

## ARTICLE

### SUNLIGHT WITHOUT SUNBURNS: BALANCING PUBLIC ACCESS AND PRIVACY IN BALLOT MEASURE DISCLOSURE LAWS

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#### ABSTRACT

Today, record sums of money are being spent in highly polarizing ballot measure elections. Disclosure laws, which require the sources of campaign funding to be publicized on the Internet, are exposing ballot measure donors to an unprecedented loss of privacy and harassment. As a result, a growing number of individuals are challenging these laws in court and pressing state legislatures to raise disclosure thresholds. On the other side, however, public access advocates are insisting that states continue to publish all campaign finance data in order to promote voter competence, preserve election transparency, and maintain donor accountability. These two sides are debating the issue as if the only available options are disclosure according to current law or no disclosure at all. This Article mines the vast, unexplored middle ground between these options and offers three innovative solutions that would protect donor privacy without undermining the goals of disclosure. These solutions, which require states to revise the information they disclose about certain donors and the means by which they disclose it, are modeled on the public access policies federal courts have adopted for plea agreements.

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*SUNLIGHT WITHOUT SUNBURNS*

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## INTRODUCTION

Casey Lumbart,<sup>1</sup> a meth dealer from Alabama, decided to become a government informant. Marjorie Christoffersen, a restaurant manager from California, donated \$100 to support Proposition 8.<sup>2</sup> Both were humiliated and harassed after government websites revealed their activities. For Mr. Lumbart, his plea agreement detailing his cooperation with law enforcement was made available on PACER, a government service that provides online access to federal court documents.<sup>3</sup> Shortly thereafter, someone seeking to publicly

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<sup>1</sup> This name has been changed to protect the individual's privacy.

<sup>2</sup> Proposition 8 was a ballot measure passed in 2008 in California that banned same-sex marriage through constitutional amendment; it has since been ruled unconstitutional. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

<sup>3</sup> See PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <http://www.pacer.gov> (last visited Feb. 25, 2012).

expose Mr. Lumbart as a “rat” posted the plea agreement, along with a short profile of him, on [www.whosarat.com](http://www.whosarat.com), an Internet database of alleged government cooperators.<sup>4</sup> In Mrs. Christoffersen’s case, her name, address, employer, and contribution amount were published on the California Secretary of State’s website in compliance with campaign disclosure law.<sup>5</sup> Armed with this information, Proposition 8 opponents descended on her restaurant after the election shouting, “Shame on you!” and demanding that she contribute money to help repeal the ban on same-sex marriage.<sup>6</sup>

These two stories reveal some of the privacy concerns that arise when the government makes information about its citizens available online. Although public access to plea agreements and campaign disclosure reports has always posed some threat to personal privacy, the dissemination of these records on the Internet has greatly magnified this threat. In the plea agreement context, courts have recently responded by adopting creative policies that balance society’s interest in public access with the defendant’s interest in privacy. Unfortunately, when it comes to campaign disclosure, states have not shown a similar willingness to adapt. Instead of tailoring disclosure requirements to reflect the increased privacy costs of online access, states have clung to the same simple, antiquated rules that have governed campaign disclosure for decades. As a result, the benefits of ballot measure disclosure laws are no longer in balance with their costs and many donors are harmed unnecessarily.

Alarmed by the harmful privacy effects of ballot measure disclosure laws, a growing chorus of citizens is challenging these laws in court and pressing state legislatures to raise disclosure thresholds. In response, public access advocates are demanding that states continue to disseminate all campaign finance data in order to promote voter competence, preserve election transparency, and maintain donor accountability. These two sides are rallying around opposite poles—public access and privacy—and debating disclosure as if the policy landscape were binary: disclosure or no disclosure. Indeed, one prominent campaign finance expert recently predicted that the battle for the future of disclosure will be fought over “who doesn’t have to disclose.”<sup>7</sup> However, this

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<sup>4</sup> See WHO’S A RAT—LARGEST DATABASE OF INFORMANTS AND AGENTS, <http://www.whosarat.com> (last visited Feb. 25, 2012).

<sup>5</sup> CAL. GOV’T CODE § 84600, et seq. (West 2010).

<sup>6</sup> Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, WALL ST. J. Dec. 27, 2008, <http://sec.online.wsj.com/article/SB123033766467736451.html>.

<sup>7</sup> Michael Beckel, *Court Battles Over Campaign Disclosure Loom*, *Legal Experts Predict*, OPEN SECRETS BLOG (Mar. 20, 2011, 10:27 AM), <http://www.opensecrets.org/news/2011/03/court-battles-over-campaign-disclos.html>.

Article insists that we can and should avoid this battle. By mining the vast, unexplored policy terrain between disclosure and no disclosure, the Article reveals three solutions that would protect donor privacy without undermining the goals of public access. It does this by studying the innovative access strategies developed by federal courts for plea agreements and adapting them to the purposes of campaign disclosure. The courts' plea agreement access strategies teach us that designing better, well-balanced disclosure laws involves focusing not on which donors have to disclose, but rather on *what* they have to disclose and *how* they have to disclose it.

This Article makes three critical contributions to the academic literature on campaign disclosure. First, it examines the costs and benefits of ballot measure disclosure laws in unprecedented depth to reveal where and how they can be improved. Second, it offers three original and practical policy proposals that would optimize these costs and benefits. And third, it is the first to investigate the striking parallels between donor disclosure and public access to plea agreements, as well as the first to use plea agreement access rules as a model for disclosure reform. Through these contributions, this Article seeks to reframe the debate over disclosure so that we stop fighting about who has to disclose and start discussing how we can achieve the objectives of disclosure while simultaneously respecting donor privacy.

The Article proceeds in three parts. Part I begins with a brief history of donor disclosure in ballot measure campaigns and a description of how conditions have changed since modern disclosure laws were written. After furnishing this historical context, it then assesses the costs and benefits of today's laws and discovers drastic imbalances in the case of minor individual donors and straightforward, controversial ballot measures. Searching for ways to correct these imbalances, Part II turns to the federal courts for guidance and explores how they confronted a similar problem involving public access to plea agreements. This Part explains how two of the judiciary's recent access reforms—what I call “offline access” and “redacted access”—could be used to reduce the costs of disclosure without diminishing the benefits. Finally, Part III further develops and transforms these access strategies into sophisticated, narrowly-tailored disclosure policies that would effectively advance the interests of both voters and donors.

## I. PUBLIC ACCESS VS. PRIVACY IN BALLOT MEASURE CAMPAIGNS

### A. *Historical Overview of Donor Disclosure in Ballot Measure Campaigns*

Ballot measures originally emerged during the Progressive movement of the

late 1890's and early 1900's as a way for citizens to bypass state legislatures that had become captured by wealthy special interests.<sup>8</sup> In 1898, South Dakota became the first state to adopt the ballot measure, and within the next twenty years nineteen other states followed suit. Today, twenty-four states allow citizens to create legislation through ballot<sup>9</sup> measures, sometimes also called initiatives, propositions, questions, or issues.

During the early years of ballot measure elections, campaign contributions were often not subject to public disclosure. For instance, in California, which added the ballot measure to the state constitution in 1911, campaign disclosure laws did not cover ballot measures until 1921.<sup>10</sup> When states did begin requiring disclosure of ballot measure contributions, the laws were generally ineffective and there was little compliance or enforcement.<sup>11</sup> As two political scientists observed in the late 1940's, disclosure requirements were "hopelessly inadequate," with many disclosure reports "wholly incomplete or unintelligible."<sup>12</sup> However, this all changed in the 1970's. In the wake of the Watergate scandal, campaign finance reform efforts swept the nation and states enacted rigorous disclosure laws.<sup>13</sup> These laws, which largely remain in force today, generally mandated that for contributions above a minimal threshold (often around \$25-\$100), the donor's name, address, occupation, employer, and contribution amount be disclosed.

In the thirty to forty years since modern disclosure laws were written, three significant changes have occurred. First, the number of ballot measures being voted on has more than doubled: between 1970 and 1979, there were 181 proposed ballot measures; between 2000 and 2009, there were 374.<sup>14</sup> Thus,

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<sup>8</sup> See STEVEN L. PIOTT, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* 1-15 (2003); JOSEPH F. ZIMMERMAN, *PARTICIPATORY DEMOCRACY* 69 (1986).

<sup>9</sup> The following states allow ballot measures: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.

<sup>10</sup> V.O. Key, Jr., *American Government and Politics: Publicity of Campaign Expenditures on Issues in California*, 30 *THE AM. POL. SCI. REV.*, 713 (1936).

<sup>11</sup> DONALD A. GROSS & ROBERT K. GOIDEL, *THE STATES OF CAMPAIGN FINANCE REFORM* 6-7 (2003). See also Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 *ELECTION L.J.* 295, 307 (2005).

<sup>12</sup> WINSTON CROUCH & DEAN MCHENRY, *CALIFORNIA GOVERNMENT: POLITICS AND ADMINISTRATION* 63-64 (1949).

<sup>13</sup> GROSS & GOIDEL, *supra* note 11, at 7.

<sup>14</sup> INITIATIVE AND REFERENDUM INSTITUTE, *INITIATIVE USE* (2010),

many more laws are now being created by ballot measure, including laws concerning such controversial subjects as affirmative action, abortion, gay marriage, euthanasia, immigration, environmental<sup>15</sup> regulation, health care reform, gambling, and the legalization of marijuana.

Second, there has been a similar explosion in the volume of campaign spending. In California, spending on ballot propositions has increased over 1,200% since 1974, the year it passed its current disclosure law.<sup>16</sup> The Proposition 8 campaign alone raised more than \$83 million.<sup>17</sup> This trend is occurring nationwide. In Washington, 2010 was the highest year ever for ballot measure spending with \$61 million raised, easily surpassing the previous high of \$22.8 million in 2005.<sup>18</sup> This surge in modern campaign spending has intensified pressure on individuals to contribute money in order to support political causes.

The third change has been the increase in campaign contribution data due to inflation and the Internet. Because disclosure thresholds have generally remained constant despite rising inflation, more small donors are now forced to reveal their political activity than in the past. Adjusting for inflation, donors in 1975 could contribute around four times as much money as donors today without triggering disclosure requirements.<sup>19</sup> Furthermore, the growth of

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[http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(2010-1\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(2010-1).pdf).

<sup>15</sup> See, e.g., Nebraska Civil Rights Initiative (Nebraska, 2008) (prohibiting race- and gender-based admissions and hiring decisions); Alaska Parental Involvement Act (Alaska, 2010) (requiring notice to the parent or guardian of a female under the age of 18 before she has an abortion); Florida Marriage Amendment (Florida, 2008) (defining marriage as the union of one man and one woman); Washington “Death with Dignity” Initiative (Washington, 2008) (allowing terminally ill adults access to lethal medication under some circumstances); Public Program Eligibility Act (Arizona, 2006) (denying public funding to illegal immigrants); Clean Energy Initiative (Missouri, 2008) (creating a renewable electricity standard); Missouri Health Care Freedom (Missouri, 2010) (blocking a government mandate to buy health insurance); Four Casinos Initiative (Ohio, 2009) (allowing casinos in Cincinnati, Cleveland, Columbus and Toledo); Michigan Medical Marijuana Initiative (Michigan, 2008) (de-criminalizing medical marijuana).

<sup>16</sup> ROBERT M. STERN, CALIFORNIA HEALTHCARE FOUNDATION, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT, [http://digital.library.ucla.edu/websites/2005\\_997\\_013/initiatives.html](http://digital.library.ucla.edu/websites/2005_997_013/initiatives.html).

<sup>17</sup> Jesse McKinley, *California Releasing Donor List for \$83 Million Marriage Vote*, N.Y. TIMES (Feb. 3, 2009), at A13, <http://www.nytimes.com/2009/02/03/us/03calif.html>.

<sup>18</sup> Rachel La Corte, *Wash. Initiative Campaign Spending Breaks Record*, ASSOCIATED PRESS (Oct. 28, 2010), <http://www.komonews.com/news/local/106128518.html>.

<sup>19</sup> See *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1774 to*

online fundraising has caused a proliferation of campaign donors, especially small ones, thereby subjecting a large number of previously uninvolved individuals to disclosure.<sup>20</sup> Finally, and most importantly, the release of campaign disclosure reports on the Internet has led to widespread dissemination and republication of contribution data. All these changes have led to a more expansive public record of people's political speech than anyone could have anticipated when disclosure laws were originally drafted years ago.

