckley*, 424 U.S. at 14–15).

<sup>37</sup> *Buckley*, 424 U.S. at 13–14.

<sup>38</sup> *See id.* at 41–43 (addressing vagueness). In this respect, the Fifth Amendment, U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."), applies to the federal government, *see, e.g.*, *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238–39 (1925) (understanding this point), while the Fourteenth Amendment applies to the states, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

<sup>39</sup> *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *see also* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

<sup>40</sup> *See, e.g.*, *Citizens United*, 558 U.S. at 329 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)) (addressing political speech); *id.* at 334 (emphasizing "the primary importance of speech itself to the integrity of the election process").

Other "speech" is *not* at the core of the First Amendment. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 411–12, 412 nn.1–2 (2000) (Thomas, J., dissenting) (addressing lesser "speech" and collecting authorities); *see also* *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 508 (6th Cir. 2004) (Batchelder, J., dissenting) (following *Shrink Missouri*).

<sup>41</sup> *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

<sup>42</sup> *Id.* at 41 n.48 (ellipsis omitted) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

intent and meaning. [This] blankets with uncertainty whatever may be said. It compels the speaker[s] to hedge and trim.”<sup>43</sup> Vague law thereby “chill[s] speech: People ‘of common intelligence must necessarily guess at the law’s meaning and differ as to its application.’”<sup>44</sup>

To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. “First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal.”<sup>45</sup> Complex laws regulating political speech are in effect prior restraints.<sup>46</sup> “Prolix laws chill speech for the same reason that vague laws chill speech,”<sup>47</sup> and “First Amendment freedoms need breathing space to survive.”<sup>48</sup> “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.”<sup>49</sup>

Vague law does not “provide the kind of notice that will enable ordinary people to understand what conduct” it regulates; furthermore, “it may authorize and even encourage arbitrary and discriminatory enforcement.”<sup>50</sup> The latter can occur when laws lack “explicit standards” for those who enforce them.<sup>51</sup>

Even non-vague law regulating political speech must comply with the First Amendment,<sup>52</sup> which guards against overbreadth.<sup>53</sup> What the

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<sup>43</sup> *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

<sup>44</sup> *Citizens United*, 558 U.S. at 324 (brackets omitted) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The Supreme “Court and judges generally should adopt clear, bright-line rules that . . . you can explain to the gas station attendant as easily as to a law professor.” Clarence Thomas, *Be Not Afraid*, AM. ENTER. INST. (Feb. 13, 2001), <http://www.aei.org/publication/be-not-afraid>.

<sup>45</sup> *Citizens United*, 558 U.S. at 336 (brackets and internal quotation marks omitted) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)).

<sup>46</sup> *Id.* at 335.

<sup>47</sup> *Id.* at 324.

<sup>48</sup> *Id.* at 329 (quoting *Wis. Right to Life*, 551 U.S. at 468–69 (opinion of Roberts, C.J.)).

<sup>49</sup> *Id.* at 324.

<sup>50</sup> *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

<sup>51</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 & n.4 (1972) (collecting authorities).

<sup>52</sup> The Fourteenth Amendment applies the First Amendment to the states via the Due Process Clause, *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (addressing freedom of speech and freedom of the press), or, alternatively and straightforwardly, via the Privileges or Immunities Clause, *see McDonald v. City of Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring) (addressing the Second Amendment). *The result is the same either way.* *See id.* (reaching the same result).

<sup>53</sup> *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (per curiam) (referring to “impermissibly broad” law). “Overbreadth” applies to both as-applied and facial claims.

Supreme Court has held regarding the Second Amendment also pertains to the First:

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. . . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>54</sup>

This Article now turns to how the First Amendment applies to law—particularly state law—triggering Track 1 burdens. The principles of law that follow apply to any organization, large or small, on any side of any issue. The organization might be a club, an association, a house of worship, a group of neighbors, a union, a mom-and-pop business, or a larger business, any of which might or might not be incorporated, and any of which might work with other similar or different organizations. These principles apply across the board, because the freedom of speech is for everyone, not just the well-heeled few who can afford to hire professionals to help them comply with law triggering Track 1 burdens.<sup>55</sup>

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*E.g.*, Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 785 (9th Cir. 2006) (analyzing overbreadth in an as-applied challenge).

The absence of vagueness does not make law banning, otherwise limiting, or regulating political speech constitutional. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.) (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986)) (rejecting a contention that law is constitutional merely because it is not vague). If it did, government could ban all political speech and then fend off a constitutional challenge by saying the law is not vague. While this may seem obvious, the Federal Election Commission, in briefs authored not by FEC counsel but by the solicitor general's office, unsuccessfully tried a similar tactic in *Wisconsin Right to Life* by asserting the Federal Election Campaign Act's electioneering-communication ban, 52 U.S.C. § 30118(a), (b)(2) (Supp. II 2015), was constitutional, because it was not vague. *See, e.g.*, Brief for Appellant Federal Election Commission at 41, FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (Nos. 06-969 & 06-970), [http://fec.gov/law/litigation/wrtl\\_sc06\\_fec\\_brief.pdf](http://fec.gov/law/litigation/wrtl_sc06_fec_brief.pdf) (taking this position); Brief for Appellee Federal Election Commission at 10, 27–28, 34, Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (No. 04-1581), [http://fec.gov/pages/bcra/wrtl\\_sc\\_appellee\\_brief.pdf](http://fec.gov/pages/bcra/wrtl_sc_appellee_brief.pdf) (same).

<sup>54</sup> District of Columbia v. Heller, 554 U.S. 570, 634–36 (2008) (citations omitted).

<sup>55</sup> *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.”)



## II. POLITICAL-COMMITTEE AND POLITICAL-COMMITTEE-LIKE BURDENS

Some laws inherently *ban* political speech. For example, an organization and a political committee that it *forms or has* are separate entities, so law requiring an organization to *form or have* a political committee, and letting *only* the political committee engage in political speech, inherently bans such speech by the organization itself.<sup>56</sup>

By contrast, some other laws do *not* inherently ban such speech by the organization itself. Nevertheless, when the organization itself engages in its speech, the organization itself must *be* a political committee<sup>57</sup> or a political-committee-like organization.<sup>58</sup> Alternatively, such laws require—or *in effect* require—a fund or account that is part of the organization to *be* a political-committee-like fund or account.<sup>59</sup>

Political committees, political-committee-like organizations, and political-committee-like funds or accounts “are expensive to administer

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<sup>56</sup> See *id.* at 337–40 (describing such law).

<sup>57</sup> See *Buckley*, 424 U.S. at 63 (describing such law). This is as opposed to having to *form or have* a separate political committee.

<sup>58</sup> *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 834 (7th Cir. 2014) (describing such an organization).

<sup>59</sup> *E.g., id.* at 825, 839–40, 844–46 (describing such an account); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 868–72 (8th Cir. 2012) (en banc) (describing such a fund/account); see *infra* note 92.

To be clear, such law does not require an organization to *form or have* a political committee. When an organization *forms/has* a political committee, the political committee is *separate* from the organization. *Citizens United*, 558 U.S. at 337; *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981). An organization does not speak through a political committee it *forms/has*; such a political committee, not its parent organization, speaks and bears Track 1, political-committee burdens as a separate entity. *Citizens United*, 558 U.S. at 337. This *Citizens United* holding supersedes *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (holding that organizations “speak through” their political committees), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) (opinion of Brennan, J.) (same), and *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (asserting an organization’s political committee is an “avenue for” the organization’s own “contributions”). That an organization may wholly control a political committee that it *forms/has*, *Beaumont*, 539 U.S. at 149, does not change the point of law that the organization and such a political committee are separate under *Citizens United*, 558 U.S. at 337.

By contrast, when an organization itself must *be* a political committee or political-committee-like organization to speak, the organization itself speaks and bears Track 1, political-committee or political-committee-like burdens. *Barland*, 751 F.3d at 812–16, 822, 825–26. The same holds when a fund or account that is part of the organization must *be* a political-committee-like fund or account. *E.g., id.* at 825, 839–40, 844–46; *Minn. Citizens Concerned for Life*, 692 F.3d at 868–72.

Some courts conflate *forming/having* and *being* a political committee. See, e.g., *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 601, 604 (Tex. Ct. App. 2012) (incorrectly holding that law banning an organization’s speech and letting the organization “create its own political committee,” which then speaks, does not ban the organization’s speech).

and subject to extensive regulations.”<sup>60</sup> Government may trigger far greater burdens for them than for other organizations.<sup>61</sup>

Being a political committee or a political-committee-like organization, and being an organization with a political-committee-like fund or account, can trigger what the Supreme Court has established are Track 1, political-committee or political-committee-like burdens:<sup>62</sup>

- registration (including treasurer-designation, bank-account-designation, and termination (i.e., deregistration) requirements);
- recordkeeping; and
- extensive<sup>63</sup> and ongoing<sup>64</sup> reporting, which extends beyond Supreme Court-approved Track 2, non-political-committee reporting.<sup>65</sup>

Such organizational and administrative burdens are “onerous” as a matter of law—not only for,<sup>66</sup> but “particularly” for, small organizations<sup>67</sup>—even when there are neither limits nor source bans on

<sup>60</sup> *Citizens United*, 558 U.S. at 337; see also *Barland*, 751 F.3d at 823 (quoting *Citizens United*, 558 U.S. at 337–38); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same).

<sup>61</sup> See *Citizens United*, 558 U.S. at 338 (describing such law); *Mass. Citizens for Life*, 479 U.S. at 251, 252 & n.6, 253, 254 & n.7, 255 & n.8, 256 & n.9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same); see also *Barland*, 751 F.3d at 840 (quoting *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.)).

<sup>62</sup> *Citizens United*, 558 U.S. at 338; *Buckley*, 424 U.S. at 63.

<sup>63</sup> See, e.g., *Citizens United*, 558 U.S. at 338 (describing such law); *Mass. Citizens for Life*, 479 U.S. at 253–54, 254 n.7, 255 & n.8, 256 & n.9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same).

<sup>64</sup> E.g., *Minn. Citizens Concerned for Life*, 692 F.3d at 871, 873 & n.7, 874, 875 & nn.9–10, 876–77. This is periodic reporting. E.g., *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.).

<sup>65</sup> See *supra* text accompanying notes 8–12. Track 2, non-political-committee reporting includes neither registration, recordkeeping, nor extensive or ongoing reporting. See *infra* text accompanying notes 125–28.

<sup>66</sup> *Citizens United*, 558 U.S. at 339; cf. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) (quoting *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 493 (1985)) (holding that the First Amendment applies to big players and little players); see also *Barland*, 751 F.3d at 823 (quoting *Citizens United*, 558 U.S. at 339); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same). This is *not* a question of fact, notwithstanding *Yamada v. Snipes*, 786 F.3d 1182, 1196 (9th Cir.) (quoting *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1053 (D. Haw. 2012)) (distinguishing Hawaii law from the Wisconsin law struck down in *Barland*, which is a distinction without a difference because both laws trigger Track 1 burdens), *cert. denied*, 136 S. Ct. 569 (2015); *id.* at 1199 n.8 (citing *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013–14 (9th Cir. 2010)) (disagreeing that such burdens are onerous “as a general matter,” which is incorrect because such burdens *are* onerous “as a general matter”).

<sup>67</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life*, 479 U.S. at 253–55 (opinion of Brennan, J.)); see also *Barland*, 751 F.3d at 839 (quoting *Wis. Right to Life*, 551 U.S. at 477 n.9 (opinion of

contributions received.<sup>68</sup> Thus, Track 1 burdens that state law imposes are “onerous,”<sup>69</sup> even without limits or source bans.<sup>70</sup>

To trigger Track 1 burdens, law need not trigger all forms of registration, recordkeeping, and reporting burdens. Even when law does not expressly require recordkeeping, one must undertake recordkeeping to comply with reporting requirements.<sup>71</sup> And law triggering registration and recordkeeping with extensive or ongoing reporting, but not both, still requires Track 1 analysis.<sup>72</sup>

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Roberts, C.J.). Many organizations would rather forgo their speech than bear such burdens. *See infra* text accompanying notes 129–34.

<sup>68</sup> *See, e.g., Citizens United*, 558 U.S. at 338 (mentioning the Track 1 burdens of registration, recordkeeping, and extensive and ongoing reporting, but not limits or source bans on contributions received); *Buckley*, 424 U.S. at 63 (same); *Mass. Citizens for Life*, 479 U.S. at 266 (O’Connor, J., concurring) (focusing on the registration burden, or “organizational restraints”); *cf. Yamada*, 786 F.3d at 1196 (holding that neither limits nor source bans on contributions received change the analysis).

This supersedes *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 791 (9th Cir. 2006). *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 597 (8th Cir. 2013) (understanding this point). Nevertheless, *Yamada* elsewhere relies on *Alaska Right to Life Yamada*, 786 F.3d at 1196.

<sup>69</sup> *Coal. for Secular Gov’t v. Williams*, 815 F.3d 1267, 1280 (10th Cir.), *cert. denied*, 85 U.S.L.W. 3143 (2016); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (quoting *Citizens United*, 558 U.S. at 339).

<sup>70</sup> *See, e.g., Coal. for Secular Gov’t*, 815 F.3d at 1270–72 (describing state law without limits or source bans on contributions received); *Barland*, 751 F.3d at 825, 839–40, 844–46 (same); *Minn. Citizens Concerned for Life*, 692 F.3d at 868–70 (same); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 672–73 (10th Cir. 2010) (same). These opinions do not mention source bans under 52 U.S.C. § 30118(a), (b)(2) (Supp. II 2015) (national banks/corporations), or 52 U.S.C. § 30121 (Supp. II 2015) (foreign nationals).

All political committees, including non-federal political committees, must comply with source bans on contributions received, except for contributions received from non-foreign nationals for only independent spending for political speech. *Compare, e.g., Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 537–39 (5th Cir. 2013) (addressing a source ban), *with Bluman v. FEC*, 800 F. Supp. 2d 281, 286–89 (D.D.C. 2011) (addressing foreign nationals), *aff’d*, 132 S. Ct. 1087 (2012) (mem.). A Supreme Court affirmance without opinion of a three-judge-district-court judgment affirms only the judgment, not the reasoning. *Fusari v. Steinberg*, 419 U.S. 379, 391 & n.\* (1975) (Burger, C.J., concurring); *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (adopting *Fusari*).

<sup>71</sup> *See, e.g., Justice v. Hosemann*, 771 F.3d 285, 288–89 (5th Cir. 2014) (addressing law with extensive and ongoing reporting burdens yet not recordkeeping burdens), *cert. denied*, 136 S. Ct. 1514 (2016). Other recent Fifth Circuit appeals are distinguishable, because organizations *accept* being political committees, *see Joint Heirs Fellowship Church v. Akin*, 629 F. App’x 627, 630 (5th Cir. 2015) (“The churches did not appeal the district court’s determination that they would be deemed a political committee or that the statutory requirements that thereby apply are constitutional.”), and *then* challenge particular Track 1 burdens one-by-one, *see Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 418–19 (5th Cir. 2014) (addressing such a challenge), as others have. *Let’s Help Fla. v. McCrary*, 621 F.2d 195, 197–98 (5th Cir. 1980), *aff’d sub nom. Firestone v. Let’s Help Fla.*, 454 U.S. 1130 (1982) (mem.); *see infra* text accompanying notes 236–37.

<sup>72</sup> *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (addressing extensive but not ongoing reporting). Delaware electioneering-communication

That organizations are “capable” of complying with law—including “complicated and burdensome” law—does not make the law constitutional.<sup>73</sup>

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law uses the phrase “electioneering communication,” so it initially sounds like Track 2 law, *see supra* text accompanying note 10, yet it “sweeps far broader than” and “bears little resemblance to the federal [Track 2] disclosure requirements that [the Supreme] Court has considered.” *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (denial of certiorari). This Delaware law is *not* Track 2 law. Instead, it triggers Track 1, political-committee-like burdens: registration (including treasurer designation), DEL. CODE ANN. tit. 15, § 8031(a)(1) (LEXIS through 80 Del. Laws, ch. 427) (citing *id.* § 8005(1)), recordkeeping, *id.* § 8031(f), and extensive but not ongoing reporting, *id.* § 8031(a)(2)-(5), (b); *see also Del. Strong Families*, 136 S. Ct. at 2376 (Thomas, J., dissenting) (discussing § 8031(a)). Nevertheless, “[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987)). In the challenge to this law, the parties addressed it as Track 2 law, not Track 1 law, and the court did as well. *See Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 312–13 n.10 (3d Cir. 2015) (addressing this challenge), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal). However, Track 1 burdens are greater than Track 2 requirements, so Track 1 analysis is more stringent than Track 2 analysis. *See Mass. Citizens for Life*, 479 U.S. at 262 (contrasting Track 1 and Track 2); *Buckley*, 424 U.S. at 63–64 (same). 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.

<sup>73</sup> *Minn. Citizens Concerned for Life*, 692 F.3d at 874; *see Coal. for Secular Gov’t*, 815 F.3d at 1279 (striking down law triggering Track 1 burdens for an organization even though the organization “is better prepared to comply” than another organization). *But see, e.g., Justice*, 771 F.3d at 300 (quoting *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1250 (11th Cir. 2013)) (considering capability and contradicting *Buckley*, *Massachusetts Citizens for Life*, *Wisconsin Right to Life*, and *Citizens United*, *supra* text accompanying notes 3–12, 60–70; *infra* text accompanying notes 74–86, 131, by incorrectly finding that bearing Track 1 burdens is “what a prudent person or group would do in these circumstances”); *State v. Green Mountain Future*, 2013 VT 87, ¶ 37, 194 Vt. 625, 86 A.3d 981 (following *Worley*). Government’s helping organizations comply with law triggering Track 1 burdens does not save “an overly burdensome regulatory framework.” *Coal. for Secular Gov’t*, 815 F.3d at 1279.

Sometimes wealthy organizations do not object to Track 1 burdens, *see Barland*, 751 F.3d at 827 (describing two other challenges), because they can afford to bear them. Many other organizations cannot afford to bear them. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life*, 479 U.S. at 253–55 (opinion of Brennan, J.)) (recognizing that political committees “impose well-documented and onerous burdens, particularly on small nonprofits”); *cf. Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (quoting *Majors v. Abell*, 361 F.3d 349, 357–58 (7th Cir. 2004) (Easterbrook, J., *dubitante*)) (addressing Track 2 law).

Indeed, where people stand on this issue may depend on where they sit. 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. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring). Those who can *benefit* from Track 1 law may quite naturally *not* be thoroughly familiar with constitutional law with which one can *challenge* Track 1 law. *Cf. infra* notes 106, 154, 156 (citing opinions overlooking such constitutional law or treating it as an afterthought). Who can benefit? Those who:

### III. BUCKLEY: THE FIRST INQUIRY

Law need not ban or otherwise limit political speech to be unconstitutional.<sup>74</sup> Although “burdens” and “bans” differ, pre- and post-*Citizens United*, “the ‘distinction between laws burdening and laws banning speech is but a matter of degree’ and . . . the ‘Government’s content-based’<sup>75</sup> burdens must satisfy the same rigorous scrutiny as its content-based bans.”<sup>76</sup> Lawmakers may no more silence unwanted speech

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- professionally advocate or defend such law reaching beyond Track 1 boundaries, *see infra* Part V;
  - hold public office and avoid criticism when such law chills political speech;
  - work for government and whose livelihoods depend to whatever extent on civilly enforcing or criminally prosecuting such law;
  - work in the private sector and whose livelihoods depend to whatever extent on helping people comply with such law, and thereby avoid civil enforcement and criminal prosecution; or
  - engage in political speech themselves, can afford to hire professionals to help them comply with such law, and have less competition in the marketplace of ideas, because others cannot afford such help, *see infra* text accompanying notes 129–37.

Nevertheless, those who engage or seek to engage in political speech themselves and can afford to hire such help can have standing to challenge such laws, *infra* note 130, and they have the same First Amendment rights as others, *see, e.g.*, *Davis v. FEC*, 554 U.S. 724, 741–42 (2008) (addressing a big player, holding that government may not level the playing field, and collecting authorities). *However, for the First Amendment—and the Constitution in general—to fulfill its promise, it must protect not only the big players, but also the little ones. See, e.g., Wis. Right to Life*, 551 U.S. at 477 n.9 (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life*, 479 U.S. at 253–55 (opinion of Brennan, J.)) (addressing a little player and recognizing that political committees “impose well-documented and onerous burdens, particularly on small nonprofits”). After all, big players can often fend for themselves when little ones cannot. *See infra* text accompanying notes 153–57.

<sup>74</sup> *See Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816 & n.5, 2817–18 (2011) (striking down law that does not ban or otherwise limit speech); *Buckley*, 424 U.S. at 63–64, 79–82 (same); *infra* notes 102, 130.

<sup>75</sup> Political-speech law is content based as a matter of law, because it depends “on the communicative content of the” speech. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227, 2230 (2015) (holding that law based on whether speech “is ‘designed to influence the outcome of an election’” “is content based on its face” as a matter of law and calling this “obvious”). Such law is content based “regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Moreover, “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 2230 (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)). In addition, “the fact that a distinction is speaker based” or “event based does not render it content neutral.” *Id.* at 2230–31. *Reed* thereby supersedes the *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 601–02 (8th Cir. 2013), holding that political-speech law is not content based.

<sup>76</sup> The scrutiny level does not affect the result. *See infra* text accompanying notes 236–56.

by burdening its utterance than by censoring its content.”<sup>77</sup> Thus, government “does not alleviate the First Amendment problems” with a speech ban by allowing organizations to speak while triggering Track 1 burdens for them.<sup>78</sup>

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens. With Track 1 burdens in mind,<sup>79</sup> with an understanding that group association enhances effective advocacy, particularly but not only when ideas or subjects are controversial,<sup>80</sup> and to counter as-applied and facial overbreadth,<sup>81</sup> *Buckley* allows government—subject to further inquiry<sup>82</sup>—to trigger Track 1 burdens only for “organizations”<sup>83</sup> that (a) are “under the control of a candidate” or candidates in their capacities as candidates, or (b) have “the major purpose of . . . nominat[ing] or elect[ing] . . . a candidate” or candidates or passing or defeating a ballot measure or ballot measures.<sup>84</sup> Neither

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<sup>77</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (citations omitted). The use of money for political speech is itself political speech. *See, e.g., Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (quoting *Buckley*, 424 U.S. at 39) (holding that using money to support a candidate is speech), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365 (2010); *Buckley*, 424 U.S. at 19 & n.18 (explaining that limiting money limits speech).

<sup>78</sup> *Citizens United*, 558 U.S. at 337 (holding that even if allowing speech by a political committee that an organization *forms or has* allowed the organization itself to speak—“and it does not”—that would “not alleviate the First Amendment problems” with a speech ban).

<sup>79</sup> *See generally id.* at 338 (describing such burdens); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253, 254 & n.7, 255 & n.8, 256 & n.9 (1986) (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same).

<sup>80</sup> *See Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)) (recalling such a holding).

<sup>81</sup> *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014); *see Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262 (addressing as-applied and facial overbreadth). *Buckley* 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. *Buckley*, 424 U.S. at 63, 79 & n.105.

<sup>82</sup> *See supra* notes 3–4.

<sup>83</sup> Government may trigger Track 1 burdens only for organizations. *Buckley*, 424 U.S. at 63, 79. It may not trigger them for an individual, *Volle v. Webster*, 69 F. Supp. 2d 171, 174–77 (D. Me. 1999), or for a husband and wife, *Osterberg v. Peca*, 12 S.W.3d 31, 47, 48 & n.23 (Tex. 2000). Mississippi law, however, triggers Track 1, political-committee-like extensive and ongoing reporting for individuals. *Justice v. Hosemann*, 771 F.3d 285, 289 (5th Cir. 2014) (citing MISS. CODE ANN. §§ 23-17-51(2), 23-17-53(c)) (LEXIS through 2016 Legis. Sess.), *cert. denied*, 136 S. Ct. 1514 (2016). Mississippi also in effect triggers Track 1 recordkeeping necessary for extensive and ongoing reporting for individuals. *See supra* note 71. However, *Justice* does not address these issues. *Justice*, 771 F.3d at 287–300.

<sup>84</sup> *Buckley*, 424 U.S. at 63, 79; *see also McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010); *Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262 (following *Buckley*); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (quoting *Mass. Citizens for Life*, 479 U.S. at 252–53) (applying the test pre-

*FEC v. Wisconsin Right to Life, Inc.* nor *Citizens United* changes this.<sup>85</sup> Nor does *McCutcheon v. FEC*.<sup>86</sup>

The *Buckley* tests go to the tailoring part of constitutional scrutiny,<sup>87</sup> not the government-interest part, which *Buckley* describes

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Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010), to an organization engaging in ballot-measure speech); *accord* Wis. Right to Life, Inc. v. Barland, No. 10-C-0669, at 6–7, 2015 WL 658465 (E.D. Wis. Jan. 30, 2015, as amended Feb. 13, 2015) (declaratory judgment and permanent injunction following *Barland*, 751 F.3d at 844). This is *assuming* it is constitutional to trigger Track 1 burdens based on ballot-measure speech in the first place. *Infra* note 150.

*FEC v. Akins* mentions, yet has no holding on, the major-purpose test. See *FEC v. Akins*, 524 U.S. 11, 26–29 (1998) (discussing the major-purpose test, addressing an FEC rule on another subject, and remanding for the FEC “to develop a more precise rule that may dispose of this case, or at a minimum, will aid the Court in reaching a more informed conclusion”).

Whether organizations “are, by definition, campaign related” is *not* a test for whether government may trigger Track 1 burdens for them. *Buckley*, 424 U.S. at 79. *Contra* N.M. Youth Organized v. Herrera, 611 F.3d 669, 676 (10th Cir. 2010) (quoting *Buckley*, 424 U.S. at 79) (creating an unambiguously-campaign-related test for constitutionality of Track 1 law); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 287–88 (4th Cir. 2008) (quoting *Buckley*, 424 U.S. at 80) (same). Besides, this phrase is vague. How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that an organization is, “by definition, campaign related”? *Buckley*, 424 U.S. at 79; *cf. infra* note 181 (rejecting the unambiguously-campaign-related test under Track 2).

Nevertheless, *Buckley* protects not only organizations “engag[ing] purely in issue discussion,” *Buckley*, 424 U.S. at 79, but also other non-candidate-controlled/non-major-purpose organizations, including those making contributions or engaging in *Buckley* express advocacy, *e.g.*, *Iowa Right to Life*, 717 F.3d at 581; *N.C. Right to Life*, 525 F.3d at 277–78, and even including for-profit organizations. *Minn. Citizens Concerned for Life*, 692 F.3d at 867.

<sup>85</sup> S.C. *Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 720 (D.S.C. 2010).

<sup>86</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459–60 (2014) (addressing disclosure); see *Barland*, 751 F.3d at 840–41 (considering *McCutcheon*). *But see* *Yamada v. Snipes*, 786 F.3d 1182, 1197, 1200 (9th Cir.) (considering *McCutcheon*), *cert. denied*, 136 S. Ct. 569 (2015). Nor does *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666–68 (2015) (addressing a ban on judicial candidates’ directly soliciting campaign contributions).

The Supreme Court has approved no other as-applied-overbreadth or facial-overbreadth test for whether government may trigger Track 1 burdens. *Supra* text accompanying notes 3–4. In political-speech law, when Supreme Court precedent establishes the norm and circuit precedent—such as *Sampson v. Buescher*, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010)—protects additional speakers, courts consider the Supreme Court precedent first. If it does *not* protect speakers, courts *then* consider the circuit precedent. *E.g.*, *Colo. Right to Life*, 498 F.3d at 1147–49. Although *Sampson* overlooks the *Buckley* tests, *New Mexico Youth Organized* and *Colorado Right to Life* do not. See *N.M. Youth Organized*, 611 F.3d at 677–78 (addressing *Buckley*); *Colo. Right to Life*, 498 F.3d at 1153–55 (same). Being the earlier Tenth Circuit panel opinions, *New Mexico Youth Organized* and *Colorado Right to Life* control. See *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996) (establishing when earlier panel opinions control).

<sup>87</sup> *Barland*, 751 F.3d at 841–42; *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); see *Human Life of Wash.*, 624 F.3d at 1008–12 (addressing—under “Tailoring Analysis”—a

elsewhere.<sup>88</sup> Courts “do not [look to a government interest and] truncate this tailoring test at the outset.”<sup>89</sup> Thus, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny.

The major-purpose test applies to state law, both when the entire organization must *be* a political committee<sup>90</sup> or a political-committee-like

*Human Life of Washington*-created “a priority”-“incidentally” test, a watered-down substitute for the major-purpose test); *see also Yamada*, 786 F.3d at 1198–1200 (following *Human Life of Washington* and creating an “a significant participant in [the] electoral process” test for an organization that “may not make political advocacy a priority”).

Similarly, what government may regulate with Track 2 attributions, disclaimers, and non-political-committee reporting, *see supra* text accompanying notes 8–12, goes to the tailoring part of constitutional scrutiny, *see, e.g.,* *Indep. Inst. v. Williams*, 812 F.3d 787, 792–93, 797–98 (10th Cir. 2016) (addressing overbreadth); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 282–85 (4th Cir. 2013) (addressing underinclusiveness), not the government-interest part. *But see, e.g., Human Life of Wash.*, 624 F.3d at 1016–19 (overlooking that under tailoring, *Buckley/Citizens United* reach only independent expenditures/Federal Election Campaign Act electioneering communications, while creating an express-advocacy strawman). *But cf. Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (addressing Track 2 law and stating incorrectly that “the Supreme Court[] treats speech . . . and transparency . . . as equivalents”).

This Track 2 *Buckley/Citizens United* point, *see supra* text accompanying notes 8–12, does *not* apply when government may trigger Track 1 burdens. *Infra* note 149; *cf. Gable v. Patton*, 142 F.3d 940, 944–45 (6th Cir. 1998) (upholding an attribution requirement for a political committee). *But cf. Yamada*, 786 F.3d at 1203 (incorrectly believing the plaintiff asserts this Track 2 point applies if government *may* trigger Track 1, political-committee(-like) burdens). Other attribution/disclaimer points, however, apply both when government *may* trigger Track 1 burdens and when it may *not*. *See, e.g., Barland*, 751 F.3d at 816, 832 (striking down an attribution and disclaimer requirement that applies to both political committees and individuals). *See generally id.* at 815–16 (understanding the difference between attributions and disclaimers).

<sup>88</sup> *Buckley*, 424 U.S. at 66–68.

<sup>89</sup> *McCutcheon*, 134 S. Ct. at 1450 (addressing another tailoring test).

<sup>90</sup> *E.g., N.M. Youth Organized*, 611 F.3d at 677–78. Whether law is an “undue burden,” *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1250 (11th Cir. 2013); *see also Yamada*, 786 F.3d at 1195 (quoting *Worley*, 717 F.3d at 1250), is not the test under constitutional scrutiny, *see, e.g., Worley*, 717 F.3d at 1245 (understanding this point); *see infra* note 246.

*Center for Individual Freedom, Inc. v. Tennant* holds, as a matter of West Virginia statutory law, that an organization is a West Virginia political committee only if its sole purpose is to engage in particular speech; an organization doing anything else is *not* a West Virginia political committee. *Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 678–79 (S.D. W. Va. 2011). So an organization devoting ninety-nine percent of its spending to contributions or independent expenditures properly understood and one percent to charitable activity—and engaging in more than small-scale speech—would not be a West Virginia political committee. *Id.* Attempts to persuade the district court that this makes no sense were unsuccessful. *Id.* The defendants did not appeal this holding, *see Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 279 (4th Cir. 2013) (considering other issues), so the Fourth Circuit opinion does not address law triggering Track 1, political-committee burdens.



organization,<sup>91</sup> and when law requires, or in effect requires, a fund or account that is part of the organization to *be* a political-committee-like fund or account.<sup>92</sup>

Even if the major-purpose test were a narrowing gloss for *federal* law—as some circuit-splitting opinions assert in applying other tests to *state* law<sup>93</sup>—the purpose of the test would be to avoid as-applied and facial overbreadth,<sup>94</sup> so the test would still apply as a constitutional principle, not as a narrowing gloss,<sup>95</sup> to state law.<sup>96</sup>

In holding otherwise, *National Organization for Marriage, Inc. v. McKee* believes almost any such law not banning or otherwise limiting speech requires only “disclosure” or “transparency” and is constitutional post-*Citizens United* pages 366–71/914–16.<sup>97</sup> *Yamada v. Snipes* and

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<sup>91</sup> *Barland*, 751 F.3d at 834. The label is irrelevant. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (en banc); *see also* *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 590 (8th Cir. 2013) (quoting *Minn. Citizens Concerned for Life*, 692 F.3d at 875). Government may not abrogate First Amendment rights through clever drafting or revision, and it “cannot foreclose the exercise of constitutional rights by mere labels.” *NAACP v. Button*, 371 U.S. 415, 429 (1963); *see also* *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) (quoting *Button*, 371 U.S. at 429).

<sup>92</sup> *See, e.g., Barland*, 751 F.3d at 839–40, 842 (addressing such law); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same). Many state laws use no term such as “fund” or “account.” Nevertheless, they trigger Track 1 burdens for the organization but require reporting of only *particular* income and spending. *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015). They do not require reporting *all* income and spending, as federal law does. *Citizens United v. FEC*, 558 U.S. 310, 338 (2010). The effect of such state law is the same as if it required a fund/account for political speech: The organization in effect reports a fund/account for political speech. *See, e.g., Barland*, 751 F.3d at 825, 839–40 (addressing such law); *Minn. Citizens Concerned for Life*, 692 F.3d at 868–72 (same).

<sup>93</sup> *E.g., Vt. Right to Life*, 758 F.3d at 136.

<sup>94</sup> *See supra* text accompanying note 81.

<sup>95</sup> Unlike in federal-court challenges to *federal* law, *e.g., Boumediene v. Bush*, 553 U.S. 723, 732, 787 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001)) (holding that narrowing glosses apply in federal-court challenges to *federal* law only when they are “fairly possible”), narrowing glosses apply in federal court challenges to *state* law only when they are “reasonable and readily apparent,” *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000)).

<sup>96</sup> *See, e.g., Barland*, 751 F.3d at 811, 842 (applying the test); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (applying the test and collecting authorities).

<sup>97</sup> *Citizens United*, 558 U.S. at 366–71, 130 S. Ct. at 914–16; *Nat’l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 41, 56–59 (1st Cir. 2011); *see also* *Nat’l Org. for Marriage, Inc. v. Fla. Sec’y of State*, 477 F. App’x 584, 585 (11th Cir. 2012) (following *McKee*). *McKee* is also followed in *State v. Green Mountain Future*, 2013 VT 87, ¶ 22 n.5, 194 Vt. 625, 86 A.3d 981, and *National Organization for Marriage, Inc. v. Commission on Governmental Ethics and Elections Practices*, 121 A.3d 792, 801 n.10 (Me. 2015).

*Vermont Right to Life Committee, Inc. v. Sorrell* agree.<sup>98</sup> *Center for Individual Freedom v. Madigan*<sup>99</sup> and *Human Life of Washington, Inc. v. Brumsickle*<sup>100</sup>—though less averse than *McKee*, *Yamada*, and *Vermont Right to Life* to restraining government power—also contrast bans and other limits while asserting “disclosure” or “transparency” post-*Citizens United* pages 366–71/914–16.<sup>101</sup>

Notwithstanding *McKee*, *Yamada*, *Vermont Right to Life*, *Madigan*, *Human Life of Washington*, and *Iowa Right to Life Committee, Inc. v. Tooker*,<sup>102</sup> *Citizens United* pages 366–71/914–16 do not apply here, because the reporting they address and support is only Track 2, non-political-committee reporting.<sup>103</sup>

<sup>98</sup> See *Yamada v. Snipes*, 786 F.3d 1182, 1197–98, 1200–01 (9th Cir.) (discussing disclosure, transparency, and information), *cert. denied*, 136 S. Ct. 569 (2015); *Vt. Right to Life*, 758 F.3d at 125 n.5, 132 & n.12, 135–36 (discussing disclosure).