*B. Comparing the Costs and Benefits of Disclosure*

*i. The Benefits of Disclosure*

The main reason states compel disclosure of ballot measure campaign contributions is that it improves voter competence by exposing those seeking to influence the election. As U.S. District Judge Morrison England stated recently in court during litigation over the constitutionality of California's disclosure rules, "[i]f there ever needs to be sunshine on a particular issue, it's a ballot measure."<sup>21</sup> Indeed, deprived of the political party labels offered in candidate campaigns and disinclined to spend time studying the meaning and implications of every proposed law, ballot measure voters use information about donors as a quick and easy heuristic cue, or voting shortcut.<sup>22</sup> The Ninth Circuit explained this heuristic function of donor disclosure in *California Pro-Life Council, Inc. v. Getman*:

Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term

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*Present*, MEASURINGWORTH <http://www.measuringworth.com/uscompare/> (last visited Aug. 13, 2012).

<sup>20</sup> See Howard Dean, Opinion, *We the People (Who Write Small Checks)*, WALL ST. J. (Nov. 10, 2003), at A16 (describing the successful small-dollar online fundraising of the Dean campaign).

<sup>21</sup> Bob Egelko, *Prop. 8 campaign can't hide donors' names*, S.F. CHRON., January 30, 2009, [http://articles.sfgate.com/2009-01-30/bay-area/17198533\\_1\\_same-sex-disclosure-ballot-measure](http://articles.sfgate.com/2009-01-30/bay-area/17198533_1_same-sex-disclosure-ballot-measure).

<sup>22</sup> See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1178-79 (2003); Garrett & Smith, *supra* note 11, at 295-300; Elizabeth Garrett, *A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 U. RICH. L. REV. 1011, 1022-34 (2003); ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 2, 25 (1998).

policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.<sup>23</sup>

Political scientist Arthur Lupia has demonstrated persuasively that heuristic cues, particularly those provided by interest groups, are incredibly effective at improving voter competence. In an exit poll conducted in 1988, Professor Lupia found that California voters who were ignorant about the substantive content of various insurance-related propositions, but knew the positions of relevant interest groups, voted almost exactly like substantively knowledgeable voters.<sup>24</sup> As Michael Kang put it, heuristic cues “help organize complex information into cognitive shortcuts that voters use to translate their preferences into competent vote choices.”<sup>25</sup> Voters themselves recognize the value of these heuristic cues. In a 2006 survey of voters from around the country, 71% said that knowing which well-known organizations contributed money to a ballot measure campaign would affect their opinion about that ballot measure.<sup>26</sup>

Disclosing the sources of campaign funding is especially important given how deceptive ballot measure campaigns can be. In *Getman*, the court cited the example of Proposition 199, a California ballot measure that appeared on the 1996 ballot as the “Mobile Home Fairness and Rental Assistance Act.”<sup>27</sup> Despite its name, the proposed law was not the result of a grassroots effort by mobile home residents wanting “fairness” or “rental assistance.”<sup>28</sup> Rather, two mobile home park owners principally backed the measure, and after their involvement was revealed by journalists who had reviewed campaign disclosure reports, the measure was soundly defeated.<sup>29</sup> Another more

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<sup>23</sup> Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003).

<sup>24</sup> See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 69-72 (1994); Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 537, n. 107 (2007).

<sup>25</sup> Kang, *supra* note 22, at 1151.

<sup>26</sup> Dick M. Carpenter II, Ph.D., *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, INST. FOR JUST. 7-8 (Mar. 2007), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/DisclosureCosts.pdf](http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf).

<sup>27</sup> *Getman*, 328 F.3d at 1106 n.24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



common example of election deception is when political organizations hide behind misleading, populist-sounding names.<sup>30</sup> For instance, a ballot measure committee might call itself “Citizens for a Greener Oregon” when in fact it is funded by a handful of oil companies.<sup>31</sup> Finally, donors may attempt to sway public opinion through misleading campaign advertising. When this occurs, knowing who these donors are allows viewers to assess the accuracy and credibility of the advertisements.

In summary, the major benefit of campaign disclosure is that it furnishes voters with information that helps them make better choices. In fact, the constitutionality of disclosure laws in ballot measure elections, unlike in candidate elections, derives entirely from their informational benefits.<sup>32</sup> However, not all donor disclosure is of equal informational value. The usefulness of donor information depends on two factors: the type of donor and the type of ballot measure.

Certain donors provide more effective heuristic cues than others. As Elizabeth Garrett and Daniel A. Smith explain in *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, in order for a campaign donor to serve as a helpful heuristic, “voters must correctly associate the [donor] with a particular ideology or policy position that allows them to draw accurate inferences about the consequences of a vote for or against the ballot question.”<sup>33</sup> In other words, only recognizable donors with known political or financial agendas provide meaningful cues. This category includes corporations, special interest groups, and politicians, as well as celebrities and personal acquaintances with outspoken political ideologies. But the vast majority of individual donors—those who lack publicly-known, identifiable political views—are incapable of illuminating ballot measures or educating voters. While knowing which side of an issue the NAACP or the insurance industry supports could affect one’s opinion on that issue, knowing which side

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<sup>30</sup> See *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007).

<sup>31</sup> Garrett & Smith, *supra* note 11, at 305-06.

<sup>32</sup> See *Getman*, 328 F.3d at 1105 n.23 (explaining how the Supreme Court in *Buckley v. Valeo* stated that donor disclosure in candidate campaigns is justified by three separate governmental interests: “(1) informing the electorate about the sources and uses of funds expended, (2) deterring corruption and the appearance of corruption, and (3) gathering data to detect violations [of contribution limits]”) (citation omitted). There are no contribution limits in ballot measure campaigns, and as the Supreme Court stated in *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978), “[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.” (citations omitted).

<sup>33</sup> Garrett & Smith, *supra* note 11, at 297.

some obscure stranger supports could not.

However, although the identities of obscure individuals generally do not provide a useful heuristic, there is value in disclosing the identities of large donors regardless of how well known they are. There are two reasons for this. First, voters benefit from knowing who has a strong financial or ideological stake in the outcome of an election, and the size of a campaign contribution is a rough indication of that stake.<sup>34</sup> Even if voters are not familiar with an individual who is principally funding a campaign, they will presumably want to become familiar so they can understand her motives. Second, voters can better evaluate political speech when they know who is speaking. Since campaign advertising is generally controlled by the campaign's major donors, it is critical that these parties be known to the public regardless of how famous or recognizable they are.<sup>35</sup>

Even information about minor, obscure donors can become meaningful when aggregated. Although their names and street addresses are of little value, cumulative data about what region they come from, what they do for work, and what percentage of total campaign spending they represent can be very informative. Voters may think differently about a ballot measure after discovering that it is supported by a grassroots movement of small donors, or a large number of workers in the logging industry, or a group of individuals from a heavily conservative part of the state. The district court in *National Organization for Marriage v. McKee* recently echoed this point in rejecting a challenge to Maine's \$100 disclosure threshold: "The public has an interest in knowing, for example, that a ballot measure has been supported by a multitude of gifts, even small gifts, from a particular state or from a specific profession. Such information could be crucial in the context of ballot measures involving public works projects or regulatory reform."<sup>36</sup> A 1998 study of California voters confirms the importance of aggregate disclosure data. In that study, a

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<sup>34</sup> It is only a "rough" indication because contribution size is determined not only by a donor's strength of interest, but also by the donor's wealth. A wealthy donor can more easily make a large donation without necessarily holding a stronger interest in the issue than a less wealthy donor who makes a small contribution.

<sup>35</sup> This is why contemporaneous disclosure and disclaimers in campaign advertisements are important.

<sup>36</sup> Nat'l Org. for Marriage v. McKee, 666 F. Supp. 2d 193, 213 (D. Me. 2009). See also *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1224, n. 11 (E.D. Cal. 2009) ("[T]he public could very well be swayed by the fact that numerous donations to Plaintiffs, and likely to others, came from out of state. It appears very probable to this Court that the California electorate would be interested in knowing if a California initiative was funded by the citizens it is intended to affect or by out of state interest groups and individuals.").

sample of voters was informed prior to the election that more than 60% of the funds used to place Proposition 226 on the ballot came from out-of-state interests. This disclosure<sup>37</sup> caused support for the ballot measure to decline by a staggering 15-20 percent.

The informational value of donor disclosure is also determined by the type of ballot measure at issue. As the court noted in *Getman*, disclosure is especially helpful when “ballot measure language is . . . confusing, and the long-term policy ramifications . . . are . . . unknown.”<sup>38</sup> Thus, voters benefit most from disclosure when ballot measures involve complex or abstruse issues such as energy policy or corporate regulation. Instead of investing enormous amounts of time studying the ramifications of these issues, voters can learn a great deal simply<sup>39</sup> by referencing the list of donors who support or oppose the ballot measures. Conversely, donor disclosure is of little use when ballot measures involve straightforward moral issues like gay rights, euthanasia, or abortion. In these situations, knowing who donated to which campaign does not help voters understand the effects or desirability of the ballot measures.<sup>40</sup> For the most part, voters already know where they stand on these issues. Knowing which of my neighbors oppose gay marriage, for instance, might tell me a lot about my neighbors, but it tells me little about gay marriage that I did not already know. Moreover, these types of issues, more than others, are the focus of intense media coverage and political party endorsements, which provide far greater heuristic cues than any campaign disclosure report.<sup>41</sup> In conclusion, the informational benefits of disclosure are greatest when ballot measures involve complicated policy matters and campaign donors are well-known entities and/or contribute large sums of money, although aggregate data about minor donors may also be helpful.

Of course, donor information only assists voters if they have access to it. Not surprisingly, then, the benefits of disclosure increased when states began

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<sup>37</sup> See *Getman*, 328 F.3d at 1106 n.25.

<sup>38</sup> *Getman*, 328 F.3d at 1106.

<sup>39</sup> *Id.*

<sup>40</sup> See DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 122-44 (1984); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1355 (1985); Kang, *supra* note 22, at 1152.

<sup>41</sup> See Briffault, *supra* note 33, at 1355 (noting that voters are better informed about straightforward, controversial ballot measures because of extensive media coverage); Kang, *supra* note 22 at 1152-53 (observing that politicians are more likely to get involved in ballot measure campaigns involving salient, partisan issues in order to burnish their liberal or conservative bonafides).

releasing campaign contribution data on the Internet in the late 1990's. As Justice Kennedy explained in *Citizens United v. Federal Election Commission*, "modern technology makes disclosure more rapid and informative."<sup>42</sup> The Internet, he continued, gives us a "campaign finance system . . . with effective disclosure [that] has not existed before today."<sup>43</sup> Indeed, online disclosure expands public access to donor information and enables people to easily sort and manipulate the data. However, although this enhances voter competence, it does so only when the disclosed information is useful, i.e., when the donors are large or well known, or the data is aggregated, and when the ballot measure requires illumination. In other words, despite the empowering effects of the Internet, unhelpful disclosure information, such as the identities of minor individual donors, remains unhelpful when it appears online.

Regardless, even when donor information is useful, research indicates that voters rarely reference online disclosure reports before voting. In a 2006 survey conducted by Dick Carpenter at the Institute for Justice, 72% of voters said they had not sought out information about campaign donors in the upcoming ballot measure election.<sup>44</sup> Moreover, 60% said they did not even know where to go to access this information.<sup>45</sup> These figures corroborate the suspicions of campaign finance scholars who question the public's utilization of disclosure data.<sup>46</sup> Therefore, compelled online disclosure may not actually have as profound an impact on voter competence as one might assume. Furthermore, because the Internet has made all sorts of information about ballot measures readily accessible (including the opinions of politicians, celebrities, special interest groups, and friends, as well as news reports about campaign contributions), the need for direct access to donor information may be minimal. However, even though the average voter might rarely inspect disclosure reports, journalists, activists, and political opponents have a strong

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<sup>42</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> Carpenter, *supra* note 26, at 12.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> See BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 27 (2002) ("[I]f most voters pay scant attention to politics, they won't take the time to go through the lengthy lists of donors published in the name of 'full information.'"); RICHARD DAVIS, THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM 23 (1999) (noting that most citizens, on most political issues, will not take the time to seek out information regardless of how inexpensive or convenient it may be to do so); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 266 (2010) (questioning whether voters even know information about donors before they enter the voting booth).

interest in analyzing these reports and relaying important findings to the public.