<sup>99</sup> *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012).

<sup>100</sup> *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

<sup>101</sup> *Madigan*, 697 F.3d at 476–77, 482, 484, 488–91, 498; *Human Life of Wash.*, 624 F.3d at 994, 1005–13. *Madigan* and *Human Life of Washington* implicitly contemplate the major-purpose test only when limits and source bans on contributions received are present. *Madigan*, 697 F.3d at 488; *Human Life of Wash.*, 624 F.3d at 1013.

<sup>102</sup> *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 589–91 (8th Cir. 2013). Many such opinions seize on the *Citizens United* statement that “disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ and ‘do not prevent anyone from speaking.’” *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (citations omitted); see also, e.g., *Iowa Right to Life*, 717 F.3d at 591 (purporting to follow *Citizens United*); *infra* text accompanying notes 129–31. See generally *supra* note 2 (defining “disclosure”). But law need not ban or otherwise limit political speech to be unconstitutional. See *supra* text accompanying note 74; *infra* notes 129–31.

Indeed, “First Amendment rights are all too often sacrificed for the sake of transparency in federal and state elections.” *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2376 (2016) (Thomas, J., dissenting) (denial of certiorari). Government’s “interest in transparency does not always trump First Amendment rights.” *Id.*

<sup>103</sup> E.g., *Citizens United*, 558 U.S. at 369 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)) (recalling that such Track 2 “disclosure is a less restrictive alternative to more comprehensive [Track 1] regulations of speech”); *Mass. Citizens for Life*, 479 U.S. at 262 (citing *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam)) (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”); *Indep. Inst. v. Williams*, 812 F.3d 787, 795 & n.9 (10th Cir. 2016); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824, 836–37, 839, 841 (7th Cir. 2014); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 n.9 (8th Cir. 2012) (en banc); see also *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 312–13 n.10 (3d Cir. 2015) (following *Barland* but incorrectly addressing Track 1 law as Track 2 law), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal); *supra* note 72. See *infra* text accompanying notes 125–28.

*Independence Institute* frames this differently by applying the label “disclosure” not to both Track 1 law and Track 2 law, *contra supra* note 2 (defining “disclosure”), but only to Track 2 law, *Indep. Inst.*, 812 F.3d at 795 & n.9. Either way, *Citizens United* pages 366–

Although the major-purpose test does not apply when state law triggers “only [Track 2, non-political-committee] disclosure obligations,”<sup>104</sup> it does apply—even post-*Citizens United* and notwithstanding *Madigan* and *Human Life of Washington*<sup>105</sup>—when state law triggers “[Track 1, political-committee(-like)] disclosure obligations”—meaning one or some combination of the organizational and administrative burdens of registration, recordkeeping, and extensive and ongoing reporting, even without limits or source bans on contributions received.<sup>106</sup> While the Supreme Court has not applied the major-purpose test to state law,<sup>107</sup> it has not accepted such a case either.

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71/914–16 do *not* apply here, because the reporting they address/support is only Track 2, non-political-committee reporting. *Citizens United*, 558 U.S. at 366–71, 130 S. Ct. at 914–16; *Indep. Inst.*, 812 F.3d at 795 & n.9. In other words, the label does not affect the result. Ultimately, the label is irrelevant. *Supra* note 91.

There is a flipside to the mistaken belief that *Citizens United* pages 366–71/914–16, *Citizens United*, 558 U.S. at 366–71, 130 S. Ct. at 914–16, allow government to trigger Track 1 burdens. The flipside is another mistaken belief: that the discussion of Track 1 burdens on *Citizens United* pages 337–40/897–98, *id.* at 337–40, 130 S. Ct. at 897–98; *supra* text accompanying notes 56, 60–70, applies *only* to speech bans and other limits, such as law requiring an organization to *form or have* a separate political committee and let *only* the separate political committee engage in the speech. *E.g.*, *Yamada*, 786 F.3d at 1196 n.7; *Vt. Right to Life*, 758 F.3d at 139. But these *Citizens United* pages apply 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 organization to speak, or when a fund/account that is part of the organization must *be* a political-committee-like fund/account. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014); *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010).

<sup>104</sup> *Madigan*, 697 F.3d at 488.

<sup>105</sup> Again, *Madigan* and *Human Life of Washington* implicitly contemplate the major-purpose test only when limits and source bans on contributions received are present. *Madigan*, 697 F.3d at 488; *Human Life of Wash.*, 624 F.3d at 1013.

<sup>106</sup> *See, e.g., Barland*, 751 F.3d at 839–40, 842 (applying the test to such law); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677–78 (10th Cir. 2010) (same). *But see* *King Street Patriots v. Tex. Democratic Party*, 459 S.W.3d 631, 648–49 (Tex. Ct. App. 2014) (rejecting a facial challenge—not an as-applied challenge—to law triggering Track 1 burdens beyond *Buckley* and *Sampson*), *review granted*, No. 15-0320 (Tex. Sept. 23, 2016); *see also infra* Part V (discussing *Buckley* and *Sampson*).

When courts address the as-applied or facial overbreadth of law triggering Track 1 burdens, the *Buckley* tests should be either the *primary or only* thought, *supra* note 86, not an *afterthought*, as in *Madigan*, 697 F.3d at 486–91. It was an afterthought for the *Madigan* court and the *Madigan* parties, whose briefs together understandably devoted only six pages to this subject. Brief and Short Appendix of Plaintiff-Appellant Center for Individual Freedom at 39–40, *Madigan*, 697 F.3d 464 (No. 11-3693), 2012 WL 248224, at \*39–40; Brief of Defendants-Appellees at 48–50, *Madigan*, 697 F.3d 464 (No. 11-3693); Reply Brief of Center for Individual Freedom at 23–24, *Madigan*, 697 F.3d 464 (No. 11-3693), 2012 WL 1226103, at \*23–24. This is perhaps because some wealthy organizations understandably do not especially (have to) care about expensive Track 1 burdens. *Supra* note 73. Also, “[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987)). Nevertheless, what

Nevertheless, some circuit-splitting opinions hold the major-purpose test does not even apply to state law,<sup>108</sup> replace the major-purpose test with a watered-down version,<sup>109</sup> water it down so that it does not apply to all Track 1 burdens,<sup>110</sup> or otherwise water down the tailoring requirement by articulating it but not applying it to state law.<sup>111</sup>

Were any of these approaches correct, state governments would have more power than the federal government to trigger Track 1

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understandably does not occur to parties can be what courts need before extensively discussing this important circuit-splitting issue. When oral argument raises new issues, or when factors such as word limits prevent courts from having all the information they want or need, courts should ask for supplemental briefing, *see* *Citizens United v. FEC*, 557 U.S. 932 (2009) (mem.) (requesting such briefing); Plaintiffs-Appellants WRTL and WRTL-SPAC's Supplemental Brief at 14–28, *Barland*, 751 F.3d 804 (Nos. 12-2915, 12-3046, 12-3158), 2013 WL 600718, at \*14–28 (providing such briefing), lest mistakes ensue, *see* *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288 n.5 (4th Cir. 2008) (acknowledging a mistake). Regardless of *Madigan's* result, *Madigan* would have done well not to engage in its extensive discussion without the information it needed. Without that information, *McCutcheon v. FEC* counsels against overly relying on decisions “written without the benefit of full briefing or argument on the issue.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014) (discussing another part of *Buckley*).

<sup>107</sup> *Madigan*, 697 F.3d at 488 (citing *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011)).

<sup>108</sup> *E.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1198, 1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

Some parties and courts overlook the *Buckley* major-purpose test, or treat it as an afterthought, when organizations that might lack the *Buckley* major purpose challenge law triggering Track 1 burdens. *See supra* note 106; *infra* notes 154, 156.

<sup>109</sup> *See Human Life of Wash.*, 624 F.3d at 1011 (creating an “a priority”-“incidentally” test). *Human Life of Washington* holds government may trigger Track 1, political-committee(-like) burdens for organizations that have “‘a’ major purpose of political advocacy,” but equates this with “a ‘primary’ purpose of political activity.” *Id.* By this, *Human Life of Washington* means organizations that “make political advocacy a priority,” yet not organizations “that only incidentally engage in such advocacy.” *Id.*; *see also Yamada*, 786 F.3d at 1198–1200 (following *Human Life of Washington*). The *Human Life of Washington*-created “a priority”-“incidentally” test is unconstitutionally vague for two reasons: It is based on “political advocacy,” *Human Life of Wash.*, 624 F.3d at 1011, so it is vague under *Buckley v. Valeo*, 424 U.S. 1, 42–43 (1976) (per curiam), and the boundary between “a priority” and “incidentally” is unclear. Another watered-down version—*Utter v. Building Industrial Association of Washington v. Washington's* “‘a’ primary purpose test”—is also vague. *Utter v. Bldg. Indus. Ass'n of Wash. v. Wash.*, 341 P.3d 953, 965–67 (Wash.) (equating “primary” with “major,” which is incorrect, because what is “primary” can be the plurality rather than the majority), *cert. denied*, 136 S. Ct. 79 (2015). Yet another watered-down version—*Yamada's* “a significant participant in [the] electoral process” test for an organization that “may not make political advocacy a priority”—is also vague. *Yamada*, 786 F.3d at 1200. For another watered-down version—a we'll-know-it-when-we-see-it version—*see infra* note 144.

<sup>110</sup> *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 593–94 (8th Cir. 2013) (not applying the major-purpose test to registration).

<sup>111</sup> *See Madigan*, 697 F.3d at 477–78, 490–91 (articulating the tailoring requirement but applying no tailoring analysis).

burdens. But political speech needs protection from both federal and state governments,<sup>112</sup> and *McDonald v. City of Chicago* rejects “watered-down” standards for state governments under the Bill of Rights.<sup>113</sup> “States have no greater power” than the federal government to “restrain . . . [First Amendment] freedoms.”<sup>114</sup> Thus, the First Amendment limits when either state or federal government may trigger Track 1 burdens.

#### IV. REGISTRATION

Letting organizations terminate Track 1 burdens by deregistering solves nothing when law triggering them is unconstitutional in the first place.<sup>115</sup> Such law is still “onerous” under Supreme Court case law.<sup>116</sup>

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<sup>112</sup> See *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (addressing state law); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778–79 (1978) (same). Supreme Court opinions on the First Amendment apply to state law even when state-government officials disagree with them. See *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 1307, 1308 (2012) (mem.) (Ginsburg, J., concurring) (recalling that “lower courts are bound to follow [the Supreme] Court’s decision[s] until they are withdrawn or modified”).

<sup>113</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 765, 785–86 (2010) (opinion of Alito, J.).

<sup>114</sup> *Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985). Besides, the *anti-major-purpose-test* point about *Citizens United* pages 366–71/914–16, *Citizens United v. FEC*, 558 U.S. 310, 366–71, 130 S. Ct. 876, 914–16 (2010), pertains not only when the major-purpose test applies to *state* law but also when it applies to *federal* law, *supra* text accompanying notes 97–102. So if the *anti-major-purpose-test* opinions were right about *Citizens United* pages 366–71/914–16, *Citizens United*, 558 U.S. at 366–71, 130 S. Ct. at 914–16, then the major-purpose test also would not apply to federal law. But it *does* apply to federal law. *Supra* text accompanying notes 84–86.

<sup>115</sup> See *Iowa Right to Life*, 717 F.3d at 599–601 (addressing such law). *But see, e.g., Yamada v. Snipes*, 786 F.3d 1182, 1199 (9th Cir.) (holding otherwise), *cert. denied*, 136 S. Ct. 569 (2015). *Yamada* compares registration thresholds to determine whether Hawaii law is constitutional and notes that an organization can terminate its Track 1 registration when it “reduces” its political speech to below the registration threshold. *Id.* at 1199–1200 & n.9. How nice. Just reduce your speech, *Yamada* says. *Id.* *Yamada* thereby contradicts Supreme Court case law, because “[i]t is no answer to say” that organizations can just “chang[e] what they say” to avoid law triggering “onerous” Track 1 burdens. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448–49 (2014) (addressing an aggregate-contribution limit and holding that “[i]t is no answer to say that the individual can simply contribute less money to more people”); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (addressing a Federal Election Campaign Act electioneering-communication ban and “disagree[ing] with the dissent’s view that [organizations] can still speak by changing what they say to avoid mentioning candidates”); *supra* text accompanying notes 66–70 (“onerous”).

That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says “I disagree with the draft,” *cf. Cohen v. California*, 403 U.S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, *cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Such notions run afoul of “the fundamental rule of protection under the First Amendment, that [speakers have] the autonomy to choose the

*Iowa Right to Life* even holds that registration is not a Track 1 burden to which the major-purpose test necessarily applies.<sup>117</sup> This splits from *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>118</sup> plus all circuits applying the major-purpose test to state law.<sup>119</sup>

Even circuits applying tests other than the major-purpose test to state law triggering Track 1 burdens<sup>120</sup>—and even the superseded circuit opinion articulating the tailoring requirement but applying no tailoring analysis to law triggering Track 1 burdens<sup>121</sup>—apply their tests to registration.<sup>122</sup>

*Iowa Right to Life* believes *Citizens United* page 369/915 “uphold[s] a registration requirement.”<sup>123</sup> It does not.<sup>124</sup>

Moreover, the reporting that *Citizens United* pages 366–71/914–16 address and support is only Track 2, non-political-committee

content of [their] own message.” *Hurley v. Irish-Am[.] Gay, Lesbian [& Bisexual Group of Boston, Inc.]*, 515 U.S. 557, 573 (1995).

*Wis. Right to Life*, 551 U.S. at 477 n.9 (opinion of Roberts, C.J.). “Government may not penalize [them] for ‘robustly exercising’ [their] First Amendment rights.” *McCutcheon*, 134 S. Ct. at 1449 (brackets altered) (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

<sup>116</sup> *Supra* text accompanying notes 62–70.

<sup>117</sup> *Iowa Right to Life*, 717 F.3d at 593–94. *Contra Citizens United*, 558 U.S. at 338 (describing registration as a Track 1 burden); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253 (1986) (opinion of Brennan, J.) (same); *Buckley v. Valeo*, 424 U.S. 1, 63 (1976) (per curiam) (same).

<sup>118</sup> *Buckley*, 424 U.S. at 63, 79; *Mass. Citizens for Life*, 479 U.S. at 252 & n.6, 262; see also *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66.

<sup>119</sup> *E.g.*, *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 839–40, 842 (7th Cir. 2014); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 672–73, 677–78 (10th Cir. 2010); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 868–69, 869 n.3, 871, 873 & n.8 (8th Cir. 2012) (en banc) (discussing registration); *id.* at 872 (major-purpose test); *id.* at 877 (calling registration statute “most likely unconstitutional”).

<sup>120</sup> See, e.g., *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137–39 (2d Cir. 2014) (applying a weak tailoring analysis without the major-purpose test), *cert. denied*, 135 S. Ct. 949 (2015); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1011 (9th Cir. 2010) (“a priority”-“incidentally” test); see also *Yamada v. Snipes*, 786 F.3d 1182, 1198–1200 (9th Cir.) (following *Human Life of Washington* and creating an “a significant participant in [the] electoral process” test for an organization that “may not make political advocacy a priority”), *cert. denied*, 136 S. Ct. 569 (2015).

<sup>121</sup> See *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 477–78, 490–91 (7th Cir. 2012) (articulating the tailoring requirement but applying no tailoring analysis), *superseded by Barland*, 751 F.3d at 839.

<sup>122</sup> *E.g.*, *id.* at 486; *Yamada*, 786 F.3d at 1186, 1194–95; *Vt. Right to Life*, 758 F.3d at 137.

<sup>123</sup> *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 593 (8th Cir. 2013) (citing *Citizens United v. FEC*, 558 U.S. 310, 369 (2010)).

<sup>124</sup> See *Citizens United*, 558 U.S. at 366–71 (addressing no registration requirement).

reporting.<sup>125</sup> Track 2 reporting, as upheld for particular speech in *Buckley* and *Citizens United*,<sup>126</sup> includes neither registration, recordkeeping, nor extensive or ongoing reporting: Track 2 reporting occurs only for reporting periods when the particular speech occurs,<sup>127</sup> and the reports are less burdensome than extensive or ongoing reporting.<sup>128</sup>

Even when Track 2, non-political-committee reporting requirements “do not prevent anyone from speaking,”<sup>129</sup> Track 1 burdens are still onerous, especially—but not only<sup>130</sup>—when organizations reasonably

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<sup>125</sup> *Supra* text accompanying note 103. One appellate panel missed this explanation in the briefing. *Nat'l Org. for Marriage, Inc. v. Fla. Sec'y of State*, 477 F. App'x 584, 585 & n.2 (11th Cir. 2012).

<sup>126</sup> *See supra* text accompanying notes 8–12 (describing Track 2 attributions, disclaimers, and non-political-committee reporting); *cf. supra* text accompanying notes 60–70 (describing Track 1 burdens).

<sup>127</sup> This is what “one-time” and “event-driven” mean. *E.g.*, *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824, 836, 841 (7th Cir. 2014). 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 FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (describing Track 2, non-political-committee reporting); *Buckley v. Valeo*, 424 U.S. 1, 63–64 (1976) (*per curiam*) (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).

<sup>128</sup> *See, e.g., Mass. Citizens for Life*, 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) (Supp. II 2015) (same); *see also supra* text accompanying notes 60–70 (describing Track 1 burdens).

<sup>129</sup> *Citizens United*, 558 U.S. at 366 (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)); *supra* note 102.

<sup>130</sup> *Supra* text accompanying notes 66–70, 73. *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1038 (D. Haw. 2012), *aff'd in part and rev'd in part on other grounds sub nom. Yamada v. Snipes*, 786 F.3d 1182, 1187–1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015), holds that the plaintiff challenging law triggering Track 1 burdens has standing, not because the law chills its speech, *cf. Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring) (addressing standing), but because it will engage in its speech and comply with the law while seeking an injunction so that compliance is no longer necessary, *see Davis v. FEC*, 554 U.S. 724, 733–35 (2008) (addressing standing). As *Yamada* demonstrates, law triggering Track 1 burdens does not inherently ban or otherwise limit speech. *See Yamada*, 872 F. Supp. 2d at 1038 (understanding this point); *supra* text accompanying notes 57–59. That, however, does not make such law constitutional. *Supra* text accompanying notes 74–77; *supra* note 102. Such law is still unconstitutional when it exceeds First Amendment boundaries for Track 1 law. *Infra* Part V. This is so regardless of whether such law, for example, chills speech (in which case the law *in effect* bans or otherwise limits speech), or whether a speaker will engage in its speech and comply with the law while seeking an injunction so that compliance is no longer necessary (in which case the law does *not* in

conclude that the speech is “simply not worth it.”<sup>131</sup> “And who would blame them?”<sup>132</sup> Such “onerous” law<sup>133</sup> “discourages” organizations, especially “small” ones “with limited resources, from engaging in protected political speech.”<sup>134</sup>

Such law, however, often does *not* discourage the well-heeled few from engaging in political speech triggering Track 1 burdens, because they can afford to hire professionals to help them comply with the law.<sup>135</sup>

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<sup>136</sup> 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,<sup>137</sup> big players have no right—none—to political-speech law protecting them at the expense of little players.

Thus, the First Amendment limits when government may trigger Track 1 burdens.

#### V. APPLYING *BUCKLEY* AND *SAMPSON*

Determining whether an organization is “under the control of a[ny] candidate[s]”<sup>138</sup> in their capacities as candidates is straightforward.<sup>139</sup>

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effect ban or otherwise limit speech). In other words, the constitutionality of law triggering Track 1 burdens does *not* turn on whether it bans or otherwise limits speech.

<sup>131</sup> *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.); see *Buckley*, 424 U.S. at 64 (recalling that the Supreme Court has “repeatedly found that compelled disclosure, in itself, can seriously infringe” First Amendment rights); see also *Barland*, 751 F.3d at 840 (quoting *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.)). *SpeechNow.org v. FEC* contradicts *Buckley*, *Massachusetts Citizens for Life*, *Wisconsin Right to Life*, and *Citizens United*, see *supra* text accompanying notes 3–12, 60–70, 74–86, by saying Track 1, political-committee burdens are not that much greater than Track 2, non-political-committee reporting. *SpeechNow.org v. FEC*, 599 F.3d 696, 690–92, 697–98 (D.C. Cir. 2010) (en banc) (making this mistake); see also *Yamada*, 796 F.3d at 1195–96 (following *SpeechNow*); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 558 (4th Cir. 2012) (following *SpeechNow*); *Free Speech v. FEC*, 720 F.3d 788, 797–98 (10th Cir. 2013) (following *Real Truth*).

<sup>132</sup> *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (en banc).

<sup>133</sup> *Id.* at 872–73 (quoting *Citizens United v. FEC*, 558 U.S. 310, 339 (2010)).

<sup>134</sup> *Id.* at 874 (collecting authorities); see also *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 589 (8th Cir. 2013) (quoting *Minn. Citizens Concerned for Life*, 692 F.3d at 874).

<sup>135</sup> *Supra* text accompanying note 55; *supra* note 73.

<sup>136</sup> *Infra* Part V.

<sup>137</sup> *Supra* text accompanying notes 66–67; *supra* note 73.

<sup>138</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).



Determining whether an organization has “the major purpose” under *Buckley* is also straightforward.<sup>140</sup> The test asks what *the* major purpose of the organization is, not whether something is *a* major purpose.<sup>141</sup> And *major* is the root of *majority*, which means more than half.<sup>142</sup> Thus, an organization can have only one major purpose.<sup>143</sup> Constitutional law provides two non-vague methods<sup>144</sup> to determine whether an organization has the *Buckley* major purpose.<sup>145</sup> Method 1 considers how the organization *articulates* its mission, and Method 2 considers how the organization *carries out* its mission. An organization has the *Buckley* major purpose if the organization (1) articulates this in

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<sup>139</sup> See, e.g., *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 838 (7th Cir. 2014) (applying the test). Without the in-their-capacities-as-candidates part of the inquiry, even a candidate’s own household or business may have to be a political committee.

<sup>140</sup> *Buckley*, 424 U.S. at 79.

<sup>141</sup> E.g., *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287–89, 302–04 (4th Cir. 2008). *But see* *Indep. Inst. v. Coffman*, 209 P.3d 1130, 1139–40 (Colo. App. 2008) (rejecting a facial challenge—not an as-applied challenge—to “a major purpose”). *Independence Institute* cites an earlier Colorado appellate opinion for another point, *id.* at 1136, but overlooks its significance on the major-purpose test. See *All. for Colo.’s Families v. Gilbert*, 172 P.3d 964, 972–73 (Colo. App. 2007) (citing *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154–55 (10th Cir. 2007)) (holding that the *Buckley* major-purpose test applies to state law).

<sup>142</sup> *Majority*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>143</sup> See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986) (opinion of Brennan, J.) (referring to “the major purpose” of an organization and “[i]ts central organizational purpose,” not purposes).

<sup>144</sup> A “we’ll know it when we see it approach,” *N.C. Right to Life*, 525 F.3d at 290, such as the Federal Election Commission’s major-purpose test, see *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556–58 (4th Cir. 2012) (not entirely following *North Carolina Right to Life* as circuit precedent); see also *Free Speech v. FEC*, 720 F.3d 788, 797–98 (10th Cir. 2013) (following *Real Truth* instead of following *Colorado Right to Life* or *New Mexico Youth Organized* as circuit precedent); *Corsi v. Ohio Elections Comm’n*, 2012-Ohio-4831, 981 N.E.2d 919, ¶ 24 (10th Dist.) (following *Real Truth*), is vague. It gives insufficient direction to regulators and speakers, *N.C. Right to Life*, 525 F.3d at 290, leads to burdensome discovery, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 n.5, 469 (2007) (opinion of Roberts, C.J.), and really is “an administrative nightmare,” *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 489 (7th Cir. 2012).

Even if the major-purpose test properly understood were “an administrative nightmare” in any respect, *id.*, that would be “of no moment; ‘the First Amendment does not permit the State to sacrifice speech for efficiency.’” *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2824 (2011) (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). Neither the efficiency, convenience, nor usefulness of law “save[s] it if it is contrary to the Constitution.” *INS v. Chadha*, 462 U.S. 919, 944 (1983). Other values are higher. *Id.* at 959. “With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.” *Id.*

<sup>145</sup> *Buckley*, 424 U.S. at 79.

its organizational documents or in its “public statements”<sup>146</sup> or (2) carries out its mission by devoting the majority of its spending to contributions to,<sup>147</sup> or independent expenditures properly understood for,<sup>148</sup> candidates<sup>149</sup> or ballot measures.<sup>150</sup>

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<sup>146</sup> *Mass. Citizens for Life*, 479 U.S. at 241–42, 252 n.6 (addressing organizational documents); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (addressing public statements). An organization need not use the exact words “the major purpose” to indicate in its organizational documents or in its public statements that it has the *Buckley* major purpose. As with *Buckley* express advocacy, there are no crucial, magic words. *See Buckley*, 424 U.S. at 44 n.52 (defining *Buckley* express advocacy not with crucial, magic words but with words “such as” the examples given).

<sup>147</sup> Contributions include direct and indirect contributions. *Buckley*, 424 U.S. at 24 n.24, 46–47, 78.

<sup>148</sup> That is, non-coordinated *Buckley* express advocacy. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 834, 839, 841–42, 844 (7th Cir. 2014) (major purpose of express advocacy); *see supra* note 9; *infra* text accompanying notes 168–71. *Appeal-to-vote-test analysis is unnecessary/improper. Infra* text accompanying notes 172–92.

It can be, though often it is not, constitutional to trigger Track 1 burdens for an organization engaging in only “independent spending.” *Mass. Citizens for Life*, 479 U.S. at 262. Yet whatever the importance—even the “heightened importance,” *Yamada v. Snipes*, 786 F.3d 1182, 1201 n.11 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015)—of triggering such burdens for organizations engaging in independent spending, it goes to the *government interest* part of constitutional scrutiny. *Id.* at 1196–97; *see id.* at 1200 (addressing the government interest). For such law to be constitutional, it must also survive the *tailoring* part of constitutional scrutiny. *See supra* text accompanying notes 87–89; *infra* text accompanying notes 155–56.

<sup>149</sup> *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013) (quoting *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007)) (addressing the test); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (same); *see N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 & n.6 (4th Cir. 2008) (equating primary with major, which is incorrect, because what is primary can be the plurality rather than the majority). Elsewhere, *Iowa Right to Life* incorrectly implies the test inquires after only “express advocacy,” not contributions. *Iowa Right to Life*, 717 F.3d at 591. This may be because of Iowa’s odd definition including “contribution[s]” in “[e]xpress advocacy.” IOWA CODE § 68A.102(14)(a) (2015); *cf. Buckley*, 424 U.S. at 44 & n.52, 80 (defining express advocacy under the Constitution).

*Massachusetts Citizens for Life* 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.” *Mass. Citizens for Life*, 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. *See Colo. Right to Life*, 498 F.3d at 1152 (quoting *Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262) (holding that *Massachusetts Citizens for Life* suggests “two methods to determine an organization’s ‘major purpose’: (1) examination of the organization’s central organizational purpose; or (2) comparison of the organization’s independent spending with overall spending to determine whether the preponderance of [spending is] for express advocacy or contributions to candidates”); *see also Iowa Right to Life*, 717 F.3d at 584 (following *Colorado Right to Life*); *N.M. Youth Organized*, 611 F.3d at 678 (same).

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Some laws trigger Track 1 burdens for an organization partly based on contributions it receives. However, notwithstanding *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 138 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015), the test for constitutionality does not consider contributions an organization receives. Makes, yes. Receives, no.

Once it is constitutional to trigger Track 1 burdens for an organization, government may—subject to further inquiry, *supra* note 3—require disclosure of all income and spending by the organization, see *Citizens United v. FEC*, 558 U.S. 310, 338 (2010) (describing Track 1 burdens); *Buckley*, 424 U.S. at 63 (same), not just, for example, *Buckley* express advocacy or donations earmarked for it under *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995). *Cf. supra* text accompanying notes 8–12 (addressing Track 2 law, which is different). However, in *determining* constitutionality—*i.e.*, whether government may trigger Track 1 burdens for the organization in the first place—one applies the major-purpose test properly understood.

The *McKee/Committee for Justice and Fairness/Green Mountain Future* express-advocacy/issue-advocacy discussion is a strawman that misses these points. *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 54–55 (1st Cir. 2011); *Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office*, 332 P.3d 94, 104–05 (Ariz. Ct. App. 2014), *petition for review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015); *State v. Green Mountain Future*, 2013 VT 87, ¶ 27, 194 Vt. 625, 86 A.3d 981; *see also* *Inst. v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016) (quoting *McKee*, 649 F.3d at 54–55) (addressing Track 2 law, which is different); *cf. supra* note 12 (addressing an express-advocacy strawman under Track 2, which is different).

<sup>150</sup> *Compare Iowa Right to Life*, 717 F.3d at 584 (quoting *Colo. Right to Life*, 498 F.3d at 1152) (applying the test to organizations speaking about candidates), and *N.M. Youth Organized*, 611 F.3d at 678 (same), with *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (quoting *Mass. Citizens for Life*, 479 U.S. at 252–53) (applying the test pre-*Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), to an organization engaging in ballot-measure speech).

This is *assuming* it is constitutional to trigger Track 1 burdens based on ballot-measure speech in the first place. *E.g.*, *Cal. Pro-Life Council*, 328 F.3d at 1102–04. *But see*, *e.g.*, *Sampson v. Buescher*, 625 F.3d 1247, 1255–61 (10th Cir. 2010) (holding otherwise for small-scale speech). The Supreme Court has not addressed this. *E.g.*, *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 482 (7th Cir. 2012) (not distinguishing Track 1, political-committee(-like) burdens from Track 2, non-political-committee reporting).

An “independent expenditure” for a ballot measure is speech expressly advocating the ballot measure’s passage or defeat which is not coordinated with a candidate. *Cf. supra* note 9 (addressing speech about candidates).

A political-committee(-like) definition triggers Track 1 burdens for organizations doing what the definition contemplates. *See* *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (applying such a definition). However, under Method 2, government may not trigger such burdens for organizations making *neither* contributions *nor* independent expenditures, because the numerator in Method 2 is zero. Such organizations present the easiest case under Method 2, *see N.M. Youth Organized*, 611 F.3d at 678 (addressing such facts), and extensive, speech-discouraging discovery is especially unnecessary/improper, *cf. FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 n.5, 469 (2007) (opinion of Roberts, C.J.) (addressing discovery burdens). Moreover, an organization presents an easy case—yet not the easiest case—under Method 2 when “[i]ts central organizational purpose is issue advocacy, although it occasionally” makes contributions or independent expenditures. *Mass. Citizens for Life*, 479 U.S. at 252 n.6.

Although the major-purpose test<sup>151</sup> standing alone can yield different results for “small group[s]” with the *Buckley* major purpose than for “mega-group[s]” lacking it,<sup>152</sup> the major-purpose test does *not* stand alone. *Sampson v. Buescher* in effect exemplifies this: The next, supplemental step is to hold it is unconstitutional to trigger Track 1 burdens for organizations with the *Buckley* major purpose<sup>153</sup>—*but only small-scale speech*, objectively and precisely defined.<sup>154</sup>

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<sup>151</sup> Which focuses on the organization’s major purpose, *i.e.*, the nature of the speaker, not the speech. *Mass. Citizens for Life*, 479 U.S. at 262 (citing *Buckley*, 424 U.S. at 79).

Meanwhile, Track 2 attributions, disclaimers, and non-political-committee reporting are “based on the communication, not the organization,” *i.e.*, the nature of the speech, not the speaker. *N.C. Right to Life*, 525 F.3d at 290.

A speaker’s status under statutory or regulatory law, such as the Internal Revenue Code or the Internal Revenue Service regulations, does *not* determine whether Track 1 law or Track 2 law, or other political-speech law, survives a challenge under constitutional law. *See* Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304, 308–09 (3d Cir. 2015) (incorrectly addressing Track 1 law as Track 2 law), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal); *supra* note 72; *cf.* *Citizens United*, 558 U.S. at 336–66 (addressing the nature of the speaker and holding that government may not ban or otherwise limit spending for political speech by non-foreign nationals just because speakers are incorporated, or by extension are unions). That would be like the statutory or regulatory tail wagging the constitutional dog.

<sup>152</sup> *Madigan*, 697 F.3d at 489 (quoting *McKee*, 649 F.3d at 59); *see also* *Yamada*, 786 F.3d at 1200 (citing *Madigan*, 697 F.3d at 489–90); *Utter v. Bldg. Indus. Ass’n of Wash.*, 341 P.3d 953, 966 (Wash.) (quoting *Madigan*, 697 F.3d at 489), *cert. denied*, 136 S. Ct. 79 (2015). *Madigan/McKee/Utter* use “perverse” insultingly here. *Madigan*, 697 F.3d at 488–89 (quoting *McKee*, 649 F.3d at 59); *Utter*, 341 P.3d at 966 (same). At best, this is unfortunate. “People can disagree in good faith . . . , but it similarly does more harm than good to question the openness and candor of those on either side of the debate.” Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring).

<sup>153</sup> *See* *Sampson*, 625 F.3d at 1251 (addressing such organizations). Perhaps because the *Sampson* plaintiffs have the *Buckley* major purpose and understandably do not press the point, *Sampson* overlooks the major-purpose test, yet it applies under Tenth Circuit precedent. *See supra* note 86.

<sup>154</sup> *See* *Sampson*, 625 F.3d at 1249, 1261 (addressing such organizations); *see also* *Coal. for Secular Gov’t v. Williams*, 815 F.3d 1267, 1269, 1276–81 (10th Cir.) (addressing an organization engaging in small-scale speech but mistakenly not indicating whether the organization has the *Buckley* major purpose), *cert. denied*, 85 U.S.L.W. 3143 (2016); *Justice v. Hosemann*, 771 F.3d 285, 295 (5th Cir. 2014) (addressing organizations that have the *Buckley* major purpose and understandably do not press the point), *cert. denied*, 136 S. Ct. 1514 (2016); *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1249 (11th Cir. 2013) (same); *cf.* *Wis. Right to Life*, 551 U.S. at 477 n.9 (opinion of Roberts, C.J.) (recognizing that political committees “impose well-documented and onerous burdens, particularly on small nonprofits”); *Yamada*, 786 F.3d at 1200 (creating an “a significant participant in [the] electoral process” test for an organization that “may not make political advocacy a priority”); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 592, 596 (8th Cir. 2013) (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (en banc)) (addressing “smaller businesses and associations”). *But see* *Corsi v. Ohio Elections Comm’n*, 2012-Ohio-4831, 981 N.E.2d 919, 927, ¶ 22 (10th Dist.) (rejecting a *Sampson* contention).

Unlike the *Sampson*, *Worley*, and *Justice* plaintiffs, the *Coalition for Secular Government* plaintiff once contended it may lack the *Buckley* major purpose. It did so in the district court, yet not in the court of appeals. Compare, e.g., Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 11, *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176 (D. Colo. 2014) (No. 12-cv-01708-JLK) (stating that "CSG believes, based on the outcome of this case, that it may be in a position where it does not have 'the major purpose' of [nominating or electing candidates or passing or defeating] ballot measures because it does not [make contributions or devote] the preponderance of its [spending to] express advocacy"), <http://www.campaignfreedom.org/wp-content/uploads/2012/08/CSG-Mem-in-Support-of-Motion.pdf>, with Plaintiff-Appellee's Answer Brief at 3 n.1, *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (2016) (No. 14-1469) ("It is undisputed that CSG exists for purposes other than ballot issue advocacy."), <http://www.campaignfreedom.org/wp-content/uploads/2015/03/CSG-Answering-Brief-As-Filed.pdf>. This may explain why *Coalition for Secular Government* overlooks *Buckley*. See *Coal. for Secular Gov't*, 815 F.3d at 1276–81 (overlooking *Buckley*).