Finally, although the only constitutionally significant purpose of disclosure in ballot measure elections is to inform voters about the sources of campaign funding, there are at least five other benefits worth mentioning. The first is that disclosure promotes civility, honesty, and accountability in campaign advertising. When donors operate behind a cloak of anonymity, it is easier for campaigns to make harmful or outrageous claims. The second benefit of disclosure is that it creates a political environment of openness and transparency which strengthens public confidence in the ballot measure process and, by extension, the law. The third benefit, articulated by Justice Scalia in his concurrence in *John Doe No. 1 v. Reed*, is that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”<sup>47</sup> The fourth benefit of disclosure is that it exposes political corruption. Although ballot measure elections are not about candidates, there is still the possibility of corruption, or at least the appearance of corruption, when a politician seeks to advance his or her candidacy through a ballot measure campaign by, for example, controlling a ballot measure committee or serving as its spokesperson.<sup>48</sup> In these situations, disclosure is necessary to assess whether donors later received special treatment for contributing to the politician’s cause. In addition, given the absence of contribution limits for ballot measure committees, disclosure enables the state to monitor whether candidates and donors are using these committees as conduits for the circumvention of candidate contribution limits. The fifth benefit, which applies only in the case of corporate donors, is that disclosure allows for shareholder monitoring of corporate spending.<sup>49</sup> As the Court wrote in *Citizens United*: “[D]isclosure of expenditures can provide shareholders . . . with the information needed to hold corporations . . . accountable for their positions . . . . Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits . . . .”<sup>50</sup>

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<sup>47</sup> *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

<sup>48</sup> See Hank Dempsey, *The “Overlooked Hermaphrodite” of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics*, 95 CALIF. L. REV. 123, 150-51, 159-60 (2007); Brief for Brennan Center for Justice at NYU School of Law as Amici Curiae Supporting Appellee, *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir.) (Nos. 08-1389 & 08-1415), available at <http://www.brennancenter.org/page/-/Democracy/sampson/5.5.09%20Final%20Brief%20Sampson%20v.%20Buescher%20.pdf>.

<sup>49</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010).

<sup>50</sup> *Id.*

These five benefits of disclosure are important and must be considered when assessing possible ways to reform current laws.

ii. The Costs of Disclosure

Despite its benefits, campaign disclosure burdens the exercise of free speech by threatening the privacy of donors.<sup>51</sup> People may be deterred from contributing to ballot measure campaigns if they do not want their personal views made public, if they believe that others will draw incorrect conclusions about their views based on their contributions, if they fear retaliation by those who disagree with them, or if they simply do not feel comfortable publicizing private information such as their name, address, occupation, and employer. As the Supreme Court stated in *McIntyre v. Ohio Elections Commission*, the decision to avoid disclosure “may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”<sup>52</sup> Dick Carpenter’s 2006 multi-state survey of ballot measure voters provides some empirical insight into the deterrent effect of disclosure.<sup>53</sup> In that survey, 60% of voters said they would think twice before donating to a ballot measure campaign if it required public disclosure of their name and address.<sup>54</sup> Thus, disclosure can have a profound impact on people’s decisions to support political causes. Donor disclosure is particularly invasive in ballot measure elections because they are so revealing of donors’ political beliefs. Whereas support for a political candidate could be based on any number of issues, support for a ballot measure is a clear indication of one’s position on that specific issue—it labels the donor in a way that invites judgment, animosity, and retaliation. And for those who secretly hold beliefs that are different from those of their family, friends, coworkers, or community, campaign disclosure can be extremely embarrassing and costly.

Like the benefits of disclosure, the costs depend on both the type of donor and the type of ballot measure. First, in terms of the type of donor, the costs are greater for individuals than for organizations (a category that includes corporations and special interest groups). Individuals experience the chilling effects of disclosure more acutely because they have the capacity for personal

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<sup>51</sup> In addition, disclosure laws create a burden on ballot measure committees by forcing them to comply with registration and reporting requirements. This is one reason why states have minimum disclosure thresholds; the burden of having to report de minimis contributions outweighs the benefits of their disclosure.

<sup>52</sup> *McIntyre v. Ohio Elections Comm’n.*, 514 U.S. 334, 341-342 (1995).

<sup>53</sup> See Carpenter, *supra* note 26, at 7, Figure 1.

<sup>54</sup> *Id.*

privacy, dignity, and autonomy, all of which are threatened when the state reveals people's beliefs against their will.<sup>55</sup> Organizations are generally far less sensitive to these uniquely human costs.<sup>55</sup> Furthermore, because organizations, unlike individuals, usually have publicly-known interests, when they donate to ballot measures that further those interests, disclosure does not reveal anything about them that is not already known.

Admittedly, disclosure is not cost-free for organizations. It has at least the potential to deter them from donating to ballot measure campaigns. For instance, it is possible that a corporation may decide not to support a favorable ballot measure because disclosure of this support will hinder the measure's success, prompt consumer backlash, or alert competitors to its business intentions. However, a corporation, unlike a person, will make such a decision purely on the basis of financial calculations. Since it is unlikely that the harm from disclosure will outweigh the benefit of funding an advantageous ballot measure (especially when the funding is substantial), the corporation will typically choose to contribute. As for special interest groups such as Greenpeace, AARP, or NOW, it is harder to imagine scenarios where they would be deterred from contributing because of disclosure. These groups usually have clear political agendas they are not afraid to publicize. When they support a ballot measure, they usually announce their support openly. Even for shadowy special interest groups that do not publicize their activities, disclosure is of little deterrence so long as the individuals bankrolling these groups remain hidden.<sup>56</sup> To be sure, many special interest groups would probably prefer to donate anonymously since that would allow them to suggest that their ballot measure campaign is a grassroots effort. However, preventing

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<sup>55</sup> The impact of disclosure on personal privacy is usually the salient concern under the First Amendment. *See, e.g., McIntyre*, 514 U.S. 334 (1995); *Brown v. Socialist Workers '74 Campaign Comm. (Oh)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Citizens United*, 130 S. Ct. at 979-82 (Thomas, J., concurring in part and dissenting in part). And many courts have indicated that corporations, institutions, and organizations lack personal privacy rights. *See, e.g., FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011); *Sims v. C.I.A.*, 642 F.2d 562, 572 n. 47 (D.C. Cir. 1980); *Nat'l Parks & Conservation Ass'n. v. Kleppe*, 547 F.2d 673, 685 n. 44 (D.C. Cir. 1976). Nonetheless, members of an organization possess personal privacy interests that may be threatened by disclosure of the organization's campaign contributions. But because these members' names are not revealed in disclosure reports, the privacy threat is highly attenuated.

<sup>56</sup> These groups exploit loopholes in the tax code in order to advocate anonymously. One of the most important challenges for an effective disclosure regime is to pierce these groups and expose their underlying donors. For an excellent analysis of this "veiled political actor" problem, *see* Garrett & Smith, *supra* note 11.



this sort of deception is a benefit, not a cost, of disclosure.

Thus, the costs of disclosure are almost exclusively borne by individual donors. Yet even within this category, some are affected more than others. Although all donors share similar privacy concerns, these concerns are more likely to deter small donors from contributing to ballot measure campaigns than large donors. Small donors may reasonably conclude that their insignificant contributions do not justify the personal privacy invasion that comes with disclosure. This is especially true for those whose small contributions reflect a lack of passion for the ballot measure. As the Supreme Court stated in *Buckley v. Valeo*, “[c]ontributors of relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences.”<sup>57</sup> Major donors, either because of a stronger passion for the cause or a greater payoff from their large contributions, are less likely to be dissuaded by disclosure requirements. Furthermore, large, politically active donors have the means and incentive to conceal their identities by funneling campaign contributions through elaborate front organizations created under section 501(c)(4) of the tax code. This strategy has been used to great effect by Charles and David Koch and Sam and Charles Wyly, two sets of brothers who spend millions of dollars each year advancing conservative causes under names such as “Citizens for a Sound Economy,” “Citizens for the Environment,” and “Republicans for Clean Air.”<sup>58</sup> By exploiting loopholes in the tax code, donors like these have been able to avoid many of the privacy costs that minor donors must bear.

In addition, certain professions may be more vulnerable to the costs of disclosure than others. As privacy law scholar William McGeveran observes, “[t]hose who rely on trust and identification with others to do their work—such as ministers, psychotherapists or schoolteachers—may find their roles undermined if congregants, patients or parents know and judge their personal political activity.”<sup>59</sup> Indeed, consider the case of a high school teacher who wishes to donate money to support the legalization of marijuana. That teacher may feel uncomfortable having her students, her students’ parents, or fellow teachers learn about her donation. She may be regarded as a drug user herself and be taken less seriously as an educator. Disclosure may also be especially

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<sup>57</sup> *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

<sup>58</sup> See *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)); Jane Mayer, *Covert Operations*, THE NEW YORKER, (Aug. 30, 2010), [http://www.newyorker.com/reporting/2010/08/30/100830fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer).

<sup>59</sup> William McGeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. LAW 1, 17 (2003).



harmful to anyone holding nonconformist beliefs in a job that rewards conformity. Being “outed” as a liberal in a conservative organization or a gay rights advocate in the military could make one’s professional life miserable. Even worse, prospective employees could be screened out on the basis of their political contributions. Employers regularly do Internet searches on applicants, and a donation to the wrong ballot measure campaign could hurt a candidate’s chances of getting hired. Such politicized hiring famously occurred during the second Bush Administration when government officials searched online disclosure databases to discern the political leanings of federal job applicants.<sup>60</sup> Finally, some professionals, namely journalists and judges, may be forbidden from engaging in public political activity. For them, disclosure effectively denies them the right to participate in ballot measure campaigns.<sup>61</sup>

The costs of disclosure are also determined by the type of ballot measure. Those measures that concern emotionally-charged, divisive issues such as gay marriage or abortion generally impose a higher cost on donors than those that involve dry, arcane policy questions. That is because emotionally-charged, divisive issues are particularly private and are more likely to stir strong negative reactions from those who disagree. Thus, while the average donor may feel comfortable revealing her stance on tort reform, for example, she may not want to share her opinions on a more contentious topic like abortion rights. Unfortunately, due to political gridlock and the need for compromise in the legislative process,<sup>62</sup> the most contentious topics often end up being the subjects of ballot measures.

To summarize, the costs of disclosure in ballot measure campaigns are highest in precisely the same circumstances where the benefits are lowest: where the donors are individuals contributing relatively minor amounts and the ballot measures involve hot-button issues. This cost-benefit asymmetry has always existed. However, before disclosure reports were published on the Internet, this asymmetry was inconsequential because the costs were largely theoretical. In the days before online disclosure, the only people who saw campaign contribution data were curious journalists and voters who traveled in person to an election agency office and rummaged through piles of paper

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<sup>60</sup> OFFICE OF THE INSPECTOR GENERAL, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL, chap. 3 (2008), <http://www.justice.gov/oig/special/s0807/chapter3.htm#19>.

<sup>61</sup> See McGeveran, *supra* note 59, at 17-18.

<sup>62</sup> See BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, AMERICAN CITIZENSHIP 13 (2010), [http://www.america.gov/media/pdf/books/american\\_citizenship.pdf#popup](http://www.america.gov/media/pdf/books/american_citizenship.pdf#popup).

documents stored in filing cabinets.<sup>63</sup> Consequently, there was little risk that anyone's political contribution would ever be known to the public. But that all changed in the late 1990's when states began requiring that all campaign contribution data be posted on government websites.<sup>64</sup> Suddenly, intimate information about people's political beliefs that would have previously resided in "practical obscurity"<sup>65</sup> became instantly available to anyone in the world with an Internet connection. By broadcasting this sensitive information over the Web, states exponentially increased the costs of disclosure, thereby causing the cost-benefit asymmetry to become problematic.

Publishing donor information online has raised the costs of disclosure by profoundly altering (1) the *number* of people who can see the information, (2) the *way* people can see it, and (3) the way people can *use* it. First, in terms of the size of the potential audience, now disclosure data can be easily viewed by anyone with Internet access. Given the ubiquity of Internet-equipped devices such as computers, cell phones, and iPads, this is a staggering number of people who are just a couple of clicks away from viewing the contribution history of anyone they want. While this means donor information is now more accessible to ballot measure voters, it also means the information is more accessible to neighbors, friends, first dates, coworkers, clients, customers, employers, and anyone else donors might not want knowing their political beliefs. In addition, the Internet makes this information easily available to data-mining companies seeking to exploit it for commercial purposes.<sup>66</sup>

This increased access to disclosure data has led to a number of alarming intrusions into donor privacy. For example, after California banned same-sex marriage three years ago by passing Proposition 8, some opponents of the ballot measure retaliated against donors who had supported it by damaging their property, harassing them at work, and threatening them with physical violence.<sup>67</sup> The harassment went both ways. A group of Proposition 8 supporters wrote letters to gay rights advocates who had donated money to oppose the ballot measure and requested they correct their "error" with a large

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<sup>63</sup> See McGeveran, *supra* note 59, at 10.