Meanwhile, applying *Sampson* beyond *Sampson*-sized organizations, but not to "mega-groups," further addresses *Madigan/McKee/Utter*. *Supra* text accompanying note 152; see *Coal. for Secular Gov't*, 815 F.3d at 1276–81 (applying *Sampson* beyond *Sampson*-sized organizations).

Anyway, *Sampson* does not apply to mega-groups with small-scale speech, because they lack the *Buckley* major purpose. If organizations—whatever their size—lack the *Buckley* major purpose, *Sampson* analysis is unnecessary/improper. *Supra* note 86. Thus, only little players—not big players—are likely to bring proper *Sampson* small-scale-speech challenges to law triggering Track 1 burdens. *Sampson* protects little players. The Supreme Court could, of course, make *Sampson*, rather than *Buckley*, the threshold inquiry. That is, the Supreme Court could first ask whether *non*-candidate-controlled organizations engage in more than small-scale speech and then, if they do, apply the *Buckley* major-purpose test. However, until the Supreme Court does that, *Buckley* is the threshold inquiry. *Id.*

Besides, the *Madigan/McKee/Utter* point about the major-purpose test leading to different results pertains not only to *state* law but also to *federal* law. *Supra* text accompanying note 152. So if these opinions were right in jettisoning the major-purpose test because it leads to different results, then the major-purpose test would not apply to either state or federal law. But it does apply to federal law, and constitutional principles applying to federal political-speech law must also apply to state political-speech law. *Supra* text accompanying notes 84–86, 112–14; see *Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985) ("States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.").

So the solution to the different results to which the major-purpose test leads is *not* to jettison the major-purpose test, as some circuits have done. *Supra* text accompanying notes 97–101, 104–06. Instead, part of the solution to these different results is to keep the major-purpose test and take the *supplemental Sampson* step of holding it is unconstitutional to trigger Track 1 burdens for organizations *with* the *Buckley* major purpose but only small-scale speech. *Supra* text accompanying notes 140–54.

Does this ameliorate all of the criticism of the major-purpose test? No. *Infra* text accompanying notes 159–62. Yet constitutional law is about drawing good lines, not perfect lines. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1669 (2015) (drawing the line between judicial candidates' directly soliciting campaign contributions and judicial candidates' sending thank-you notes).

Anyway, law need not "let[] the perfect become the enemy of the good." *Wallace v. Kato*, 549 U.S. 384, 399 (2007) (Stevens, J., concurring). Imperfect though *Buckley* and *Sampson* are, they present the best—indeed, the only—non-vague *existing* structure protecting organizations from law triggering "onerous," Track 1 burdens. *Supra* text accompanying notes 107–14, 144. *It is incumbent on those who dislike the major-purpose*

Parallel to the *Buckley* tests,<sup>155</sup> this supplemental step goes to the tailoring part of constitutional scrutiny.<sup>156</sup> Again, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny.

Without this supplemental step, even two children who devote the majority of their lemonade-stand proceeds to contributions to, or

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*test to suggest an improvement, as this Article does. Infra* text accompanying notes 159–62. Suggesting that *Citizens United* pages 366–71/914–16, 558 U.S. at 366–71, 130 S. Ct. at 914–16, allow all disclosure in the name of transparency will not do. *Supra* text accompanying notes 97–103. Again, “First Amendment rights are all too often sacrificed for the sake of transparency in federal and state elections.” *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2376 (2016) (Thomas, J., dissenting) (denial of certiorari). Government’s “interest in transparency does not always trump First Amendment rights.” *Id.*

<sup>155</sup> *Supra* text accompanying notes 87–89.

<sup>156</sup> *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032–34 (9th Cir. 2009). *Contra, e.g., Sampson*, 625 F.3d at 1255–61 (holding that this supplemental step goes to the government-interest part when the speaker is an organization with small-scale ballot-measure speech).

In *Sampson*-like fashion, *Canyon Ferry* strikes down law triggering Track 1, political-committee-like burdens, *Canyon Ferry*, 556 F.3d at 1026–27, as applied to an organization engaging in *one-time de-minimis* ballot-measure speech, *id.* at 1033–34. *Instead*, however, the holding should have been that the organization lacked the *Buckley* major purpose under *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (quoting *Mass. Citizens for Life*, 479 U.S. at 252–53) (*pre*-Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010)), even *if* it is constitutional to trigger such burdens based on ballot-measure speech.

*Canyon Ferry*, 556 F.3d at 1033–34, is not alone in overlooking the *Buckley* major-purpose test when organizations that might *lack* the *Buckley* major purpose challenge law triggering Track 1 burdens. *See Coal. for Secular Gov’t*, 815 F.3d at 1276–81 (overlooking *Buckley*, *see supra* note 154 for additional discussion); *Del. Strong Families*, 793 F.3d at 312–13 n.10 (overlooking *Buckley*, *see supra* note 72 for additional discussion); *Joint Heirs Fellowship Church v. Ashley*, 45 F. Supp. 3d 597, 626–29 (S.D. Tex. 2014) (overlooking *Buckley*, *see supra* note 71 for additional discussion), *aff’d on other grounds sub nom.* *Joint Heirs Fellowship Church v. Akin*, 629 F. App’x 627, 629–32 (5th Cir. 2015); *Comm. for Justice & Fairness v. Ariz. Sec’y of State’s Office*, 332 P.3d 94, 104–05 (Ariz. Ct. App. 2014) (overlooking *Buckley*), *review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015); *cf. supra* note 106 (discussing *Buckley* as an afterthought in another opinion).

Meanwhile, when law triggers Track 1 burdens and organizations do *not* challenge it, *Buckley* and *Sampson* rightly do not arise. *See Joint Heirs*, 629 F. App’x at 630 (“The churches did not appeal the district court’s determination that they would be deemed a political committee or that the statutory requirements that thereby apply are constitutional.”); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 827 (7th Cir. 2014) (describing two other challenges); *Cook v. Tom Brown Ministries*, 385 S.W.3d 592, 600–08 (Tex. Ct. App. 2012) (not challenging such law).

Either way, “[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987)). It does not diminish *Buckley* or *Sampson* when parties or courts overlook *Buckley* or *Sampson*, when parties or courts treat them as an afterthought, or when parties do not challenge applicable law triggering Track 1 burdens. On the contrary, *McCutcheon v. FEC* counsels against overly relying on decisions “written without the benefit of full briefing or argument on the issue.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014) (discussing another part of *Buckley*).

independent expenditures for, candidates or ballot measures would have to bear onerous Track 1 burdens where any contribution or independent expenditure by an organization—no matter how small—triggers Track 1 burdens.<sup>157</sup>

Of course, this supplemental step is unnecessary if an organization lacks the *Buckley* major purpose in the first place.<sup>158</sup>

However, there is still a problem: This supplemental step does not completely address the different results to which the *Buckley* major-purpose test can lead. Even with this supplemental step, an organization that is not controlled by a candidate or candidates in their capacities as candidates could devote a massive amount—albeit less than half—of its spending to contributions or independent expenditures properly understood and avoid bearing Track 1 burdens by avoiding stating, in its organizational documents or public statements, that it has the *Buckley* major purpose.<sup>159</sup> Meanwhile, a small organization that has the *Buckley* major purpose and engages in slightly more than small-scale speech could not avoid bearing Track 1 burdens.<sup>160</sup> One solution to this problem is to supplement the *Buckley* major-purpose test in an additional way on

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<sup>157</sup> *E.g.*, Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 686 (2d Cir. 2013) (addressing a challenge to New York's expansive definition of "political committee"). Saying law reaches only *Buckley* express advocacy, *e.g.*, Klepper v. Christian Coal. of N.Y., 686 N.Y.S.2d 898, 900 (N.Y. App. Div. 1999) (per curiam); *cf.* *Comm. for Justice & Fairness*, 332 P.3d at 101, 103–05 (holding that particular Track 1 law reaches only express advocacy but defining express advocacy incorrectly by reaching beyond *Buckley*); *Indep. Inst. v. Williams*, 812 F.3d 787, 793 n.4 (10th Cir. 2016) (similarly misdefining express advocacy in addressing Track 2 law), is no answer when law unconstitutionally triggers Track 1 burdens.

Nevertheless, after an August 2011 Second Circuit oral argument and after the Second Circuit in April 2013 reversed the district court's October 2010 ripeness-based dismissal of the challenge to New York law triggering Track 1, political-committee burdens, *Walsh*, 714 F.3d at 687–93, *vacating and remanding* Nat'l Org. for Marriage, Inc. v. Walsh, No. 10-CV-751A, 2010 WL 4174664, at \*3–4 (W.D.N.Y. Oct. 25, 2010), the *Walsh* plaintiff dismissed the challenge, so the New York law remains. *Walsh*, Stip. of Dismissal at 1 (W.D.N.Y. June 8, 2013) ("Plaintiff . . . files this stipulation of dismissal . . ."). See *generally* Plaintiffs-Appellants' Third Supplemental Authority Notice at 2 n.2, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014) (No. 12-2904-cv) ("Notwithstanding its previous statements, see [*Walsh*, 714 F.3d at 686], the *Walsh* plaintiff – having switched to in-house counsel in April 2012 . . . now makes . . . candidate contributions."); Defendants-Appellees-Cross-Appellants' Brief at 3, 5–6, *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34 (1st Cir. 2010) (Nos. 10-2000 & 10-2049), 2010 WL 5621624, at \*3, \*5–6, 2010 WL 6188638, at \*3, \*5–6 (explaining that the plaintiff had "stated under oath in its June 25[, 2010,] pleading that . . . it would not run any ad[s] . . . unless the district court declared unconstitutional the Maine laws [it] was challenging . . . , filed its Notice of Appeal on August 20, 2010, and . . . although it had not obtained the relief it was seeking, . . . sent postcards to Maine households in late September 2010 that differed from the ad[s] it submitted as trial evidence and on which [it] based its as-applied claims.").

<sup>158</sup> *Supra* text accompanying note 153.

<sup>159</sup> *Supra* text accompanying note 84.

<sup>160</sup> *Supra* text accompanying note 152.

the opposite end of the spectrum from the small-scale-speech supplemental step: hold that an organization making a massive amount—objectively and precisely defined<sup>161</sup>—of contributions or independent expenditures properly understood has the *Buckley* major purpose, without 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 leads.<sup>162</sup>

And while some courts uphold laws triggering Track 1 burdens by citing government’s interest in preventing circumvention of law,<sup>163</sup> that interest can apply only when the challenged law is valid in the first place.<sup>164</sup> Government’s interest in preventing circumvention of valid law neither saves otherwise invalid law nor allows government to prevent circumvention of valid with invalid law,<sup>165</sup> because “there can be no freestanding anti-circumvention interest.”<sup>166</sup>

The First Amendment limits when government may trigger Track 1 burdens. Without the *Buckley* and *Sampson* principles, law triggering Track 1 burdens reaches organizations that in no constitutional way are

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<sup>161</sup> The \$50,000 in past contributions in an election cycle in *Yamada* were not massive. *Cf. Yamada v. Snipes*, 786 F.3d 1182, 1186, 1199, 1204, 1206 n.18, 1207 (9th Cir.) (incorrectly finding that an organization wanted to make contributions *after* a contribution ban applied and the court upheld the ban, and incorrectly considering such no-longer-desired contributions in determining whether government may trigger Track 1, political-committee-like burdens for the organization), *cert. denied*, 136 S. Ct. 569 (2015).

<sup>162</sup> In *McKee*, 649 F.3d at 49, neither the parties nor the court asserted that an organization making \$1.8 million in contributions in an election cycle has the *Buckley* major purpose. Again, *McCutcheon v. FEC* counsels against overly relying on decisions “written without the benefit of full briefing or argument on the issue.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014).

<sup>163</sup> *E.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 140 n.20 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

<sup>164</sup> *Yamada*, 786 F.3d at 1200 (referring to “the circumvention of valid campaign finance laws”).

<sup>165</sup> *McCutcheon*, 134 S. Ct. at 1452–53, 1452 n.7, 1454–59.

<sup>166</sup> *Republican Party of N.M. v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013); *accord Landell v. Sorrell*, 406 F.3d 159, 169 (2d Cir. 2005) (Walker, C.J., dissenting) (citing *McConnell v. FEC*, 540 U.S. 93, 161 (2003)) (“anti-circumvention is not an independent state interest”), *rev’d on other grounds sub nom.* *Randall v. Sorrell*, 548 U.S. 230, 246–62 (2006). That “speakers find ways to circumvent campaign finance law” does not allow anyone to prevent circumvention with unconstitutional law. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (citing *McConnell*, 540 U.S. at 176–77). In other words: On the one hand, when law *is* constitutional, one may circumvent it legally yet not illegally. That is the difference between avoiding taxes, which is legal, and evading taxes, which is illegal. *Compare Tax Avoidance*, BLACK’S LAW DICTIONARY (10th ed. 2014), *with Tax Evasion*, BLACK’S LAW DICTIONARY (10th ed. 2014). On the other hand, when law is unconstitutional, and enforcement/prosecution of it is enjoined, one may freely circumvent it.



political committees, political-committee-like organizations, or organizations with political-committee-like funds or accounts.<sup>167</sup>

## VI. THE APPEAL-TO-VOTE TEST

Under constitutional law, express advocacy—including independent expenditure—means *Buckley* express advocacy,<sup>168</sup> 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.’”<sup>169</sup> To be *Buckley* express advocacy, speech need not include the specific *Buckley* words. Synonyms suffice. That is what “such as” means.<sup>170</sup> Nevertheless, *Buckley* express advocacy requires “explicit words of advocacy.”<sup>171</sup>

Under constitutional law, the *Wisconsin Right to Life* “‘appeal to vote’ test”—once known as “the functional equivalent of express advocacy”<sup>172</sup>—cannot be a form of express advocacy. Rather, “as . . . explained in” and “consistent with the lead opinion in” *Wisconsin Right to Life*,<sup>173</sup> the appeal-to-vote test reached beyond *Buckley*’s words and synonyms for them.<sup>174</sup> It applied when there were no explicit words of

<sup>167</sup> *Supra* text accompanying notes 60, 157. These stand in contrast to other organizations. See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) (addressing an organization that does not object to *being* a political committee).

<sup>168</sup> *Supra* notes 9, 150.

<sup>169</sup> *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976) (per curiam); see *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1102, 1103 n.18, 1104 (9th Cir. 2003) (addressing “express ballot-measure advocacy”).

<sup>170</sup> *Buckley*, 424 U.S. at 44 n.52; *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 730–31 (Wis. 1999).

<sup>171</sup> *Buckley*, 424 U.S. at 43; *Wis. Mfrs. & Commerce*, 597 N.W.2d at 737 (quoting *Buckley*, 424 U.S. at 43); accord *id.* at 730–31 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249–50 (1986); *Buckley*, 424 U.S. at 43–44 & n.52, 80 & n.108).

<sup>172</sup> *Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.)). *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) (quoting *Citizens United*, 558 U.S. at 335) (declaratory judgment and permanent injunction following *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 844 (7th Cir. 2014)).

<sup>173</sup> *Barland*, 751 F.3d at 834, 838; see *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 193 (Wis. 2015) (addressing the “functional equivalent, as . . . defined in” *Wisconsin Right to Life*), cert. denied, 85 U.S.L.W. 3147 (2016).

<sup>174</sup> *Barland*, 751 F.3d at 820. Thus, *Wisconsin Right to Life* asked not whether speech was “express advocacy” but whether it was “the functional equivalent of express advocacy.” *Wis. Right to Life*, 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.).

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.<sup>175</sup> This test applied only to Federal Election Campaign Act electioneering communications,<sup>176</sup> which by definition are not express advocacy, because they are not expenditures or independent expenditures.<sup>177</sup> Only expenditures/independent expenditures are express advocacy.<sup>178</sup> Indeed, one point of regulating Federal Election Campaign Act electioneering communications was for Track 2 law to reach beyond express advocacy.<sup>179</sup>

Furthermore, after *Citizens United*, the appeal-to-vote test no longer even affects whether government may ban, otherwise limit, or regulate speech.<sup>180</sup> *Citizens United* thereby “eliminated the context in which the appeal-to-vote test has had any significance” under the Constitution.<sup>181</sup>

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<sup>175</sup> *Wis. Right to Life*, 551 U.S. at 469–70 (opinion of Roberts, C.J.) (holding pre-*Citizens United* that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”); *Barland*, 751 F.3d at 820.

<sup>176</sup> *E.g.*, *Wis. Right to Life*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (holding that “this test is only triggered if the speech” is a Federal Election Campaign Act electioneering communication “in the first place”); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008); *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1257–58 (Colo. 2012); *see also Barland*, 751 F.3d at 819–21, 823 (addressing the appeal-to-vote test).

<sup>177</sup> *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 311 (3d Cir. 2015) (quoting 52 U.S.C. § 30104(f)(3)(B)(ii) (Supp. II 2015)), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal). *But see* *Indep. Inst. v. FEC*, 816 F.3d 113, 116 (D.C. Cir. 2016) (citing *Citizens United*, 558 U.S. at 368–69) (implicitly and incorrectly believing that Federal Election Campaign Act electioneering communications can be express advocacy).

<sup>178</sup> *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976) (per curiam).

<sup>179</sup> *McConnell v. FEC*, 540 U.S. 93, 189–94 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66.

<sup>180</sup> *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); *Indep. Inst. v. Williams*, 812 F.3d 787, 793 n.4, 794–95 (10th Cir. 2016) (reviewing *Citizens United*’s Track 2 holding while mistakenly conflating express advocacy and the appeal-to-vote test); *Del. Strong Families*, 793 F.3d at 308 (quoting *Citizens United*, 558 U.S. at 368) (rejecting the plaintiff’s contention that the appeal-to-vote test remains valid post-*Citizens United*); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) (quoting *Citizens United*, 558 U.S. at 369) (agreeing with a plaintiff’s contention that the appeal-to-vote test is invalid post-*Citizens United*), *cert. denied*, 135 S. Ct. 949 (2015).

<sup>181</sup> *Nat’l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 69 (1st Cir. 2011).

*Citizens United* holds the appeal-to-vote test does not prevent regulating speech with Track 2 law. *Citizens United*, 558 U.S. at 368–69. However, if anything is beyond what

government should regulate with Track 2 law, then “genuine issue” speech is. *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.) (addressing a speech ban). Track 2 law regulating genuine-issue speech is not tailored to any government interest in regulating elections, *supra* text accompanying notes 32–37, 87; *cf. supra* note 149 (addressing Track 1 law, which is different), much less “substantial[ly] relat[ed]” to a “‘sufficiently important’ government interest,” *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66) (addressing Track 2 law). Moreover, genuine-issue speech presents an easy case, because it is at the opposite end of the issue-advocacy spectrum from appeal-to-vote speech, once known as “the functional equivalent of express advocacy.” *Id.* at 335 (quoting *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.)). *See generally supra* notes 2, 25 (defining “regulation,” “ban,” and “limit”); *McConnell*, 540 U.S. at 206 n.88 (referring to regulation of genuine-issue speech but meaning a ban).

If genuine-issue speech were the perfect complement of appeal-to-vote speech, then *Citizens United*’s appeal-to-vote-test holding on Track 2 law would similarly foreclose a genuine-issue-speech test. One would be just the flipside of the other: Saying that speech is genuine-issue speech would be the same as saying it is *not* appeal-to-vote speech, and *vice versa*. Then, since the appeal-to-vote test is *not* a boundary between what is and is not regulable with Track 2 law, *Citizens United*, 558 U.S. at 368–69, a genuine-issue-speech test would also not be a boundary.

However, genuine-issue speech is *not* the perfect complement of appeal-to-vote speech. Whatever the appeal-to-vote test may have meant, some speech is neither genuine-issue speech nor appeal-to-vote speech—some speech is in-between. *See Wis. Right to Life*, 551 U.S. at 469–70 (opinion of Roberts, C.J.) (defining the appeal-to-vote test pre-*Citizens United*, and establishing a safe harbor among genuine-issue speech by holding that (1) the “content [of particular ads] is consistent with that of a genuine issue ad” because they “focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter” and neither “mention an election, candidacy, political party, or challenger” nor “take a position on a candidate’s character, qualifications, or fitness for office” without acknowledging that (2) “urg[ing] the public to contact public officials” is unnecessary for speech to be genuine-issue speech); *see also Indep. Inst.*, 812 F.3d at 793 n.5 (quoting *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.)). Therefore, *Citizens United* does not foreclose a genuine-issue-speech test.

Meanwhile, the phrases “unambiguously related to the campaign” and “unambiguously campaign related” in *Buckley*, 424 U.S. at 80–81, are *not* a test for constitutionality of Track 2 law. So whether government may regulate speech, including genuine-issue speech, does *not* turn on whether it is unambiguously campaign related. *Indep. Inst.*, 812 F.3d at 796 (incorrectly rejecting a genuine-issue-speech test after correctly declining to define genuine-issue speech in this way). *Contra* N.M. Youth Organized v. Herrera, 611 F.3d 669, 676 (10th Cir. 2010) (citing *Wis. Right to Life*, 551 U.S. at 476 (opinion of Roberts, C.J.)) (creating in *dictum* (because no Track 2 law was at issue) an unambiguously-campaign-related test for constitutionality of Track 2 law); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 281 (4th Cir. 2008) (quoting *Buckley*, 424 U.S. at 80) (creating an unambiguously-campaign-related test for constitutionality of Track 2 law). “The difficulty of reliably distinguishing between campaign-related speech and non-campaign-related speech is why courts must look only to whether the specific statutory definitions before them are sufficiently tailored to the government’s [compelling or sufficiently important] interests.” *Indep. Inst.*, 812 F.3d at 796. Besides, these phrases are vague. How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech is “unambiguously related to the campaign” or “unambiguously campaign related”? *Buckley*, 424 U.S. at 80–81; *cf. supra* note 84 (rejecting “campaign related” under Track 1).

The word “pejorative” in *Citizens United* would fare no better as a constitutional-law standard even if the word were not dictum. *Citizens United*, 558 U.S. at 320, 368; *see also*

Alternatively, even if *Citizens United* pages 3[68–]69 had appeal-to-vote-test dictum,<sup>182</sup> and the test therefore remained in constitutional law,<sup>183</sup> the test would *still* be unnecessary and improper in the major-purpose test, because it is not a form of express advocacy.<sup>184</sup>

In any event, *Citizens United* pages 368–69 have no appeal-to-vote-test dictum.<sup>185</sup> *Barland* incorrectly concludes that they do by crucially believing *Citizens United* (1) holds, on pages 324–2[6], that *all* the speech at issue—a Federal Election Campaign Act electioneering-communication movie *and Federal Election Campaign Act electioneering-communication ads for it*—is the functional equivalent of express advocacy, i.e., is appeal-to-vote speech,<sup>186</sup> and (2) allows, on pages 3[68–]69, Track 2, non-political-committee reporting of Federal Election Campaign Act electioneering communications even when they are not the functional equivalent of express advocacy, i.e., are not appeal-to-vote speech.<sup>187</sup> Point 2 is correct. If Point 1 were entirely correct, Point 2 would be dictum.<sup>188</sup> But Point 1 is *incorrect*: Only the movie was the functional equivalent of express advocacy, i.e., was appeal-to-vote speech, so Point 2 is not dictum.<sup>189</sup>

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Del. Strong Families v. Denn, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (denial of certiorari) (quoting *Citizens United*, 558 U.S. at 368). How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech is pejorative?

<sup>182</sup> Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 836 (7th Cir. 2014) (saying “the [functional] equivalent of express advocacy,” not the appeal-to-vote test).

<sup>183</sup> *Id.* at 838; State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 192–93, 193 n.23 (Wis. 2015) (holding that the appeal-to-vote test remains valid post-*Citizens United*), *cert. denied*, 85 U.S.L.W. 3147 (2016).

<sup>184</sup> *Supra* text accompanying notes 148, 172. 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.

<sup>185</sup> 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).

<sup>186</sup> *Barland*, 751 F.3d at 823 (discussing *Citizens United*, 558 U.S. at 324–2[6]).

<sup>187</sup> *Id.* at 824–25, 836 (discussing *Citizens United*, 558 U.S. at 3[68–]69).

<sup>188</sup> *Id.* at 836.

<sup>189</sup> *Indep. Inst. v. Williams*, 812 F.3d 787, 794–95, 795 nn.8–9, 798 n.13 (10th Cir. 2016) (recognizing that the *Wisconsin Right to Life* ads were not the functional equivalent of express advocacy, 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) (recognizing that the *Wisconsin Right to Life* ads were not the functional equivalent of express advocacy, 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).

*Barland* bases its narrowing gloss, which includes the appeal-to-vote test, on a false premise about *Elections Board v. Wisconsin Manufacturers and Commerce*. The premise is that *Wisconsin Manufacturers and Commerce* understood Wisconsin law to reach “express advocacy and its functional equivalent.” *Barland*, 751 F.3d at 833 (citing *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 728–31 (Wis. 1999)); *see also* *Yamada v. Snipes*, 786 F.3d 1182, 1189 (9th Cir.) (following *Barland*), *cert. denied*, 136 S. Ct. 569 (2015); *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 192 (Wis. 2015) (same), *cert. denied*, 85 U.S.L.W. 3147 (2016).

However, the Wisconsin Supreme Court decided *Wisconsin Manufacturers and Commerce* in 1999. The “functional equivalent of express advocacy” first arose in Supreme Court case law four years later, *McConnell v. FEC*, 540 U.S. 93, 206 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66, and the Court defined it four years after that, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70, 474 n.7 (2007) (opinion of Roberts, C.J.).

*Barland* cites *Wisconsin Manufacturers and Commerce* here. *Barland*, 751 F.3d at 833 (citing *Wis. Mfrs. & Commerce*, 597 N.W.2d at 728–31). In so doing, *Barland* appears to confuse “such as” in *Buckley*—which *Wisconsin Manufacturers and Commerce*, 597 N.W.2d at 730–31, correctly explains—with the appeal-to-vote test. They are *not* the same. *Supra* text accompanying notes 168–79. The root of the confusion may be that Wisconsin law itself:

- used “functional equivalents” without defining it before it meant the appeal-to-vote test in Supreme Court case law, *Barland*, 751 F.3d at 821–22 (quoting EL BD § 1.28(2) (2001)); and
- carried “functional equivalents” forward afterward, while separately including (an imperfect version of) the appeal-to-vote test. *Id.* at 826 (quoting WIS. ADMIN. CODE GAB § 1.28(3)(a)–(b) (2010)).

Notwithstanding *Barland*, EL BD 1.28(2) could not have understood “functional equivalent” in the *Wisconsin Right to Life* sense of the words, *Barland*, 751 F.3d at 822, because EL BD 1.28 was promulgated in 2001, and *Wisconsin Right to Life* was decided in 2007.

At most, *Wisconsin Manufacturers and Commerce* elsewhere quotes language similar to part of the appeal-to-vote test—language that the Ninth Circuit incorrectly used to expand *Buckley* express advocacy beyond explicit words of advocacy, *Wis. Mfrs. & Commerce*, 597 N.W.2d at 733 (quoting *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987)) (“no other reasonable interpretation but as an exhortation to vote for or against a specific candidate”)—and then provides counterpoints, *see id.* at 733–34 (providing counterpoints). Consistent with the counterpoints, the Ninth Circuit has abandoned this *Furgatch* language and held that express advocacy requires “explicit words of advocacy.” *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (citing *Furgatch*, 807 F.2d at 864).

*Yamada* in effect and incorrectly runs *Furgatch* and the appeal-to-vote test together. *See Yamada*, 786 F.3d at 1189 (making this mistake). However, being the *earlier* Ninth Circuit panel opinion, *California Pro-Life Council* controls. *See* *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (establishing when earlier panel opinions control).

Meanwhile, other courts incorrectly run *Buckley* express advocacy and the appeal-to-vote test together. *Indep. Inst.*, 812 F.3d at 793 n.4 (quoting *Citizens United*, 558 U.S. at 324–25); *Comm. for Justice & Fairness v. Ariz. Sec’y of State’s Office*, 332 P.3d 94, 101, 103–05 (Ariz. Ct. App. 2014), *review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015).

Moreover, under *Wisconsin Right to Life*, the appeal-to-vote test is vague as to speech other than Federal Election Campaign Act electioneering communications.<sup>190</sup> Elsewhere the test “might . . . create an unwieldy standard that would be difficult to apply” and unconstitutionally chill political speech.<sup>191</sup> 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.<sup>192</sup>

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<sup>190</sup> See *Wis. Right to Life*, 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”). Notwithstanding *Yamada*, the *Wisconsin Right to Life* plaintiff presented not a vagueness challenge, *Yamada*, 786 F.3d at 1189, but an as-applied overbreadth challenge, *Wis. Right to Life*, 551 U.S. at 456 (opinion of Roberts, C.J.). Nevertheless, *Wisconsin Right to Life* addresses vagueness. *Id.* at 474 n.7 (opinion of Roberts, C.J.).

<sup>191</sup> *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.)). Please recall that the appeal-to-vote test applied only to Federal Election Campaign Act electioneering communications, *supra* text accompanying note 176, one part of the definition of which is that speech—other than speech about presidential or vice-presidential candidates—must be “targeted to the relevant electorate,” *supra* note 10, meaning it can be received by a certain number of people, *McConnell*, 540 U.S. at 190. When speech is broadcast—which Federal Election Campaign Act electioneering communications are, *supra* note 10—government knows with precision how many people can receive it, because government licenses broadcasters for particular signal strength. Government cannot know this for non-broadcast speech. See *The Electioneering Communications Database*, FED. COMM’NS COMM’N (Feb. 28, 2016), <http://apps.fcc.gov/ecd> (addressing broadcast speech). Hence the Federal Election Campaign Act electioneering-communication definition is vague as to non-broadcast speech.

It may be tempting to resolve this vagueness as to non-broadcast speech by removing the targeted-to-the-relevant-electorate requirement. But then the law would be overbroad, as applied and facially: When spending for political speech is *not* for *Buckley* express advocacy or for speech that is targeted to the relevant *electorate*, Track 2 law regulating the speech is not tailored to any government interest in regulating *elections*, *supra* text accompanying notes 32–37, 87; *cf. supra* note 149 (addressing Track 1 law, which is different), much less “substantial[ly] relat[ed]” to a “‘sufficiently important’ government interest,” *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam)) (addressing Track 2 law).

<sup>192</sup> *Wis. Right to Life*, 551 U.S. at 492–94 (Scalia, J., concurring). *Barland’s* main mistake is believing that government may use the appeal-to-vote test to regulate speech post-*Citizens United*. *Supra* text accompanying notes 186–92. However, in amending Wisconsin law post-*Barland*, the Wisconsin legislature—recognizing that it did not also have to make this mistake—correctly rejected longstanding support of the appeal-to-vote test, *e.g.*, *Barland*, 751 F.3d at 827 (describing two other challenges), and followed the only suggestion to abandon the appeal-to-vote test, *compare* WIS. STAT. § 11.0101(11) (2016) (correctly defining “[e]xpress advocacy” post-*Barland* by deleting references to the appeal-to-vote test from the bill), *with Joint Committees on Campaigns and Elections*, at 650:00–660:30 & 673:10–687:00, WIS. EYE (Oct. 13, 2015, 9:00 AM), <http://www.wiseye.org/video-Archive/Event-Detail/evhdid/10175> (a video recording of the testimony of the author explaining Track 1 law and Track 2 law, including, inter alia, why the appeal-to-vote test is not a form of express advocacy and is unconstitutionally vague).

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?

Multiple responses would be incorrect.

First, *Real Truth About Abortion, Inc. v. FEC* does not address the foregoing reasons that the appeal-to-vote test is vague.<sup>193</sup> *Center for Individual Freedom, Inc. v. Tennant* compounds this error by following *Real Truth*.<sup>194</sup> Neither follows *North Carolina Right to Life, Inc. v. Leake*, which recognizes that the test never applied beyond Federal Election Campaign Act electioneering communications.<sup>195</sup> This *North Carolina Right to Life* holding controls, because it is the earlier Fourth Circuit panel opinion.<sup>196</sup> Saying *North Carolina Right to Life* is different, because it limits the appeal-to-vote test to Federal Election Campaign Act electioneering communications,<sup>197</sup> just misses the point that the test never applied beyond Federal Election Campaign Act electioneering communications.<sup>198</sup>

Second, the appeal-to-vote test was objective.<sup>199</sup> But objective is not the opposite of vague. A test can “be both objective and vague.”<sup>200</sup> For example, a standard asking whether a reasonable person would conclude that speech “‘advocat[es] the election or defeat’ of a candidate” or is “for the purpose of influencing” elections would be both objective and vague.<sup>201</sup> In other words, objective/subjective and clear/vague are independent variables.

Third, even if law enforcers or prosecutors said whether speech has a reasonable interpretation other than as an appeal to vote for or against

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<sup>193</sup> *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 552–55 (4th Cir. 2012); see also *Free Speech v. FEC*, 720 F.3d 788, 795–96 (10th Cir. 2013) (following *Real Truth*); *Yamada*, 786 F.3d at 1191 (following *Free Speech*). This may be because the *Real Truth* parties did not raise the reasons that the appeal-to-vote test is vague. See *Real Truth*, 681 F.3d at 552–55 (addressing other assertions). Again, *McCutcheon v. FEC* counsels against overly relying on decisions “written without the benefit of full briefing or argument on the issue.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014).

<sup>194</sup> See *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 280–81 (4th Cir. 2013) (making this mistake); see also *Yamada*, 786 F.3d at 1191 (following *Tennant*).

<sup>195</sup> *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008).

<sup>196</sup> See *McMellon v. United States*, 387 F.3d 329, 332–34 (4th Cir. 2004) (en banc) (establishing when earlier panel opinions control).

<sup>197</sup> *Tennant*, 706 F.3d at 281.

<sup>198</sup> *E.g.*, *N.C. Right to Life*, 525 F.3d at 282.

<sup>199</sup> *Citizens United v. FEC*, 558 U.S. 310, 324, 335 (2010) (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007) (opinion of Roberts, C.J.)).

<sup>200</sup> *Nat’l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 47 (1st Cir. 2012).

<sup>201</sup> *Buckley v. Valeo*, 424 U.S. 1, 42–43, 77 (1976) (per curiam) (ellipsis omitted); see *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.) (addressing a test that is objective, because it turns on what is reasonable).

a clearly identified candidate,<sup>202</sup> speakers cannot know what future law enforcers or prosecutors will say about other speech, including future materially similar speech.<sup>203</sup>

In any event, the test 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.<sup>204</sup> The test did not include the seven *National Organization for Marriage, Inc. v. Roberts* factors,<sup>205</sup> which help prove the test is vague. How was anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (after the fact) that the only reasonable interpretation of speech is as an appeal to vote for or against a clearly identified candidate just because it (1) takes place just before an election, (2) has a clearly identified candidate, (3) is targeted to the relevant electorate, (4) “state[s] the candidate’s view on the issue” at hand, (5) “laud[s] or condemn[s] the view,” (6) “state[s] whether the

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<sup>202</sup> Nat’l Org. for Marriage, Inc. v. Roberts, 753 F. Supp. 2d 1217, 1220–21 (N.D. Fla. 2010).

<sup>203</sup> See Va. Soc’y for Human Life, Inc. v. FEC, 263 F.3d 379, 388 (4th Cir. 2001) (citing Chamber of Commerce v. FEC, 69 F.3d 600, 603 (D.C. Cir. 1995)) (addressing standing).

“Political speakers . . . can’t rely on [government’s] unofficial expression of intent to refrain from enforcing its [law].” Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 828–29 (7th Cir. 2014). Government’s assurance that it will not enforce, or prosecute violations of, challenged law does not deprive those challenging the law of standing. Citizens for Responsible Gov’t State PAC v. Davidson, 236 F.3d 1174, 1192–93 (10th Cir. 2000); Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383–84 (2d Cir. 2000); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 711 (4th Cir. 1999). Nor does it render their claims unripe. Nat’l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 691 (2d Cir. 2013). Holding otherwise would place “First Amendment rights ‘at the sufferance of’ ” government. *Vt. Right to Life*, 221 F.3d at 383 (quoting *N.C. Right to Life*, 168 F.3d at 711).