<sup>64</sup> See, for example, the Online Disclosure Act passed by California in 1997. CAL. GOV'T CODE § 84600, et seq. (West 2010).

<sup>65</sup> United States Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989).

<sup>66</sup> See SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 164-68 (2000).

<sup>67</sup> See ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1200-04 (E.D. Cal. 2009).

donation to the group.<sup>68</sup> Ominously, the letters warned that those who refused to make the requested donations “would have their names published.”<sup>69</sup> Sadly, these intimidation tactics only appear to be growing in popularity. There is now a whole cottage industry of political operatives who use disclosure databases to threaten and deter their opposition.<sup>70</sup> For instance, before the 2008 Presidential election, a “newly formed nonprofit group . . . plann[ed] to confront donors to conservative groups, hoping to create a chilling effect that [would] dry up contributions.”<sup>71</sup> Part of the group’s strategy was to send “warning letter[s] . . . alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives.”<sup>72</sup>

In some cases, donors have become the targets of intimidation not because of what campaign they supported, but simply because of where they worked, a fact revealed in disclosure reports. This happened to Gigi Brienza, a materials sourcing manager at Bristol-Myers Squibb. In 2006, Ms. Brienza’s name and home address appeared on a list of “targets” issued by a radical animal rights group designated by the FBI as a “domestic terrorist threat” because her employer had done business with an animal testing laboratory accused of abuse.<sup>73</sup> Although she herself had no involvement with the lab, and in fact had no idea Bristol-Myers Squibb had any involvement either, she was targeted because her two<sup>74</sup> campaign contributions exposed her as a Bristol-Myers Squibb employee.

Beyond its effect on the number of people who can access disclosure information, the Internet has also transformed the way people view this information. Whereas disclosure reports were once just text on paper, they are now sortable and searchable digital interfaces. Curious Internet users can search massive disclosure databases for specific names, professions,

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<sup>68</sup> Peter Overby, *Groups Seek To Shield Gay-Marriage Ban Donations*, NPR MORNING EDITION (Jan. 29, 2009), <http://www.npr.org/templates/story/story.php?storyId=99989765>.

<sup>69</sup> *Id.*

<sup>70</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 981 (2010). (Thomas, J., concurring in part and dissenting in part).

<sup>71</sup> Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES (Aug. 8, 2008), at A15, available at <http://www.nytimes.com/2008/08/08/us/politics/08donate.html>.

<sup>72</sup> *Id.*

<sup>73</sup> Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, THE WASHINGTON POST (July 1, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902264.html>.

<sup>74</sup> *Id.*

employers, home addresses, zip codes, contribution amounts, or any combination thereof. Consequently, a campaign donor can no longer assume that her personal information will remain hidden in a pile of disclosure data, never to see the light of day. Thanks to the Internet, this information can now be summoned with a few keystrokes. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court recognized the harmful privacy effects of this kind of technology: “[T]he compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search . . . and a computerized summary located in a single clearinghouse of information.”<sup>75</sup>

Furthermore, the digitization of disclosure data has allowed for more captivating and effective displays of donor information. The website [www.eightmaps.com](http://www.eightmaps.com) is a perfect example. Combining disclosure data and Google Maps technology, the site presents an interactive map showing the locations of homes and businesses of Proposition 8 supporters. Viewers can scan the map for donors in their neighborhood, or anywhere else in the country, and when they scroll over a highlighted location, the donor’s personal information appears. The website, which did not debut until after the election, drew enormous attention and is believed to have facilitated the widespread harassment of Proposition 8 supporters.<sup>76</sup> What made Eightmaps.com so devastatingly powerful was that it did more than simply communicate donor information. By leveraging the power of geo-analytics and information visualization, Eightmaps.com transformed disclosure data into a visually rich package that viewers’ eyes and brains could easily absorb.<sup>77</sup> One blogger described its effect as follows: “Mapping the data provided a visual context so powerful that it’s changed the debate. Without a map, all those data points are just addresses on a spreadsheet.<sup>78</sup> As a map, they communicate something different and far more powerful.”

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<sup>75</sup> *United States Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764 (1989).

<sup>76</sup> See, e.g., Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. TIMES (Feb. 7, 2009), at B3, available at <http://www.nytimes.com/2009/02/08/business/08stream.html>.

<sup>77</sup> See M.E. Shin, *Democratizing electoral geography: Visualizing votes and political neogeography*, 28 POL. GEOGRAPHY 149 (2009); STUART K. CARD, JOCK D. MACKINLAY & BEN SHNEIDERMAN, READINGS IN INFORMATION VISUALIZATION: USING VISION TO THINK 15-17 (Diane D. Cerra ed., 1st ed. 1999).

<sup>78</sup> Greg Berry, *Geo-Analytics Transforms CA Politics*, GLOBALLY AWHERE (Jan. 27, 2009) <http://blog.awhere.com/public/item/224704>.

Other digital technologies are similarly transforming the way people encounter and process donor information. For instance, there are now downloadable applications that allow users to search campaign disclosure databases directly on their cell phones. One such “app” is advertised as being “[p]erfect for finding out who [sic] friends, neighbors and . . . politicians have contributed money . . . .”<sup>79</sup> Surely it won’t be long until there is an application that alerts users when they are near the homes or businesses of donors who supported or opposed ballot measures they care about. The Internet has also made it possible for people to view donor information without even seeking it. Through a Google search of someone’s name, details of that person’s political contributions could appear unexpectedly, even years later. Thus, thanks to online disclosure, a regrettable or embarrassing campaign contribution will become part of a permanent digitized archive for anyone in the future to stumble upon.

Lastly, another way the Internet has magnified the costs of disclosure is by creating new means of misusing donor information. Within seconds of obtaining a donor’s name online, an Internet user can effortlessly copy and paste it into search engines and social networking websites to find the donor’s phone number, email address, photos, friends, family members, and additional personal information. The donor can then be harassed over email or Facebook, insulted on Internet discussion forums,<sup>80</sup> and her business given negative reviews on websites like Yelp.com.<sup>80</sup> Moreover, by facilitating easy, anonymous interactions between dispersed individuals, the Internet has enhanced the ability of groups to organize targeted shaming campaigns against donors using disclosure information retrieved from state websites.

In conclusion, although disclosure shines sunlight on the parties who are supporting and opposing ballot measures, the Internet places a powerful magnifying lens up to that light, harming the individuals who stand beneath it and causing others to flee into the shadows. The public policy aim should be to draft disclosure laws that shine enough sunlight so that voters know who is speaking, but not so much that speakers fear getting burned. Unfortunately, the dominant debate has simply been about whether or not to allow the sunlight to shine at all. In courtrooms and the media, the issue has<sup>81</sup> too often been portrayed as a choice between disclosure and no disclosure.<sup>81</sup> Two factors

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<sup>79</sup> FQ PUBLISHING, PUBLISHER’S DESCRIPTION FOR “ALABAMA POLITICAL CAMPAIGN CONTRIBUTION SEARCH (FEDERAL)”, <http://iphone.podnova.com> (last visited Feb. 20, 2012).

<sup>80</sup> See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1201-1203 (E.D. Cal. 2009).

<sup>81</sup> See, e.g., *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F. 3d 1172 (9th Cir. 2007); Cal.

have contributed to this. The first is that the only disclosure options currently available are no disclosure (for those making de minimis contributions) and total disclosure (for everyone else). The second is that traditionally the only way to successfully challenge disclosure laws has been to seek refuge under the blanket exemption offered by *Buckley* to groups that are “subject . . . to threats, harassment, or reprisals.”<sup>82</sup>

Viewing disclosure in simple binary terms—disclosure or no disclosure—ignores the possibility that there are more sophisticated, nuanced policy options available to strike the right balance between public access and privacy. In designing better approaches to disclosure—ones that achieve the desired informational benefits at a lower cost to privacy—states should look to the federal court system for guidance. Its policies governing public access to plea agreements provide helpful insight into how states could protect donor privacy without impairing the benefits of disclosure.

## II. BALANCING PUBLIC ACCESS AND PRIVACY: LESSONS FROM THE FEDERAL COURT SYSTEM

### A. *Crafting Plea Agreement Access Policies in Response to Whosarat.com*

In 2006, the federal court system faced a policy crisis similar to the one facing ballot measure states today. Like state laws requiring online disclosure of campaign contributions, judicial guidelines at the time required courts to make plea agreements publicly available on the Internet through the Public Access to Court Electronic Records (“PACER”) system.<sup>83</sup> Also like campaign

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*Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003); *Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009); *Nat’l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193 (D. Me. 2009); *Family PAC v. McKenna*, No. 10-35832, 2012 WL 266111 (9th Cir. Jan. 31, 2012); Egelko, *supra* note 121; Jessica Garrison & Patrick McGreevy, *Brown, ethics commission seek to preserve disclosure laws on Prop. 8 donors*, L.A. TIMES (Jan. 24, 2009), <http://articles.latimes.com/2009/jan/24/local/me-gay-marriage24>; Stone, *supra* note 75.

<sup>82</sup> See *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); see also *Brown v. Socialist Workers ‘74 Campaign Comm (Oh)*, 459 U.S. 87, 88 (1982).

<sup>83</sup> See U.S. COURTS, CRIMINAL CASE FILE POLICY GUIDELINES AND LOCAL RULE (2004), available at <http://www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/CriminalCaseFilePolicyGuidelines2004.aspx>; U.S. COURTS, FALL 2007 REQUEST FOR COMMENT ON PRIVACY AND SECURITY IMPLICATIONS OF PUBLIC ACCESS TO CERTAIN ELECTRONIC CRIMINAL CASE FILE DOCUMENTS (2007), [hereinafter FALL 2007 REQUEST FOR COMMENT] available at <http://www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/Fall2007RequestForComment.aspx>; Peter W. Martin, *Online Access to Court Records—From Documents to Data*,

disclosure laws, this policy was designed to promote an open, informed democracy and it enjoyed widespread public support.<sup>84</sup> The only exception to the courts' open access policy was that it allowed plea agreements to be sealed when necessary to protect a defendant's safety.<sup>85</sup> Here too, however, campaign disclosure law provides an analogue: under *Buckley*, donors may be granted exemption from disclosure if their safety would be jeopardized.<sup>86</sup> In sum, public access rules for plea agreements in 2006 mirrored those for campaign contribution data today.

Yet the most important similarity was that plea agreement access rules in 2006, like current disclosure laws, were being undermined by privacy threats on the Internet. These threats largely emanated from one source: [www.whosarat.com](http://www.whosarat.com), the most prominent and dangerous example of a new breed of websites "engaged in republishing court filings about cooperators . . . for the clear purpose of witness intimidation, retaliation, and harassment."<sup>87</sup> Created in 2004 by a drug dealer named Sean Bucci, Whosarat.com quickly became a popular forum for exposing the identities of government cooperators, or "rats." By 2006, the website boasted over four thousand "rat" profiles, many of which contained copies of plea agreements downloaded from PACER.<sup>88</sup> Whosarat.com was essentially Eightmaps.com for the criminal

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*Particulars to Patterns*, 53 VILL. L. REV. 855, 860-61 (2008).

<sup>84</sup> See generally FEDERAL JUDICIAL CENTER, REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS (2003), <http://ftp.resource.org/courts.gov/fjc/remotepa.pdf>; U.S. COURTS, COMMENTS RECEIVED BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS IN RESPONSE TO REQUEST FOR COMMENT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2000-2001), [hereinafter 2000-2001 COMMENTS RECEIVED] available at <http://www.uscourts.gov/rulesandpolicies/JudiciaryPrivacyPolicy/2000-2001CommentsReceivedFull.aspx>.

<sup>85</sup> *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) ("[E]vidence that the release of a plea agreement may threaten an ongoing criminal investigation, or the safety of the defendant and his family, may well be sufficient to justify sealing a plea agreement . . .").