Incorrectly denying political-speech law applies also does not negate justiciability. See Wis. Right to Life State PAC v. Barland, 664 F.3d 139, 147 (7th Cir. 2011) (addressing standing). Government need not say such law applies for claims to be justiciable. See *Walsh*, 714 F.3d at 691 & n.8 (addressing ripeness).

Nor do such assurances or such denials deprive those challenging law of irreparable harm. Otherwise, the *Barland* panels, *Citizens for Responsible Government State PAC*, *Vermont Right to Life*, *North Carolina Right to Life*, and *Walsh* would have denied injunctions, because irreparable harm is a prerequisite for both preliminary injunctions, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and permanent injunctions, *United Fuel Gas Co. v. R.R. Comm’n of Ky.*, 278 U.S. 300, 310 (1929). Such assurances or such denials do not diminish, much less eliminate, irreparable harm, because they do not bind government officials. Government officials are free to change their minds, and the law does not require trusting them, especially after *United States v. Stevens* holds “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *United States v. Stevens*, 559 U.S. 460, 480 (2010) (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001)).

<sup>204</sup> *Supra* text accompanying notes 175–76.

<sup>205</sup> *Roberts*, 753 F. Supp. 2d at 1220–21.



candidate is ‘good’ or ‘bad’ for [residents],” and (7) “then exhort[s] [them] to action by telling them to call the candidate”?<sup>206</sup> Factors 1, 2, and 3 extend beyond the Federal Election Campaign Act electioneering-communication definition,<sup>207</sup> and therefore beyond where the test applied.<sup>208</sup> Factors 4, 5, 6, and 7—either individually or taken together—do not mean the only reasonable interpretation of speech is as an appeal to vote for or against the clearly identified candidate.<sup>209</sup>

*Yamada* also helps prove the test is vague. How was anyone to know that someone else would conclude (after the fact) that the *Yamada* newspaper ads<sup>210</sup> were appeal-to-vote speech just because the ads “ran shortly before an election and criticized candidates by name as persons who did not, for example, ‘listen to the people’”?<sup>211</sup> The ads were obviously not broadcast, so they extended beyond Federal Election Campaign Act electioneering communications<sup>212</sup> and therefore beyond where the appeal-to-vote test applied.<sup>213</sup> Besides, even *if* the appeal-to-vote test remained in constitutional law or applied beyond Federal Election Campaign Act electioneering communications, the *Yamada* newspaper ads<sup>214</sup> would *not* have been appeal-to-vote speech, because they were not meaningfully different from the *Wisconsin Right to Life* radio ads,<sup>215</sup> which were not appeal-to-vote speech.<sup>216</sup>

Fourth, saying that *Citizens United* applied the appeal-to-vote test would not acknowledge what follows from *Citizens United*.<sup>217</sup>

Fifth, in applying a *Wisconsin Right to Life* appeal-to-vote-test narrowing gloss to vague law, *McKee* merely replaces vague law with a vague narrowing gloss.<sup>218</sup> In so doing, *McKee* misses the point. The point is not that the “basis for *Citizens United*’s holding . . . had [anything] to

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<sup>206</sup> *Id.*

<sup>207</sup> *Supra* note 10.

<sup>208</sup> *Supra* text accompanying notes 175–76.

<sup>209</sup> *Cf.* *Citizens United v. FEC*, 558 U.S. 310, 324–26 (2010) (addressing the appeal-to-vote test); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007) (opinion of Roberts, C.J.) (same).

<sup>210</sup> *Yamada v. Snipes*, 786 F.3d 1182, 1185–86 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015).

<sup>211</sup> *Id.* at 1203.

<sup>212</sup> *Supra* note 10.

<sup>213</sup> *Supra* text accompanying notes 175–76.

<sup>214</sup> *Yamada*, 786 F.3d at 1203.

<sup>215</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 458, 459 & nn.2–3 (2007) (opinion of Roberts, C.J.).

<sup>216</sup> *Id.* at 469–70 (opinion of Roberts, C.J.).

<sup>217</sup> *Compare* *Citizens United v. FEC*, 558 U.S. 310, 324–26 (2010), *with supra* text accompanying notes 180–81, 190–92.

<sup>218</sup> *See Nat’l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 66–67 (1st Cir. 2011) (making this mistake); *see also Yamada*, 786 F.3d at 1189 (following *McKee*).

do with the appeal-to-vote test or the divide between express and issue advocacy.”<sup>219</sup> Nor is the *Citizens United* holding itself the point. Instead, the point is what follows from the holding.

Notwithstanding *McKee*,<sup>220</sup> the appeal-to-vote test never was a form of express advocacy;<sup>221</sup> the appeal-to-vote test never was a “divide between express and issue advocacy” or a way of “distinguishing between express and issue advocacy.”<sup>222</sup> Because the appeal-to-vote test was not a form of express advocacy, it was also not a factor in determining whether speech is an independent expenditure properly understood,<sup>223</sup> so the appeal-to-vote test had no bearing on the major-purpose test and had no other bearing on whether government may trigger Track 1, political-committee(-like) burdens.<sup>224</sup>

*McKee* further says the appeal-to-vote test was *not* a “constitutional limit on government power.”<sup>225</sup> This misunderstands *Wisconsin Right to Life*, under which the *First Amendment* permitted the challenged law to reach only those Federal Election Campaign Act electioneering communications whose only reasonable interpretation was as an appeal to vote for or against a clearly identified candidate.<sup>226</sup>

Besides, how can *McKee* acknowledge that “*Citizens United* eliminated the context in which the appeal-to-vote test has had any significance” and then say the test was *not* a “constitutional limit on government power”?<sup>227</sup> The test was significant, because it *was* a constitutional limit on government power.<sup>228</sup> That government may regulate issue advocacy in some ways does not mean the test was something other than a “constitutional limit on government power.”<sup>229</sup>

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<sup>219</sup> *McKee*, 649 F.3d at 69; *see also Yamada*, 786 F.3d at 1191 (quoting *McKee*, 649 F.3d at 69).

<sup>220</sup> *McKee*, 649 F.3d at 69 & n.48; *accord* *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551 (4th Cir. 2012); *see also Yamada*, 786 F.3d at 1189 (following *Real Truth*); *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013) (same); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 280–81 (4th Cir. 2013) (same); *Comm. for Justice & Fairness v. Ariz. Sec’y of State’s Office*, 332 P.3d 94, 105 (Ariz. Ct. App. 2014) (same), *review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015).

<sup>221</sup> *Supra* text accompanying notes 173–79.

<sup>222</sup> *Contra McKee*, 649 F.3d at 69 & n.48. Instead, the divide between—and the way of distinguishing—express and issue advocacy remains whether speech expressly advocates. *Supra* text accompanying notes 168–71.

<sup>223</sup> *Supra* notes 9, 150.

<sup>224</sup> *Supra* note 148.

<sup>225</sup> *McKee*, 649 F.3d at 69 n.48.

<sup>226</sup> *Supra* text accompanying note 175–76.

<sup>227</sup> *McKee*, 649 F.3d at 69 & n.48.

<sup>228</sup> *Supra* text accompanying note 175–76.

<sup>229</sup> *Contra McKee*, 649 F.3d at 69 n.48.

In sum: After *Citizens United*, the appeal-to-vote test—once known as the “functional equivalent of express advocacy”<sup>230</sup>—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.<sup>231</sup>

## VII. THE SCRUTINY LEVEL AND THE DEFINITIONS

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens. Law triggering such burdens beyond *Buckley* and *Sampson* is unconstitutional, regardless of the scrutiny level<sup>232</sup> and regardless of whether one assesses political-committee(-like) definitions,<sup>233</sup> or alternatively, the Track 1 burdens themselves.<sup>234</sup> Nevertheless, *strict* scrutiny applies, and the proper challenge is to the *definitions*.<sup>235</sup>

First, when it is constitutional to trigger Track 1 burdens for an organization—i.e., when it is constitutional to make an organization itself *be* a political committee or a political-committee-like organization to speak, or make or in effect make a fund/account that is part of the organization *be* a political-committee-like fund/account to speak—in the first place, and the organization *then* challenges Track 1 disclosure law, substantial-relation *exacting* scrutiny<sup>236</sup> applies.<sup>237</sup>

However, when the challenge is to whether government may trigger Track 1 burdens for an organization itself in the first place, *strict*

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<sup>230</sup> *Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.)).

<sup>231</sup> *Supra* text accompanying notes 180–81, 190–92.

<sup>232</sup> *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014) (understanding this point); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (en banc) (same).

<sup>233</sup> *Infra* text accompanying notes 257–71.

<sup>234</sup> *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 588 (8th Cir. 2013) (stating that a court can “consider each challenged disclosure requirement in isolation”).

<sup>235</sup> *Infra* text accompanying notes 236–71.

<sup>236</sup> This is not closely-drawn exacting scrutiny. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386–88 (2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 16, 25 (1976) (per curiam)).

<sup>237</sup> *Davis v. FEC*, 554 U.S. 724, 744 (2008) (quoting *Buckley*, 424 U.S. at 64). *Vermont Right to Life Committee, Inc. v. Sorrell* does not acknowledge that limits and sources bans on contributions that political committees receive apply only when it is constitutional to make an organization *be* a political committee in the first place. *See Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 393 n.15 (D. Vt. 2012) (making this mistake), *aff’d on other grounds*, 758 F.3d 118, 135–38 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015). Notwithstanding *Vermont Right to Life*, the scrutiny level that applies to limits and source bans on contributions received is no reason not to apply *another* scrutiny level in assessing whether government may trigger Track 1 burdens for the organization in the first place. *Vermont Right to Life* itself, while asserting that closely-drawn exacting scrutiny applies to contribution limits, *id.*, holds that substantial-relation exacting scrutiny applies to law triggering Track 1, political-committee(-like) burdens, *id.* at 396.

scrutiny applies.<sup>238</sup> This is because political-committee or political-committee-like status substantially burdens speech<sup>239</sup> with onerous Track 1 requirements that *Buckley*, *Massachusetts Citizens for Life*, *Wisconsin Right to Life*, and *Citizens United* describe<sup>240</sup> and which extend beyond Track 2, non-political-committee reporting.<sup>241</sup>

In other words, strict scrutiny applies not only when law bans an organization's spending for political speech and allows speech only by a (separate) political committee that the organization *forms or has*,<sup>242</sup> but also when law does *not* ban speech,<sup>243</sup> but instead requires that for an organization to speak (1) the organization itself must *be* a political committee or a political-committee-like organization, or (2) a fund or account that is part of the organization<sup>244</sup> must *be* or must in effect *be* a political-committee-like fund or account.<sup>245</sup> Alternatively, substantial-relation exacting scrutiny<sup>246</sup> applies in these two latter circumstances.<sup>247</sup>

<sup>238</sup> *Infra* text accompanying notes 239–47.

<sup>239</sup> See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)) (applying strict scrutiny to burden, not a ban, on speech in Arizona law); *id.* at 2824 (quoting *Davis*, 554 U.S. at 740) (referring to both a “substantial burden” and a “compelling state interest”). In addressing burdens, not bans, *Arizona Free Enterprise Club's Freedom Club PAC*, 131 S. Ct. at 2817, 2824, and *Davis*, 554 U.S. at 740, rely on *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986), which addresses a speech ban.

<sup>240</sup> *Supra* text accompanying notes 3–12, 60–70, 74–86, 131; see also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (comparing burdens and bans); see quote *supra* note 77.

<sup>241</sup> *Supra* text accompanying notes 63–65, 125–28.

<sup>242</sup> See *Citizens United*, 558 U.S. at 337–40 (applying strict scrutiny to a speech ban and noting the burdens of *forming/having* a political committee that engages in the same speech); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990) (holding a state requirement that an organization *form or have* a separate segregated fund “must be justified by a compelling state interest”), *overruled on other grounds by Citizens United*, 558 U.S. at 365; *Mass. Citizens for Life*, 479 U.S. at 252 (opinion of Brennan, J.) (considering whether a compelling state interest justifies an independent-expenditure ban and noting the burdens of *forming/having* a separate segregated fund that engages in the same speech).

<sup>243</sup> *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 5, 12–15 (1st Cir. 2012) (holding “substantial burdens,” not a ban, on unions’ and an associated organization’s political speech fail strict scrutiny under *Citizens United*, 558 U.S. at 337–40).

*Fortuño* is reconcilable with First Circuit precedent only by incorrectly believing the *McKee* Track 1 burdens are “simple.” *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 56 (1st Cir. 2011); see also *Yamada v. Snipes*, 786 F.3d 1182, 1196 n.7 (9th Cir.) (quoting *McKee*, 649 F.3d at 56), *cert. denied*, 136 S. Ct. 569 (2015); *State v. Green Mountain Future*, 2013 VT 87, ¶ 22 n.5, 194 Vt. 625, 86 A.3d 981 (same).

<sup>244</sup> *E.g.*, *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 868–72 (8th Cir. 2012) (en banc) (describing such a fund/account).

<sup>245</sup> *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007) (applying strict scrutiny to an entire challenge, including a state requirement that organizations themselves be political committees); *Cal. Pro-Life Council, Inc. v. Getman*,

Although the scrutiny level itself does not affect the result, because the tailoring<sup>248</sup> analysis is the same under either scrutiny level,<sup>249</sup> strict scrutiny buttons down the holding more tightly,<sup>250</sup> and post-*Citizens United* circuits applying substantial-relation exacting scrutiny reach circuit-splitting results.<sup>251</sup>

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328 F.3d 1088, 1101 & n.16 (9th Cir. 2003) (applying strict scrutiny pre-*Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010)); see *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (addressing “narrower means” than a state requirement that organizations themselves be political committees).

<sup>246</sup> Which does *not* ask whether law is reasonable, *contra* *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 489 (7th Cir. 2012), poses an “undue burden” on speech, *contra* *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1250 (11th Cir. 2013), or is “unduly burdensome,” *contra* *Yamada*, 786 F.3d at 1195.

<sup>247</sup> *Minn. Citizens Concerned for Life*, 692 F.3d at 875 (explaining that strict scrutiny *should* apply and holding for the plaintiffs under substantial-relation exacting scrutiny); *cf.* *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (citing *Citizens United*, 558 U.S. at 366–67; *Buckley v. Valeo*, 424 U.S. 1, 64–65 (1976) (per curiam)) (denial of certiorari) (asserting that substantial-relation exacting scrutiny applies, perhaps without appreciating that the parties and the court of appeals addressed Track 1 law as Track 2 law); *supra* note 72; see also *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 589–91 (8th Cir. 2013) (following *Minnesota Citizens Concerned for Life*). Substantial-relation “exacting scrutiny is more than a rubber stamp.” *Minn. Citizens Concerned for Life*, 692 F.3d at 876 (citing *Buckley*, 424 U.S. at 64, 66). It “is not a loose form of judicial review.” *Barland*, 751 F.3d at 840. Although not strict scrutiny, it is a “strict test” and a “strict standard.” *Buckley*, 424 U.S. at 66, 75.

*Coalition for Secular Government v. Williams*, 815 F.3d 1267, 1275 (10th Cir.), *cert. denied*, 85 U.S.L.W. 3143 (2016), cites *Doe v. Reed*, 561 U.S. 186, 196 (2010), while *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010), cites *Buckley*, 424 U.S. at 64, and *Reed*, 561 U.S. at 196, for substantial-relation exacting scrutiny, yet since *Buckley*, the Supreme Court has separated strict scrutiny from exacting scrutiny. See *Iowa Right to Life*, 717 F.3d at 590–91 (understanding this point). Meanwhile, *Reed* addresses ballot-access law, not political-speech law, much less political-speech law triggering Track 1, political-committee(-like) burdens. *Accord* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (addressing, *inter alia*, ballot-access law). Anyway, *Colorado Right to Life*, 498 F.3d at 1146, is the earlier Tenth Circuit panel opinion, so it trumps *Coalition for Secular Government* and *New Mexico Youth Organized*. *Supra* note 86.

*Madigan* holds substantial-relation exacting scrutiny applies, *Madigan*, 697 F.3d at 477, 490, after incorrectly lumping into one disclosure discussion challenges by (1) multiple organizations that *can* object, under *Buckley* or *Sampson*, to being a political committee, *id.* at 470 & n.1 (collecting authorities), and (2) organizations that *cannot* raise *Buckley* and at least *do not* raise (perhaps because they feel they *cannot* raise) a *Sampson*-like contention, *id.* (citing *Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012); *SpeechNow.org v. FEC*, 599 F.3d 686, 696–98 (D.C. Cir. 2010) (en banc)) (making this mistake).

*Yamada* does the same. *Yamada*, 786 F.3d at 1194 (citing *Family PAC*, 685 F.3d at 805–06; *Human Life of Wash.*, 624 F.3d at 1005).

<sup>248</sup> *Supra* text accompanying notes 87–89, 155–56.

<sup>249</sup> *Minn. Citizens Concerned for Life*, 692 F.3d at 872, 875.

<sup>250</sup> See *Human Life of Wash.*, 624 F.3d at 1004–05, 1010 (discussing strict scrutiny and substantial-relation exacting scrutiny); *cf. id.* at 1013 (mistakenly referring to the “standard of review” rather than the scrutiny level).

<sup>251</sup> *E.g., infra* text accompanying notes 252–56.

When post-*Citizens United* circuits do *not* make the mistake of believing *Citizens United* pages 366–71/914–16 allow Track 1 burdens,<sup>252</sup> the circuits strike down law triggering Track 1 burdens when appropriate,<sup>253</sup> especially after *McCutcheon*'s strengthening closely-drawn exacting scrutiny.<sup>254</sup>

By contrast, when circuits make this mistake regarding *Citizens United*, they erroneously uphold such law.<sup>255</sup> This mistake—like the mistake of not applying the major-purpose test to state law<sup>256</sup>—is at the epicenter of the circuit splits.

Second, the proper challenge is to political-committee and political-committee-like *definitions*,<sup>257</sup> not the Track 1 burdens themselves.<sup>258</sup>

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<sup>252</sup> *Supra* text accompanying notes 103, 125–28. These *Citizens United* pages apply substantial-relation exacting scrutiny only to Track 2 law, not Track 1 law. *See Citizens United*, 558 U.S. at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66) (applying substantial-relation exacting scrutiny to Track 2 law).

<sup>253</sup> *See, e.g., Minn. Citizens Concerned for Life*, 692 F.3d at 875 & n.9 (applying substantial-relation exacting scrutiny); *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010) (same); *see also Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 589–91, 596–601 (8th Cir. 2013) (applying substantial-relation exacting scrutiny and later striking down *some* law); *cf. SpeechNow.org v. FEC*, 599 F.3d 686, 696–98 (D.C. Cir. 2010) (applying substantial-relation exacting scrutiny, while upholding such law when the plaintiff concedes it has the *Buckley* major purpose as to candidates); *Complaint for Declaratory and Injunctive Relief* at paras. 7, 47, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (No. 1:08-cv-00248-JR), 2008 WL 8050924, at \*3, 12 (plaintiff conceding that it has the *Buckley* major purpose).

<sup>254</sup> *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840–42 (7th Cir. 2014) (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445–46 (2014)).

<sup>255</sup> *E.g., Yamada v. Snipes*, 786 F.3d 1182, 1194 (9th Cir.) (applying substantial-relation exacting scrutiny), *cert. denied*, 136 S. Ct. 569 (2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 125 n.5, 136–37 (2d Cir. 2014) (same), *cert. denied*, 135 S. Ct. 949 (2015); *Iowa Right to Life*, 717 F.3d at 589–91, 593–96 (applying substantial-relation exacting scrutiny and later upholding *some* law); *accord Justice v. Hosemann*, 771 F.3d 285, 292–97, 300 n.13 (5th Cir. 2014) (holding that substantial-relation exacting scrutiny applies but later declining to decide whether to apply substantial-relation exacting scrutiny or “wholly without merit,” while incorrectly finding plaintiffs had insufficiently pleaded *Sampson*-like facts), *cert. denied*, 136 S. Ct. 1514 (2016); *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1242–45 & n.2, 1250, 1252 & n.7 (11th Cir. 2013) (applying substantial-relation exacting scrutiny, while upholding such law in a *facial* challenge, but reaching beyond the record and considering whether the *plaintiffs*—who as an organization have the *Buckley* major purpose, *if* it is constitutional to trigger Track 1, political-committee(-like) burdens based on ballot-measure speech—*expressly contemplate* going beyond small-scale speech).

<sup>256</sup> *Supra* text accompanying notes 108–11.

<sup>257</sup> Thus, it is unnecessary to convert, as some circuits do, political-committee(-like)-definition challenges into political-committee(-like)-burdens challenges. *See, e.g., Yamada*, 786 F.3d at 1186, 1194–96 (making this mistake); *Nat’l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 55–59 (1st Cir. 2011) (same); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 997–98, 1008–09, 1011–12 (9th Cir. 2010) (same).

The court-of-appeals opinions in *Yamada* and *Human Life of Washington* incorrectly say the plaintiffs challenged the Track 1 burdens themselves at the district-court level. Instead, they challenged the definitions. *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1029,

Dismissing the propriety of challenging political-committee and political-committee-like definitions by calling them “drafting tool[s],”<sup>259</sup> or saying they lack significance apart from the Track 1 burdens,<sup>260</sup> misses the point that courts often assess definitions.<sup>261</sup> Parallel to *McConnell v. FEC*<sup>262</sup> and *Buckley*,<sup>263</sup> the proper challenge is to what triggers “the full panoply” of Track 1 burdens.<sup>264</sup> The definitions trigger the burdens.<sup>265</sup>

Besides, it is simpler if a Track 1, political-committee or political-committee-like definition—not every Track 1 burden<sup>266</sup>—has the *Buckley* tests, and excludes organizations with only small-scale speech.<sup>267</sup> Otherwise, the law would be unwieldy.<sup>268</sup>

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1032–33 (D. Haw. 2012), *aff'd in part and rev'd on other grounds sub nom. Yamada v. Snipes*, 786 F.3d 1182, 1194–1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015); Verified Complaint for Declaratory & Injunctive Relief at 10–12, *Human Life of Wash., Inc. v. Brumsickle* (No. C08-0590-JCC), 2009 WL 62144 (W.D. Wash. Apr. 16, 2008).

However, once the court of appeals “addressed”/“passed upon” the burdens, they were also challengeable in the Supreme Court. *Citizens United*, 558 U.S. at 323, 330 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)).

<sup>258</sup> *E.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (“classified as a political committee”); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam) (addressing how “‘political committee’ is defined” and holding what “the words ‘political committee’ . . . need only encompass” to be constitutional); *see also McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66.

<sup>259</sup> *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

<sup>260</sup> *See Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 56, 58 (1st Cir. 2011) (raising this contention); *see also Corsi v. Ohio Elections Comm'n*, 2012-Ohio-4831, 981 N.E.2d 919, ¶ 15 (10th Dist.) (following *McKee*); *State v. Green Mountain Future*, 2013 VT 87, ¶ 32, 194 Vt. 625, 86 A.3d 981 (same).

<sup>261</sup> *E.g.*, *McConnell*, 540 U.S. at 189–94 (addressing an electioneering-communication definition); *Buckley*, 424 U.S. at 77–80 (addressing contribution, expenditure, and political-committee definitions).

<sup>262</sup> *McConnell*, 540 U.S. at 189–94 (addressing an electioneering-communication definition).

<sup>263</sup> *Buckley*, 424 U.S. at 77–80 (addressing contribution, expenditure, and political-committee definitions).

<sup>264</sup> *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *accord Buckley*, 424 U.S. at 63.

<sup>265</sup> *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 812, 815, 818, 822, 826–27, 832 & n.20, 834, 837, 840 (7th Cir. 2014); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1144, 1153–54 (10th Cir. 2007). Thus, the tests for constitutionality focus on when government may trigger Track 1 burdens. *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012) (en banc); *Colo. Right to Life*, 498 F.3d at 1153.

<sup>266</sup> *E.g.*, *supra* text accompanying notes 63–65.

<sup>267</sup> *See supra* Part V.

<sup>268</sup> *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

Political-committee(-like) definitions and other such law have disclosure thresholds. However, a challenge *under the major-purpose test* (or a watered-down counterpart) to law

triggering Track 1 burdens *cannot* be a *disclosure-threshold* challenge, because the major-purpose test (or a watered-down counterpart) *cannot* be a disclosure-threshold test, *see* N.M. Youth Organized v. Herrera, 611 F.3d 669, 678–79 (10th Cir. 2010) (understanding this point); *Colo. Right to Life*, 498 F.3d at 1153–54 (same); *supra* text accompanying notes 144–50 (defining the major-purpose test), except for organizations making a massive amount of contributions or independent expenditures properly understood, *supra* text accompanying notes 160–62.

So notwithstanding *Vermont Right to Life*, 758 F.3d at 137–38, and *Yamada v. Snipes*, 786 F.3d 1182, 1199–1200 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015), comparing political-committee(-like)-registration thresholds *cannot* be a test for the constitutionality of law triggering Track 1 burdens as applied to organizations *lacking* the *Buckley* major purpose. *See Iowa Right to Life*, 717 F.3d at 589 (understanding this point).

Nevertheless, there are three possible disclosure-threshold-challenge categories. A disclosure-threshold challenge *can*—although it *need* not—arise in Category 1, *i.e.*, when:

- (1) Under Track 1, an organization objects to law triggering Track 1 burdens, and the challenge addresses *small-scale speech*. *Compare, e.g.*, *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1279–80 (10th Cir.) (addressing a disclosure threshold as part of the analysis), *cert. denied*, 85 U.S.L.W. 3143 (2016), *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033–34 (9th Cir. 2009) (incorrectly addressing a disclosure threshold instead of the *Buckley* major-purpose test), *and supra* note 156, *with Sampson v. Buescher*, 625 F.3d 1247, 1255–61 (10th Cir. 2010) (not addressing a disclosure threshold).

A disclosure-threshold challenge *need* not arise in Category 1, because an organization objecting to law triggering Track 1 burdens, *can*—and *should*—instead challenge the political-committee(-like) *definition*. *Supra* text accompanying notes 257–68. By contrast, a disclosure-threshold challenge *does* arise in Categories 2 and 3, *i.e.*, when:

- (2) Under Track 1, it *is* constitutional to trigger Track 1 burdens for an organization in the first place, and the organization *then* objects to the low level at which such burdens begin. *E.g.*, *Family PAC v. McKenna*, 685 F.3d 800, 809, 810 & n.10, 811 (9th Cir. 2012); *Daggett v. Comm'n on Gov't Ethics & Elections Practices*, 205 F.3d 445, 466 (1st Cir. 2000) (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32 (1st Cir. 1993)); *see also ProtectMarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 831 (9th Cir. 2014) (citing *Family PAC*, 685 F.3d at 809–11); or
- (3) Under Track 2, non-political-committee reporting *is* constitutional—or at least is adjudged constitutional—in the first place, and a speaker *then* objects to the low level at which such reporting begins. *E.g.*, *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 310–11 (3d Cir. 2015) (incorrectly addressing Track 1 law as Track 2 law), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal); *supra* note 72.

In Category 1 of these three disclosure-threshold-challenge categories, strict scrutiny, or alternatively, substantial-relation exacting scrutiny, is the scrutiny level, because the organization challenges law triggering Track 1 burdens in the first place. *Supra* text accompanying notes 236–56; *see, e.g., Sampson*, 625 F.3d at 1255 (applying substantial-relation exacting scrutiny); *see also Coal. for Secular Gov't*, 815 F.3d at 1275 (applying substantial-relation exacting scrutiny and rejecting “wholly without rationality” as a scrutiny level).

In Categories 2 and 3, there is no challenge to law triggering Track 1 burdens in the first place, and substantial-relation exacting scrutiny is the scrutiny level. *E.g., Family PAC*, 685 F.3d at 809–11 (addressing Category 2); *ProtectMarriage*, 752 F.3d at 832 (addressing Category 2 and clarifying *Family PAC*). Applying such scrutiny in Category 2 is consistent with applying such scrutiny when government may trigger Track 1 burdens



for an organization itself in the first place and the organization *then* challenges Track 1 disclosure law. *Davis v. FEC*, 554 U.S. 724, 744 (2008) (quoting *Buckley*, 424 U.S. at 64). And applying such scrutiny in Category 3 is consistent with applying such scrutiny to Track 2 law. *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

By contrast, the *Buckley* “wholly without rationality” language, which sounds like something even less than the rational-basis test, *Buckley*, 424 U.S. at 83, is simply not a scrutiny level. See *Coal. for Secular Gov’t*, 815 F.3d at 1275 (addressing Category 1). After all, many Supreme Court political-speech opinions recognize that scrutiny levels all have both a government-interest element and a tailoring element. See, e.g., *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66) (applying substantial-relation exacting scrutiny); *Davis*, 554 U.S. at 744 (quoting *Buckley*, 424 U.S. at 64) (same). Although *Buckley* mentions government interests and tailoring, the *Buckley* “wholly without rationality” language itself neither has, nor is part of, a government-interest element or a tailoring element. *Buckley*, 424 U.S. at 83.

Besides, disclosure-threshold challenges in Categories 1, 2, and 3 address small-scale speech. And lowering the scrutiny level—especially to something even less than the rational-basis test—makes disclosure thresholds more likely to survive scrutiny. So to the extent that disclosure of small-scale speech is affordable for big players and not for little players, lowering the scrutiny level in this way can in effect hurt little players more than big players. Under the First Amendment, that cannot be right. *Supra* note 73; *supra* text accompanying note 137.

There are two additional and related reasons that “wholly without rationality” cannot be right in *Category 1*.

First, please recall that only little players—not big players—are likely to bring proper *Sampson*-like small-scale-speech challenges to law triggering Track 1, political-committee-like burdens. *Supra* note 154. If such a challenge is a disclosure-threshold challenge in Category 1, and if “wholly without rationality” were a scrutiny level, *contra Coal. for Secular Gov’t*, 815 F.3d at 1275 (quoting *Buckley*, 424 U.S. at 83), then little players bringing such a challenge to law triggering such burdens would prevail only if the challenged law were wholly without rationality. Yet other players—including big players—bringing *another* challenge to law triggering such burdens would enjoy strict scrutiny or, alternatively, substantial-relation exacting scrutiny. *Supra* text accompanying notes 236–56. But again, the First Amendment applies to big players and little players. *Supra* note 73. Big players have no right—none—to political-speech law protecting them at the expense of little players.

Second, when an organization challenges law triggering Track 1 burdens, no one should be able to convert a political-committee-like-definition challenge or, alternatively, a political-committee-like-burdens challenge, *supra* text accompanying notes 257–68, into a disclosure-threshold challenge and thereby *lower* the scrutiny level from strict scrutiny or, alternatively, substantial-relation exacting scrutiny, *supra* text accompanying notes 236–56, to “wholly without rationality,” *Buckley*, 424 U.S. at 83. That would make the label on the challenge relevant. But the label is irrelevant. *Supra* note 91.

By nevertheless saying—in disclosure-threshold-challenge Category 1, 2, or 3, respectively—that the *Buckley* “wholly without rationality” language, *Buckley*, 424 U.S. at 83, is the scrutiny level:

- (1) *Canyon Ferry* contradicts other case law, *supra* text accompanying notes 236–56, including *Sampson* and *Coalition for Secular Government*, under Track 1;
- (2) *Daggett* and *Vote Choice* contradict *Davis*, *Family PAC*, and *ProtectMarriage*, under Track 1; and
- (3) *Delaware Strong Families* contradicts *Citizens United*, under Track 2.

*McKee* disagrees, yet its fundamental disagreement—and its fundamental error—is not over these points. Rather, *McKee* disagrees with Supreme Court holdings that such burdens are “onerous,” and then, like *Yamada*<sup>269</sup> and *Vermont Right to Life*,<sup>270</sup> rejects the major-purpose test for state law.<sup>271</sup>

CONCLUSION: “ENOUGH IS ENOUGH.”

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens.

The First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits have addressed state law triggering Track 1 burdens.<sup>272</sup> No circuit’s holding coincides with any other circuit’s holding,<sup>273</sup> and the circuit splits on these issues have become ever more complex circuit chasms. The problem is especially acute given the circuit splits over whether *Citizens United* pages 366–71/914–16<sup>274</sup> allow state governments to trigger Track 1 burdens.<sup>275</sup>

To borrow a phrase, “Enough is enough.”<sup>276</sup> Constitutional law on political speech can unite people from across the political spectrum.<sup>277</sup>

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<sup>269</sup> *Yamada v. Snipes*, 786 F.3d 1182, 1198, 1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015).

<sup>270</sup> *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

<sup>271</sup> *Nat’l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 56, 58–59 (1st Cir. 2011); *cf. Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1011 (9th Cir. 2010) (replacing the major-purpose test with an “a priority”-“incidentally” test); *id.* at 1013–14 (“[Washington’s] political committee disclosure requirements are not unconstitutionally burdensome relative to the government’s informational interest. . . . These disclosure requirements are not unduly onerous . . . . [T]he Disclosure Law’s somewhat modest political committee disclosure requirements are substantially related to the government’s interest in informing the electorate . . . .”); *see also Yamada*, 786 F.3d at 1195, 1196 n.7, 1198 (quoting and following *Human Life of Wash.*, 624 F.3d at 1010–11, 1013–14); *id.* at 1200 (creating an “a significant participant in [the] electoral process” test for an organization that “may not make political advocacy a priority”); *State v. Green Mountain Future*, 2013 VT 87, ¶ 22 n.5, 194 Vt. 625, 86 A.3d 981 (following *McKee*).

<sup>272</sup> *See, e.g., supra* notes 245–71.

<sup>273</sup> *See, e.g., supra* notes 90–111.

<sup>274</sup> *Citizens United v. FEC*, 558 U.S. 310, 366–71, 130 S. Ct. at 876, 914–16 (2010).

<sup>275</sup> The highest courts of Vermont, Ohio, Arizona, and Washington are also part of the “circuit” splits. SUP. CT. R. 10 (establishing factors in granting certiorari petitions); *see, e.g., supra* notes 97 (Vermont), 144 (Ohio), 149 (Vermont and Arizona), 152 (Washington), 154 (Ohio and Washington), 156–57 (Arizona). The Third and Sixth circuits have issued no opinions on Track 1 law, and the District of Columbia Circuit has addressed only federal law. *Supra* note 72 (discussing a Third Circuit opinion that incorrectly addresses Track 1 law as Track 2 law).

<sup>276</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (opinion of Roberts, C.J.).

<sup>277</sup> *See id.* at 481 (opinion of Roberts, C.J.) (“These cases are about political speech. The importance of the cases to speech and debate on public policy issues is reflected in the

Courts in general, and the Supreme Court in particular,<sup>278</sup> can solve the problem by holding that—regardless of the scrutiny level and regardless of whether the challenge is to the political-committee(-like) definitions or burdens—government may trigger Track 1 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” under *Buckley*.<sup>279</sup> And even if government clears the *Buckley* hurdle, it must still clear the *Sampson* hurdle: Government may not trigger Track 1 burdens for organizations having the *Buckley* major purpose but engaging in only small-scale speech.<sup>280</sup>

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number of diverse organizations that have joined in supporting WRTL before this Court . . .”).

<sup>278</sup> See, e.g., Randy Elf, *Speech law benefits politicians, rich*, OBSERVER (July 3, 2016) (previewing this Article), <http://observertoday.com/page/content.detail/id/639563/Speech-law-benefits-politicians--rich.html>.

<sup>279</sup> *Buckley v. Valeo*, 424 U.S. 1, 63, 79 (1976) (per curiam); see also *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262 (1986) (following *Buckley*).

<sup>280</sup> E.g., *Sampson v. Buescher*, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010).