<sup>86</sup> *Buckley*, 424 U.S. at 74.

<sup>87</sup> Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to James C. Duff, Sec'y, Judicial Conference of the U.S. (Dec. 6, 2006), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/06/06-2136/Filed\\_01-31-2007\\_ProsecutorsSupplementalCommentsAppendix.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf).

<sup>88</sup> *Id.*; Theresa Cook & Jason Ryan, 'Who's a Rat': Intimidation or Information?, ABC NEWS (May 25, 2007), <http://abcnews.go.com/TheLaw/story?id=3209627&page=1>. For a more thorough description of Whosarat.com and detailed data on its use of PACER



world: it gathered sensitive information about certain disliked individuals from a government website and repurposed the information to create a powerful shaming tool that facilitated retaliation and deterred speech.

The potential implications of Whosarat.com on the criminal justice system were alarming. Although “there was no evidence that anyone had been harmed as a result of the disclosure of information from [plea agreements],”<sup>89</sup> the website endangered the safety of government cooperators and discouraged cooperation.<sup>90</sup> In one well-publicized example, copies of a Philadelphia man’s Whosarat.com profile were posted on utility poles and cars in his neighborhood and mailed to his neighbors, forcing him to move.<sup>91</sup> Another, more subtle effect of the website was that it gave prosecutors and defendants an incentive to avoid making cooperation agreements and instead bargain for benefits that circumvented public oversight and accountability, such as charge bargaining, fact bargaining, referring cases to state prosecutors, and agreeing not to oppose downward departure motions.<sup>92</sup> Notice how these effects parallel those produced by campaign disclosure. Like Whosarat.com, online disclosure can harm and, in extreme cases, endanger donors, thereby deterring campaign contributions and incentivizing the use of shadowy 501(c)(4)

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documents, see Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 956-58 (2009).

<sup>89</sup> Letter from James C. Duff, Sec’y., Judicial Conference of the U.S., to federal court judges (Mar. 20, 2008), available at <http://www.federaldefender.net/Documents/CJA%20Resources/Plea%20Agreements%20memo%203-20-08.pdf>. According to media lawyer Jeffrey Hunt: “Courts were afraid that whosarat.com would put all this information out there and there would be all kinds of negative consequences, and that just hasn’t been borne out. Once courts dug into the issue and gave it a thoughtful examination, they realized the fear had been greatly exaggerated.” Brian Westley, *Secret Justice: Online Access to Plea Agreements*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Summer 2010, at 2, available at <http://www.rcfp.org/rcfp/orders/docs/SJOAPA.pdf>.

<sup>90</sup> Being labeled a “rat” can be dangerous and socially stigmatizing, especially in communities with strong norms against cooperating with police. See Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1205 (2008) (book review); David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES (Mar. 1, 2007), at A1 (describing the “Stop Snitching” movement).

<sup>91</sup> Battle, *supra* note 87; Adam Liptak, *Web Sites Listing Informants Concern Justice Dept.*, N.Y. TIMES (May 22, 2007), <http://www.nytimes.com/2007/05/22/washington/22plea.html>.

<sup>92</sup> Morrison, *supra* note 88, at 941-42.



organizations.

But despite the need to protect cooperators by reducing access to plea agreements, there was an equally compelling need to preserve the public's ability to view these documents. Indeed, roughly 97 percent of all federal criminal cases end in a plea bargain, meaning that access to plea agreements is crucial to understanding how cases are resolved.<sup>93</sup> This is of vital importance not only to legal professionals, but also to anyone with an interest in the criminal justice system. In addition, making plea agreements publicly available allows citizens to hold federal prosecutors and unelected judges accountable for their actions. Because of these powerful concerns, the Constitution<sup>94</sup> and federal common law recognize a public access right to plea agreements. Thus, like in the current campaign disclosure debate, there was a showdown between the seemingly incommensurable values of public access and individual privacy. However, unlike ballot measure states, courts were determined to find ways to harmonize these values.

In 2006, the Judicial Conference, the body tasked with establishing policy guidelines for federal courts, began a year-long process of reexamining its plea agreement access policy in light of Whosarat.com.<sup>95</sup> In order to ensure that all options were considered and opinions heard, the Conference solicited input from the Department of Justice, federal judges, legal organizations, and the general public on whether and how it should change its policy.<sup>96</sup> In its request

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<sup>93</sup> U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure C (2010), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureC.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf).

<sup>94</sup> See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-78 (1980) (holding that the First Amendment granted a qualified right of public access to criminal trials); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-9 (1986) (recognizing a qualified First Amendment right to access criminal trials and documents filed in the course of a trial); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (finding a qualified First Amendment right of access to plea hearings and documents filed in connection with those hearings); David L. Snyder, *Nonparty Remote Electronic Access to Plea Agreements in the Second Circuit*, 35 Fordham Urb. L.J. 1263, 1282-85 (2008).

<sup>95</sup> Duff, *supra* note 80.

<sup>96</sup> In the meantime, it sent a memorandum to all district court judges alerting them to the existence of Whosarat.com and requesting that they "consider sealing documents or hearing transcripts in accordance with applicable law in cases that involve sensitive information or in cases in which incorrect inferences may be made." *Id.*

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for comments, the Judicial Conference described its goals as follows:

The federal Judiciary is seeking comment on . . . two related issues: (1) the privacy and security implications of public Internet access to plea agreements filed in federal court cases; and (2) potential policy alternatives. . . . [T]he Judiciary seeks comments on how it could otherwise meet the need to balance access issues against<sup>97</sup> competing concerns such as privacy and personal security.

Thus, the Conference was interested in fully understanding the effects of its online access policy as well as hearing suggestions on how to make improvements. After the Conference issued this statement, a spirited public debate ensued in which a wide range of participants, from concerned citizens and public officials to news organizations and bar associations, submitted their views.<sup>98</sup>

Although several parties urged the Conference to adopt greater access restrictions, commenters, by a margin of four-to-one, overwhelmingly favored retaining online access to plea agreements.<sup>99</sup> These online access advocates advanced a number of compelling arguments to support their position, focusing on, among other things: the need for convenient, remote access by journalists, defense attorneys, private investigators, academics, and other professionals; the importance of openness and transparency in the judicial system; the public's use of plea agreements to understand the law and the legal system; the overinclusiveness of policy proposals that would restrict access to all plea agreements; and the adequacy of current safety measures allowing for the sealing of plea agreements in exceptional cases.<sup>100</sup> Several commenters even invoked the familiar sunlight metaphor used in campaign disclosure law. As one individual wrote, "Sunshine is ALWAYS the best policy."<sup>101</sup>

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<sup>97</sup> FALL 2007 REQUEST FOR COMMENT, *supra* note 83.

<sup>98</sup> See U.S. COURTS, COMMENTS RECEIVED BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS IN RESPONSE TO REQUEST FOR COMMENT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (Fall 2007), [hereinafter FALL 2007 COMMENTS RECEIVED] *available at* <http://www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/Fall2007CommentsReceivedFull.aspx>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, comment 22. See also comments 26 ("Democracy means openness and sunshine

After thoroughly considering all the feedback, the Judicial Conference concluded that, rather than impose a national policy, the best strategy would be to share its findings with district courts and empower them to craft their own solutions to Whosarat.com.<sup>102</sup> In March 2008, the Conference wrote to all federal judges, “asking each court to consider adopting a local policy that protects information about cooperation in law enforcement activities but that also recognizes the need to preserve legitimate public access to court files.”<sup>103</sup> With this request, ninety-four judicial districts set out to construct the best public access policies they could. When the dust settled, four general policies emerged.

At one extreme was a policy of total public access, where unsealed plea agreements were made available both at the courthouse and online. The majority of courts opted for this approach, which of course had been the previous judicial policy.<sup>104</sup> These courts believed that, except where sealing was necessary, the benefits of unfettered public access to plea agreements trumped the privacy interests of government cooperators. At the opposite extreme was a policy of no public access, where plea agreements were completely removed from public view. The handful of courts that employed this approach did so by either sealing all plea agreements or excluding them entirely from the court record.<sup>105</sup> These courts reasoned that sealing plea agreements on a case-by-case basis provided insufficient protection for cooperators and also created a “red flag” for those whose dockets reflected a sealed plea agreement.

Importantly, however, a sizeable minority of courts rejected these all-or-nothing approaches and instead blazed a middle path between total access and no access.<sup>106</sup> These courts designed two intermediate approaches that sought to carefully balance the competing values of public access and privacy. The first of these intermediate approaches was a policy of offline access, in which plea

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and open access.”), 35 (“Plea agreements . . . are part of the ‘sunshine’ brand of disinfectant that helps us keep our democracy healthy.”), and 39 (“So now, when sunshine is and would indeed be a very powerful disinfectant, while fresh air is sorely needed, why stuff all of it back into a closet to mold and pollute and fester?”).

<sup>102</sup> Duff, *supra* note 89.

<sup>103</sup> *Id.*

<sup>104</sup> Snyder, *supra* note 94, at 1307.

<sup>105</sup> *Id.* See also Conference on Privacy and Internet Access to Court Files, *Panel Four: Cooperation and Plea Agreements—Professors and Practitioners*, 79 FORDHAM L. REV. 65, 79-80 (2010).

<sup>106</sup> Snyder, *supra* note 94, at 1307-09. See also Westley, *supra* note 86, at 3.

agreements were removed from PACER and made available only at the courthouse. This policy was endorsed by the Department of Justice as a sensible compromise<sup>107</sup> and was adopted by several districts.<sup>108</sup> Defending this policy, James Bonini, the clerk for the U.S. District Court in the Southern District of Ohio, stated, “[w]e think it’s actually a pretty sound policy in the sense that we’re trying to make this information publicly available but at the same time we’re trying to offer some protections to cooperating witnesses.”<sup>109</sup> Indeed, as one news report put it, these “federal courts have decided that while [Sean] Bucci and others may have a First Amendment right to disclose the names of informants, the courts should get out of the business of making it easy for them to do so.”<sup>110</sup> Notably, however, offline access did not mean that individuals searching for plea agreements had to comb through paper documents at the courthouse. In most courts, electronic case files were available on public computer terminals.<sup>111</sup>

The second intermediate approach courts devised was a policy of redacted access. Under this policy, all cooperation references in plea agreements were redacted, with the redacted versions made available online and at the courthouse, and the unredacted versions filed under seal as a “Plea Agreement Supplement.”<sup>112</sup> In order to avoid having sealed Plea Agreement Supplements

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<sup>107</sup> Letter from Kenneth E. Melson, Dir., U.S. Dep’t of Justice, to Abel J. Matos, Court Admin. Policy Staff, Admin. Office of the U.S. Courts (Oct. 26, 2007) (on file with U.S. Courts), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/Privacy/65.pdf>; FALL 2007 COMMENTS RECEIVED, *supra* note 98, comment 65.

<sup>108</sup> Snyder, *supra* note 94, at 1307. *See also Panel Four*, *supra* note 105, at 79.

<sup>109</sup> Westley, *supra* note 89, at 2.

<sup>110</sup> Shannon P. Duffy, *Pa. Courts Move to Protect Informants From ‘Who’s a Rat?’ Web Site*, THE LEGAL INTELLIGENCER, (July 17, 2007), <http://www.law.com/jsp/article.jsp?id=1184576795741&slreturn=1&hbxlogin=1>.

<sup>111</sup> FALL 2007 REQUEST FOR COMMENT, *supra* note 83. *See also* FALL 2007 COMMENTS RECEIVED, *supra* note 98, comment 65 (“Under our proposal all non-sealed plea agreements and related docket entries would still be available for public viewing at the courthouse, either electronically or in paper form.”).

<sup>112</sup> Snyder, *supra* note 94, at 1308; Westley, *supra* note 86, at 3. A number of individuals have also lobbied for a policy that would redact cooperating defendants’ identities instead of cooperation references. *See Morrison*, *supra* note 88, at 974-75; FALL 2007 COMMENTS RECEIVED, *supra* note 98, comments 25 and 36; Letter from Jack B. Siegel, Charity Governance Consulting, to John R. Tunheim, Chairman, Judicial Conference Comm. on Court Admin. and Mgmt. (May 22, 2007) (on file with U.S. Courts), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/Privacy/1.pdf>. No court has yet adopted

indicate cooperation, these supplements were filed in non-cooperation cases as well simply stating that there was no cooperation. The actual mechanics of this policy differed slightly in the various districts that adopted it, but the result was the same: the public was given online and offline access to all unredacted plea agreement information, and only the parties in the case had access to the redacted portions mentioning cooperation. Courts that implemented this policy found it to be an “effective”<sup>113</sup> way to “balance the safety of criminal defendants . . . with the public’s right to access court documents . . . .”<sup>114</sup>

These four policies—total access, no access, offline access, and redacted access—continue to govern plea agreements in federal courts today. In contrast, campaign disclosure in all twenty-four ballot measure states is governed by a single extreme policy: total public access to donor information for contributions above a minimum threshold. Thus, despite all their similarities, plea agreement access rules and campaign disclosure laws have responded very differently to online privacy threats. Whereas courts have found creative ways to balance the competing values at stake, states have clung to the same simple approach that has controlled campaign disclosure for decades. It is tempting to conclude from this fact either that policy reform was much more desirable in the plea agreement context or that such reform cannot feasibly be implemented in campaign disclosure. Both conclusions, however, are incorrect as the following two sections explain.

*B. Why Courts Have Modified Plea Agreement Access Rules While States Have Not Amended Disclosure Laws*

The federal plea agreement access policy in 2006 was in no greater need of reform than current disclosure laws. Indeed, not only did the judiciary’s policy have benefits that were at least equal to its costs (something that cannot be said for the disclosure of minor individual donors), it also provided ample protection for cooperators who feared retaliation by permitting courts to seal their plea agreements. Courts revised this policy not because they believed it was a failure, but because their careful examination of the costs and benefits allowed them to identify possible improvements, and their authority to freely modify the policy enabled them to implement these improvements.

From the moment PACER appeared on the Internet in 2001, the Judicial

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such a policy.

<sup>113</sup> *Panel Four*, *supra* note 105, at 72.

<sup>114</sup> Standing Order for Plea Agreements, Plea Agreement Supplements, and Motions to Reduce Sentence for Cooperation (D.S.D. 2008) (Mar. 3, 2008) *available at* <https://www.sdd.uscourts.gov/standingorders/files/Plea%20Agreements.pdf>.

Conference was deeply concerned about its privacy implications. In fact, the Conference only agreed to allow criminal case files to appear online after spending three years conducting studies, examining reports, holding public hearings, and soliciting hundreds of opinions on the effects of online access.<sup>115</sup> Even after these case files were finally made publicly available on PACER in 2004, the Judicial Conference continued to monitor their impact.<sup>116</sup> Consequently, when Whosarat.com arrived, the Conference was quick to take notice. It then spent a year reevaluating the advantages and disadvantages of online access to plea agreements and considered the advice of judges, government officials, legal organizations, and private citizens. In short, the judiciary was committed to ensuring at all times that its plea agreement access rules were as well-designed as possible. State legislatures have not shown anywhere near the same level of concern for ballot measure disclosure laws. Although state legislatures presumably realize that online access to donor information affects privacy, there is little evidence suggesting that they have carefully studied whether and how this should impact disclosure requirements.

One reason courts might have been so much more attentive to the privacy costs of online access is that an important part of their mission is managing privacy threats. Indeed, court documents are rife with confidential information that must be protected from exploitation, such as medical data, financial information, social security numbers, the identities of minors, and the names of undercover agents. Before Whosarat.com came along, courts already had extensive experience protecting these pieces of information through offline access, redaction, and sealing.<sup>117</sup> Consequently, when this digital menace

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<sup>115</sup> U.S. COURTS, THE DEVELOPMENT OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2008), *available at* <http://www.uscourts.gov/rulesandpolicies/JudiciaryPrivacyPolicy/DevelopmentOfPrivacyPolicy.aspx>.

<sup>116</sup> U.S. COURTS, NEW PRIVACY RULES IMMINENT, ANOTHER PRIVACY CHANGE CONTEMPLATED (2007), *available at* [http://www.uscourts.gov/news/TheThirdBranch/07-11-01/New\\_Privacy\\_Rules\\_Imminent\\_Another\\_Privacy\\_Change\\_Contemplated.aspx](http://www.uscourts.gov/news/TheThirdBranch/07-11-01/New_Privacy_Rules_Imminent_Another_Privacy_Change_Contemplated.aspx).

<sup>117</sup> When PACER first debuted, social security, immigration, and criminal case files were all subject to an offline access policy. *See id.* And redaction has often been used in search warrant affidavits to hide the identities of confidential informants and undercover agents. *See, e.g.,* United States v. Napier, 436 F.3d 1133, 1138 (9th Cir. 2006). Redaction has also been used to protect sensitive information such as dates of birth, social security numbers, medical or psychiatric information, financial account data, and the names of minors. Courts have exercised their discretion to seal documents when “the public’s right of access is outweighed by competing interests.” *In re Knight Publ’g Co.*, 743 F.2d 231, 235 (4th Cir. 1984).

appeared, courts were ready to respond with proven privacy strategies. In summary, the judiciary's acute awareness of the privacy implications of online access enabled it to promptly recognize and mitigate the threat posed by Whosarat.com.

However, attention to privacy alone does not explain why courts have been more successful than states at adapting their public access rules to the Internet. The other reason is that courts enjoy much greater freedom to modify their rules than state legislatures. Indeed, each district court possesses the discretion to alter its plea agreement access policy at will.<sup>118</sup> State legislatures, on the other hand, have to gather popular support and navigate a burdensome legislative process in order to amend disclosure laws. Furthermore, unelected federal judges with life tenure are much less likely to feel constrained by public opinion than elected politicians. Judges who want to limit online access to plea agreements can easily do so regardless of whether the public approves. State legislators, however, cannot disregard public opinion if they hope to be reelected. Those legislators who think that disclosure laws should be reformed may nonetheless ignore the problem to avoid being seen as thwarting public access to campaign finance data. Therefore, when courts are acting in their policymaking<sup>119</sup> capacity, they are more institutionally nimble than state legislatures. This, combined with their close attention to privacy, explains why courts have adjusted their access policies to the Internet while states have not.

In conclusion, there are only two things preventing ballot measure states from adopting the kind of creative access reforms that courts have instituted: a careful examination of the costs and benefits of disclosure and the political will to improve the law. If state legislatures study the impact of online disclosure on campaign contributors and voters, they will discover the shortcomings of their policy as it pertains to minor individual donors. They will then hopefully

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<sup>118</sup> See Fed. R. Crim. P. 57(a)(1) ("Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.").

<sup>119</sup> Of course, given that there are roughly four times as many federal district courts (94) as ballot measure states (24), it is not surprising that courts possess a more diverse range of access policies. However, state policies are not simply less diverse, they are not diverse at all. Aside from a few minor differences (some have slightly higher disclosure thresholds and some ask for slightly different information), ballot measure disclosure laws are fairly uniform when it comes to balancing public access and privacy.

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seek to address these shortcomings by pursuing more sensible disclosure strategies. The judiciary's intermediate access policies—offline access and redacted access—offer excellent starting points for designing such strategies.

*C. Improving Campaign Disclosure Through Offline Access and Redacted Access*

Just as offline access and redacted access have brought greater balance to the judiciary's policy on plea agreements, they could be utilized in a similar fashion to improve campaign disclosure laws. Specifically, they could be applied to minor individual donors in order to correct the cost-benefit imbalance that plagues their disclosure. As discussed in Part I, the compelled disclosure of these donors carries high privacy costs and low informational benefits, particularly when ballot measures involve polarizing moral issues. Offline disclosure and redacted disclosure offer ways to minimize the costs without noticeably decreasing the benefits.

Offline disclosure would entail making donor information available at various locations throughout the state (e.g., state election offices, courthouses, libraries, and/or other government-owned buildings), but not on the Internet. However, this would not require a return to the dark days of paper records and file cabinets. As with offline access to plea agreements, the information could be provided in a digital format on public computer terminals. Such digitization would allow viewers to sort, search, and aggregate disclosure data to the same extent they could online, eliminating the inconvenience of having to perform these functions with printed disclosure reports. The only difference would be that viewers could not then repurpose or disseminate the data over the Internet.

Redacted disclosure, like redacted access to plea agreements, would involve concealing the most harmful pieces of information and revealing the rest. For plea agreements, that meant redacting cooperation references; for disclosure reports, it means redacting donors' identities. Therefore, donors' names and street addresses would be hidden from everyone except for the government, which must verify compliance with disclosure requirements, while their cities, states, zip codes, occupations, employers (unless self-employed), and contribution amounts would be publicly disclosed. Such disclosure would operate like the U.S. Census, which compiles<sup>120</sup> personal information about citizens and releases only non-identifying data.

Although these intermediate access policies were designed for plea

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<sup>120</sup> See William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. LAW 1, 32-33, 53-54 (2003) (discussing a census model of disclosure).



agreements, they are in fact better suited to donor disclosure. When applied to disclosure, they can be used to protect the privacy of those donors that require it (minor individual donors) without affecting those that do not. When applied to plea agreements, by contrast, they must be used uniformly for all defendants in order to avoid raising a red flag. That means reducing access to approximately 97 percent of criminal cases even though only about 12 percent actually involve cooperation and an even smaller percentage present a realistic threat of retaliation.<sup>121</sup> Moreover, not only are these intermediate access policies overinclusive for plea agreements, they are incomplete as well since there are a variety of other ways to discover government cooperation, such as through sentencing opinions, search warrant affidavits, witness testimony, and individuals familiar with the case.<sup>122</sup> Campaign disclosure does not suffer from this problem because disclosure reports are the only public record of campaign contributions. Lastly, whereas minor individual donors offer relatively few informational benefits, plea agreements offer many. Therefore, reducing public access is more detrimental when it is done to plea agreements than to minor donor information. In sum, although offline access and redacted access have been useful strategies for plea agreements, they offer even greater promise for campaign disclosure.

In the case of minor individual donors, both offline disclosure and redacted disclosure would provide virtually the same informational benefits as current disclosure laws, but at a substantially lower cost to privacy. Each would do so in its own unique way. Offline disclosure would protect privacy by eliminating online access to donor information, thereby (1) ensuring that only members of the public with a serious interest in campaign finance would view

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<sup>121</sup> U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure C (2010), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureC.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf) (96.8% of federal criminal cases in 2010 resulted in guilty pleas); *id.*, Figure G (2010) *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureG.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureG.pdf) (in 2010, 11.5% of criminal defendants received cooperation credit USSG §5K1.1 Substantial Assistance Departure).

<sup>122</sup> In his comment to the Judicial Conference in 2007, U.S. District Judge John L. Kane described how information about cooperators is often obtained through means other than plea agreements: “[T]he same information about these informants is available from those convicted, their attorneys, witnesses and unindicted conspirators. I have read literally thousands of pages of wiretap affidavits and transcripts of recordings and can assure you that the information sought to be sealed is known within literally minutes of the first arrest.”, FALL 2007 COMMENTS RECEIVED, *supra* note 98, comment 9.

it, and (2) preventing the digital republication and misuse of the information. Despite this significant increase in privacy, offline disclosure would have little negative effect on voter competence. First, as explained in Part I(B)(i), voters rarely even look at online disclosure reports before voting.<sup>123</sup> When they do, presumably only a fraction actually bother inspecting the data on minor contributions. Second, this data is unlikely to be helpful anyway unless it reveals either a striking pattern, such as overwhelming funding by out-of-state donors, or the names of individuals with known political ideologies, such as celebrities or close acquaintances. Third, an offline disclosure policy for minor individual donors would still expose online the contributions of corporations, special interest groups, and major donors. Therefore, voters would continue to enjoy online access to the strongest heuristic cues and would also be able to determine the extent to which campaigns were grassroots efforts.<sup>124</sup> Finally, information about minor individual donors would still be publicly available offline for anyone to view. If this information contained important insights, journalists, campaign activists, and curious voters would surely discover and report them to the general public.

Redacted disclosure would provide even greater privacy protection by completely concealing the identities of all minor individual donors. Fortunately, this too would not compromise voter competence because these identities are meaningless unless voters both recognize them and associate them with a coherent set of political principles.<sup>125</sup> Ironically, by withholding donors' identities, redacted disclosure could in fact *help* voters. Indeed, as Garrett and Smith found in a series of case studies, "not all information promises to increase voter competence, and too much information will overwhelm voters with limited time and attention for ballot questions."<sup>126</sup> Courts themselves have tacitly acknowledged the insignificance of minor donors' identities. Although they have consistently upheld disclosure requirements for small donors, they have never mentioned the need to know these donors' names. Instead, they have focused on the value of aggregate data, such as how many small donors there were, where they lived, and where they worked.<sup>127</sup> Redacted disclosure would reveal all the necessary data for

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<sup>123</sup> See Carpenter, *supra* note 26, at 11-12.

<sup>124</sup> Voters could deduce the combined amount of small contributions by simply comparing the contributions disclosed online with the total contributions claimed by the campaign.

<sup>125</sup> See *supra* Part I(B)(i).

<sup>126</sup> Garrett & Smith, *supra* note 11, at 327.

<sup>127</sup> See, e.g., Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106-07 n.25 (9th

such aggregation without violating donor privacy.

Returning to the sunlight metaphor for a moment, offline disclosure and redacted disclosure thus offer different strategies for solving the magnification problem of the Internet: offline disclosure would remove the magnifying lens while redacted disclosure would soften the light. Although both strategies are effective, each offers certain advantages over the other. By exposing the identities of donors, offline disclosure would provide several benefits that redacted disclosure would not. First, it would increase transparency, which strengthens public trust and confidence in the democratic process and enhances the law's legitimacy. Second, it would promote truthfulness and civility in ballot measure campaigns by holding all donors accountable for political advertising. Third, it would foster the "civic courage" Justice Scalia spoke of in *Doe v. Reed*. Fourth, it would deter and reveal the corruption that can occur when politicians exploit ballot measure campaigns. Fifth, it would furnish heuristic cues to those voters who recognize the names of donors. Finally, it would reveal potentially enlightening biographical information about donors that may be conveyed in their names, such as their gender, nationality, and religion. Redacted disclosure, however, has one enormous advantage over offline disclosure: it would make contribution data available on the Internet, thereby permitting the public to easily access, repurpose, and disseminate it.

Fortunately, there is no need to choose between these two approaches. Because they are not mutually exclusive, offline disclosure and redacted disclosure could be combined and the advantages of both obtained. Thus, states could disclose redacted information about minor individual donors online and unredacted information about them offline. Merging the two would offer the best of both worlds.<sup>128</sup> Furthermore, by publishing unredacted data offline, citizens would be able to verify the redacted data posted by the state online, thus providing a check against government fraud and incompetence.

In conclusion, an easy, yet effective way to improve ballot measure disclosure laws would be to redact the identities of minor individual donors online while continuing to disclose them offline.<sup>129</sup> This basic modification,

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Cir. 2003); *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 212-13 (D. Me. 2009); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1220-24 (E.D. Cal. 2009); *Family PAC v. McKenna*, No. 10-35832, 2012 WL 266111 (9th Cir. Jan. 31, 2012).

<sup>128</sup> Given the complementary nature of offline and redacted access, it is surprising that courts have not pursued this strategy with plea agreements.

<sup>129</sup> At the very least, states could redact the identities of minor individual donors online immediately after the election to prevent a permanent Internet record of their political activity.

which simply imports the innovative access reforms devised by federal courts, would drastically reduce privacy costs without sacrificing informational benefits. However, there is no need to stop here. If the federal judiciary's experience with plea agreements taught us anything, it is to explore creative ways to improve public access policies as thoroughly as possible. To this end, states could refine and revise disclosure laws even further. For example, they could impose additional access restrictions on donor information when the privacy threat is extraordinary and the need for heuristic cues is negligible. Conversely, they could decrease access restrictions when there is a risk of political corruption. Or, instead of merely tinkering with access options, states could enhance disclosure by demanding different information about donors. Yet another possibility would be to remove certain disclosure data from state websites immediately after elections occur. In short, once we allow ourselves to rethink disclosure, we can imagine a variety of ways to further harmonize public access and privacy. Therefore, for states that are willing to pursue more ambitious reform than merely combining offline and redacted disclosure, policy options exist that would deliver even better results. Part III, below, presents two such options.

### III. OVERHAULING DISCLOSURE: TWO ALTERNATIVE POLICIES

#### A. *Four-Level Disclosure*

Part II revealed that there are four possible levels of campaign disclosure: the highest, referred to here as "Level 1," is total disclosure online and offline; "Level 2" is redacted disclosure online and total disclosure offline; "Level 3" is redacted disclosure online and offline; and "Level 4" is no disclosure. These four levels represent different strategies for balancing public access and privacy. As discussed in Part I, ballot measure disclosure laws currently only recognize Levels 1 (for contributions above the disclosure threshold) and 4 (for contributions below that threshold). As a result of this crude approach, the privacy of many donors is often violated unnecessarily. Instead of swinging between these two disclosure extremes, states could create a more finely-tuned policy that utilizes all four disclosure levels. Such a policy would match campaign contributions with the corresponding disclosure level that offers the highest informational benefit at the lowest privacy cost. Identifying this level requires taking into account three variables: (1) the type of donor, (2) the type of ballot measure, and (3) the possibility or appearance of corruption. Recall from Part I that these three variables largely dictate the costs and benefits of disclosure. By tailoring disclosure laws to these variables, states could optimize costs and benefits and achieve an ideal balance between public access

and privacy.

Identifying the type of donor making the campaign contribution is the first and most critical step in this policy. It establishes the initial, baseline disclosure level. For purposes of this policy, there are four types of donors: organizational donors, major individual donors, minor individual donors, and donors making de minimis contributions (below current disclosure thresholds). Because organizations and major individual donors generally provide the greatest informational value and are the least deterred by disclosure, they would be subject to Level 1 disclosure (total disclosure online and offline). Since the reverse is true for minor individual donors, they would be subject to Level 2 disclosure (redacted disclosure online, total disclosure offline). And finally, because the burden of registering and reporting de minimis contributions outweighs the informational value of their disclosure, donors making these contributions would continue to be exempt from disclosure under Level 4.

Admittedly, basing the level of disclosure on the type of donor creates potential First Amendment problems. However, although “First Amendment doctrine has ‘frowned on’ certain identity-based distinctions,”<sup>130</sup> the Supreme Court has “held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms,”<sup>131</sup> which is the case here. As the Court stated in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, “differential treatment” is constitutionally suspect “*unless* justified by some special characteristic” of the regulated class of speakers.<sup>132</sup> The “special characteristics” that distinguish donors in this policy—their contribution size and whether they are an organization or individual—certainly justify their differential disclosure treatment.<sup>133</sup> These characteristics affect voter competence and donor privacy,

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<sup>130</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 946 (2010) at 946 (Stevens, J., concurring in part and dissenting in part).

<sup>131</sup> *Id.* at 945.

<sup>132</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (emphasis added). Justice Stevens observed in his partial dissent in *Citizens United* that “[w]hen [speech] restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.” 130 S. Ct. at 946-47 (Stevens, J., concurring in part and dissenting in part). If this is true of speech “restrictions” such as the campaign contribution limits at issue in *Citizens United*, it is surely true of regulations that only indirectly burden speech like disclosure rules.

<sup>133</sup> Of course, it is doubtful that contribution size could even be considered a characteristic of a donor’s identity. But it is unnecessary to argue this point since distinctions on the basis of contribution size are clearly justifiable.

both of which the state has a strong interest in protecting.<sup>134</sup> Distinguishing donors on the basis of such highly relevant, viewpoint-neutral characteristics is necessary for creating more balanced disclosure laws and should therefore survive judicial scrutiny.<sup>135</sup> Besides, ballot measure disclosure laws already treat donors differently on the basis of these characteristics. In terms of contribution size, these laws distinguish between donors who contribute above the disclosure threshold and those who contribute below that threshold. Several states even create an additional level of disclosure—identification of donors in the actual campaign advertisements—for those contributing above a much higher threshold (in California, for example, it is \$50,000).<sup>136</sup> Furthermore, disclosure laws distinguish between organizations and individuals by requiring different information from each. While individual donors are required by most ballot measure states to reveal their employer, occupation, and home (as opposed to business) address, organizations are not (for the obvious reason that these data points do not exist). Thus, basing disclosure requirements on the identities of donors is not only justifiable, it is standard practice. The differences between the identity-based distinctions in this policy and those in existing disclosure laws are therefore only a matter of degree.

The second variable that would determine the applicable level of disclosure under this policy is the type of ballot measure. As discussed in Part I, not all ballot measures have the same impact on donor privacy or equal need for donor disclosure. Ballot measures that involve straightforward moral issues with a history of eliciting harassment or retaliation pose the greatest threat to donor privacy and are the least in need of heuristic cues. Even when these cues are useful, they are usually provided in abundance by outspoken interest groups, politicians, and political elites.<sup>137</sup> Thus, when ballot measures involve

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<sup>134</sup> Furthermore, imposing a higher level of disclosure on corporations is additionally warranted due to the need for effective shareholder monitoring of corporate expenditures. See *Citizens United*, 130 S. Ct. at 916.

<sup>135</sup> The Supreme Court has upheld the right of legislatures to apply unique regulations to organizations in the electoral context. In *Federal Election Commission v. National Right to Work Committee*, for example, the Court unanimously observed that legislatures are entitled to decide “that the special characteristics of the corporate structure require particularly careful regulation.” 459 U.S. 197, 209-10 (1982).

<sup>136</sup> See, e.g., CAL. GOV’T. CODE § 84503 (West 2010). Some states also create other disclosure thresholds. In Colorado, for example, the law requires disclosure of the name and address of any contributor who gives \$20 or more and the occupation and employer of any contributor who gives \$100 or more. See COLO. REV. STAT. § 1-45-108.5(1)(a) (2011).

<sup>137</sup> See *supra* note 41.

such uniquely polarizing issues, disclosure is simultaneously at its most harmful and least helpful. Accordingly, these conditions warrant a lower level of disclosure, meaning donors assigned to Level 1 would drop to Level 2, and those assigned to Level 2 would drop to Level 3.

However, there are two important caveats. First, organizations would continue to be subject to Level 1 disclosure because they lack personal privacy interests, they offer strong heuristic cues, and the information they disclose does not lend itself to redaction (which is what Level 2 calls for online). Second, individual donors whose campaign contributions are so large that the law currently requires them to disclose their identities on political advertisements would also remain subject to Level 1 disclosure. The personal privacy of these big spenders is far outweighed by the public's right to know who is primarily controlling political advertising. Furthermore, since these donors must reveal their identities in campaign advertisements anyway, the additional harm from revealing them in online disclosure reports is trivial. Therefore, in conclusion, when a state election commission determines (either on its own or in response to an as-applied challenge by donors) that a ballot measure creates an exceptionally grave threat to privacy and an especially low need for disclosure, it would relax disclosure levels for most individual donors.

Here again, of course, there are First Amendment concerns. Predicating disclosure levels on the type of ballot measure is a content-based regulation of speech, and is therefore constitutionally suspect. However, the fact that this regulation is content-based is not in itself cause for alarm. Indeed, there are many viewpoint-neutral, content-based regulations of speech that are valid under the First Amendment, including all campaign disclosure laws.<sup>138</sup> This particular content-based regulation could easily be justified by the compelling need to protect donors against serious harm and to encourage speech where it might not otherwise occur.<sup>139</sup> What is worrisome about this regulation is not so much its content-based nature, but rather the amount of discretion it would give state officials to alter disclosure rules. If not properly constrained, these officials could abuse their discretion and favor certain causes or donors, thereby rendering the regulation viewpoint-neutral in theory only. Therefore, in order to combat this problem, this policy would require that three conditions be met before states could exercise their authority to relax disclosure rules: (1) there must be a documented history of widespread harassment or retaliation

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<sup>138</sup> See *Citizens United*, 130 S. Ct. at 946 (Stevens, J., concurring in part and dissenting in part) (demonstrating that “the authority of legislatures to enact viewpoint-neutral regulations based on content . . . is well settled” even in the realm of political speech).

<sup>139</sup> In this way, the regulation operates as a reverse heckler's veto.



against donors, either in the current ballot measure election or in previous elections on the same issue; (2) the ballot measure must not use confusing or overly technical language and must involve a relatively straightforward moral, as opposed to financial or other, issue; and (3) there must be a history of rich heuristic cues on the subject, such as extensive political endorsements and media coverage. These narrow constraints on state authority are necessary not only to cabin discretion, but also to allow for effective judicial review and to avoid unwarranted decreases in disclosure levels.

Moreover, this content-based feature of the policy is consistent with Supreme Court caselaw on campaign disclosure. In *Buckley v. Valeo*, the Court held that minor political parties are exempt from disclosure when “the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the [law’s] requirements cannot be constitutionally applied.”<sup>140</sup> The present policy adopts a modified version of this rule by permitting states to limit access to donor information when disclosure is both extremely harmful and unhelpful. The only difference is that under this policy, donors need not wait until disclosure becomes completely unconstitutional to obtain relief. They can receive more modest protection—a one-level drop in disclosure as opposed to total exemption from the law—simply by showing that the privacy threat is incredibly high and the need for heuristic cues incredibly low.

The third and final variable that would decide disclosure levels under this policy is the possibility or appearance of corruption. Although corruption concerns are normally absent in ballot measure elections, they do arise when political candidates seek to advance their candidacies by either controlling ballot measure committees or serving as committee spokespeople. In these circumstances, there is a risk of *quid pro quo* corruption as well as the potential for circumventing candidate contribution limits. Indeed, whereas limits on contributions to candidates can be as low as \$200,<sup>141</sup> there are no limits on contributions to ballot measure committees. This creates a powerful incentive and opportunity for candidates to use ballot measure committees to directly or indirectly promote their own campaigns. Candidates regularly exploit these committees to push their policy agendas, gain popularity, shape public opinion, and impact voter turnout, and some have even illegally siphoned money from them.<sup>142</sup> Consequently, in order to effectively detect and deter corruption and

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<sup>140</sup> *Buckley v. Valeo* 424 U.S. 1, 71 (1976).

<sup>141</sup> See, e.g., COLO. CONST. art. XXVIII, §3.

<sup>142</sup> See generally, Dempsey, *supra* note 48; Brief for Brennan Center, *supra* note 48; Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005); Richard L.



strengthen public trust in the political system, there must be increased transparency in the disclosure process whenever a donor contributes to a ballot measure committee that is directed, managed, or influenced by a political candidate or her agent. Accordingly, when this occurs, disclosure levels should be raised so that donors who were previously assigned to Level 3 would move to Level 2, and those assigned to Level 2 would move to Level 1.<sup>143</sup> Because this is a narrowly-tailored, minimally-intrusive regulation of speech that is justified by a compelling interest in preventing corruption, and is neither identity-based nor content-based, its constitutionality is not in question.

The chart below summarizes this proposed four-level disclosure policy:

Four-Level Disclosure Policy: How it Works			
Four possible levels of disclosure	Step 1:  Identify the type of donor.	Step 2:  Consider the type of ballot measure.	Step 3:  Consider corruption concerns.
<b>Level 1:</b> Total disclosure online and offline.	Organizations and major individual donors are subject to Level 1 disclosure.	If the ballot measure involves a straightforward moral issue with a history of eliciting harassment or retaliation, decrease disclosure by one level (only applies to individual donors whose names do not appear on campaign advertisements).	If the contribution is made to a ballot measure committee that is directed, managed, or influenced by a political candidate or her agent, increase disclosure by one level.
<b>Level 2:</b> Redacted disclosure online, total disclosure offline.	Minor individual donors are subject to Level 2 disclosure.		
<b>Level 3:</b> Redacted disclosure online and	Donors making de minimis contributions are subject to Level 4		

Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005).

<sup>143</sup> Donors making de minimis contributions would remain at Level 4 since they present no corruption concerns whatsoever.

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offline.  <b>Level 4:</b> No disclosure.	disclosure.		
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This policy proposal incorporates all the critical insights from Parts I and II of the Article: it recognizes the different informational benefits and privacy costs associated with different types of donors and different types of ballot measures; it factors in the heightened need for disclosure when corruption concerns are present; and it leverages the intermediate access strategies developed by federal courts for plea agreements. Synthesizing all these elements into one set of practical disclosure rules, it creates an optimal balance between public access and privacy. Moreover, not only is this four-level disclosure policy a vast improvement over current disclosure laws, it is also a novel contribution to campaign finance scholarship. It is the first to reveal such a wide range of disclosure levels as well as the first to tailor these levels to the precise factors that affect voter competence, donor privacy, and candidate corruption.

*B. Enhanced Redacted Disclosure*

However, tailoring access to donor information based on salient factors is not the only way to improve disclosure laws. Another way—one that has also been overlooked by campaign finance scholars—is to change the very information being accessed.<sup>144</sup> By altering the underlying disclosure

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<sup>144</sup> This is a strategy courts have not pursued with plea agreements because they cannot—unlike states, which have the luxury of selecting the pieces of information they want divulged in disclosure reports, courts are constrained by the facts of the plea deal, all of which must be included in the plea agreement.

information, states could increase both donor privacy *and* voter competence. Although this may sound shocking to those who are accustomed to viewing these concepts as inversely related, it can be achieved through a simple bargain between voters and donors: voters would relinquish access to the identities of minor individual donors in exchange for access to more useful information about them. Thus, the state would redact the identities of minor individual donors (online and offline), but compel them to disclose more revealing data about themselves. This policy of “enhanced” redacted disclosure would be to everyone’s advantage: donors would get anonymity while voters would get more relevant information. Invoking the sunlight metaphor once again, enhanced redacted disclosure is akin to shining a softer light over a larger area—although the light is less intense, it illuminates a broader landscape.

What voters need most from disclosure laws are heuristic cues, pieces of information that can help them quickly make sense of ballot measures. Recall from Part I that the richest heuristic cues come from donors who have well-known political ideologies or policy agendas such as interest groups, corporations, and political elites. Their support or opposition allows voters “to draw accurate inferences about the consequences of a vote for or against the ballot question.”<sup>145</sup> Notably, this group does not include private individuals, who comprise the majority of donors in many campaigns. Because these individuals’ political ideologies are not publicly known, their campaign contributions are disclosed without any meaningful context, thus robbing their disclosure of significant heuristic value. However, there are data points that would reveal their political ideologies and therefore increase voter competence. The two most obvious ones are political party affiliation and campaign contribution history.

Disclosing donors’ political party affiliation would significantly enhance the value of disclosure. Indeed, party labels offer the most recognizable and useful heuristic cues in politics. As political scientist John Aldrich put it, party identification constitutes the “‘structuring principle’ or ‘lens’ for viewing and understanding politics.”<sup>146</sup> Yet these heuristic cues are conspicuously absent in ballot measure elections. Ballot measures, unlike candidates, do not come wrapped in party labels, and elected officials<sup>147</sup> and political parties rarely involve themselves in ballot measure campaigns. One study found that in 60

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<sup>145</sup> See Garrett & Smith, *supra* note 11, at 297.

<sup>146</sup> JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 166 (1995).

<sup>147</sup> Kang, *supra* note 22, at 1152. Politicians often abstain from publicly supporting or opposing ballot measures in order to avoid making enemies. As Senator William B. Saxbe

percent of these campaigns not a single prominent politician took a public stand.<sup>148</sup> Injecting party affiliation into donor disclosure would allow voters to leverage their knowledge about political parties as an organizing heuristic for understanding ballot measures, just as voters do in candidate elections. Disclosing the party membership of donors would give voters a general sense of where ballot measures fall on the political spectrum, enabling them to align themselves accordingly. And divulging donors' past campaign contributions would paint an even fuller picture of their political orientation, permitting voters to place them and, by extension, the ballot measures even more precisely along the political spectrum.

Other personal information about donors could also be useful. For instance, voters might find it helpful to know about donors' wealth, income, education level, or age. When aggregated, these data points could offer deep insights into the type of donor who is supporting or opposing a ballot measure, which can shed light on the ballot measure itself. In short, disclosure laws could reveal more valuable information about donors than they do. States need not limit themselves to a donor's name, address, contribution amount, occupation, and employer (in fact, five of the twenty-four ballot measure states do not even ask for donors' occupation or employer).<sup>149</sup> However, compelling donors to disclose more extensive personal information about themselves would be highly invasive. Presumably, far fewer individuals would contribute to ballot measure campaigns if it meant having their political party affiliation, complete campaign contribution history, and sensitive biographical data broadcast on the Internet. But if donors could contribute anonymously, there would no longer be any privacy concern. By redacting donors' identities, states could disclose all the relevant personal data they wanted without causing any harm.

Importantly, however, swapping a donor's identity for other personal data is only a good bargain if this data is more valuable than the identity. This is certainly the case for minor individual donors; their identities possess little value to voters. The heuristic cues they provide come almost entirely from the aggregation of non-identifying biographical information about them, such as where they live and what they do for work. Thus, for them, a policy of enhanced redacted disclosure would be ideal. The identities of major individual donors, on the other hand, have substantial value. As explained in

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stated, "[i]f you don't stick your neck out, you don't get it chopped off." DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 11 (1974).

<sup>148</sup> See BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 101-03 (1987).

<sup>149</sup> Carpenter, *supra* note 26, at 4.

Part I, voters have a strong interest in knowing who has the most invested in the outcome of an election and who is primarily controlling campaign advertising. This requires major donors to reveal their identities. Furthermore, the public interest in promoting civility and accountability in campaign advertising, increasing transparency, and combating corruption also militate in favor of disclosing major donors' identities. Although their party affiliation, campaign contribution history, and other private information would be enlightening data to disclose, their identities are more valuable. Consequently, it makes sense to impose traditional disclosure rules on major donors and reserve enhanced redacted disclosure for minor donors.

### CONCLUSION

By thoroughly examining the costs and benefits of donor disclosure in ballot measure elections, this Article has exposed the deficiencies of current laws and, utilizing public access strategies developed by federal courts, has offered three solutions: (1) redact the identities of minor individual donors online, but disclose them, along with all other donor information, offline on public computer terminals; (2) create four levels of disclosure and assign campaign contributions to the level that would optimize informational benefits and privacy costs; and (3) completely conceal the identities of minor individual donors and instead disclose more useful data about them. Each of these proposals would advance the privacy and free speech interests of donors without sacrificing the goals of public access. Furthermore, by reducing the chilling effect of disclosure, these proposals would promote political participation by average citizens and help counteract the domination of campaign spending by corporations, special interests, and the super-rich.<sup>150</sup> Given the important values at stake, it is imperative that states ensure that their disclosure laws are as well-designed as possible. Adopting any of these policy proposals would be a major step in that direction.

Admittedly, legislative action is not the only means of modifying disclosure laws. Campaign donors can, and no doubt will, continue to challenge these laws in court on the theory that they impermissibly violate privacy and burden speech.<sup>151</sup> Ultimately, though, innovative policy reform cannot be achieved

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<sup>150</sup> These privacy-protecting proposals would also reduce the temptation for donors to steer their contributions to shadowy organizations that promise to shield their identities by exploiting loopholes in the tax code.

<sup>151</sup> So far, these lawsuits have generally failed, but that is partly because they alleged that disclosure as a whole was unconstitutional, at least when applied to certain donors. *See, e.g., Nat'l Organization for Marriage v. McKee*, 666 F. Supp. 2d 193, 213. (D. Me. 2009);

through litigation. Although courts may craft clever policies for plea agreements, when it comes to campaign disclosure, the most they can do is strike down unconstitutional requirements. In order to create well-designed, narrowly-tailored disclosure laws, states must pass legislation. This requires lawmakers to acknowledge the enormous terrain that lies between total disclosure and no disclosure and to recognize that within this space are several creative options that can accommodate the informational needs of voters and the privacy rights of donors. Simple, extreme disclosure rules formulated decades ago are ill-suited to today's world where donor information is disseminated on the Internet. The Digital Age demands sophisticated new rules that can capture the benefits of online access without unnecessarily harming individuals who seek to support political causes.

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*ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1220 (E.D. Cal. 2009); *Family PAC v. McKenna*, No. 10-35832, 2012 WL 266111 (9th Cir. Jan. 31, 2012). Perhaps a more targeted attack against just the online disclosure of minor donors' identities might succeed. Although the Supreme Court has found that disclosure in general serves an important purpose, this does not necessarily justify publishing the names of minor donors on the Internet. Indeed, as the Eastern District of California stated in *California Republican Party v. Fair Political Practices Commission*, "the governmental objective of informing voters will not justify *all* disclosure requirements; what is sufficiently compelling to justify one disclosure requirement may not suffice to justify another." No. 04-2144, 2004 U.S. Dist. LEXIS 22160, at \*14 (E.D. Cal. Oct. 27, 2004) (emphasis in original). Therefore, a novel, and potentially successful, litigation strategy would be to argue that the online disclosure of minor donors' identities is unconstitutional because it does not, as it must, "substantially" further a "sufficiently important" governmental interest. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (applying "exacting scrutiny" to disclosure laws and requiring a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest).