Protecting Political Speech and Broadcasters from Unnecessary Disclosure: Why the FCC Should Not Expand Sponsorship Identification Requirements for Political Issue Ads

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I. INTRODUCTION

"[I]t could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

- James Madison[1]

The First Amendment of the Constitution provides that "Congress shall make no law…abridging the freedom of speech; or the press."[2] Political speech, especially, is "central to the First Amendment's meaning and purpose."[3] Furthermore, the "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."[4] Those that try to protect this fundamental civil liberty and the forces that suppress speech have long been at odds, especially as related to political speech. Since the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[5] which found that the First Amendment prohibited governmental limitations on political expenditures by non-profit and for-profit organizations,[6] many critics have cited concerns about donors and special interest groups with deep pockets controlling the political landscape.[7] With unlimited expenditures, these organizations did undoubtedly change the political landscape: they produced more political advertising that focused on a range of topics during election cycles and they contributed to the range of political knowledge and opinion available to the public.[8] But despite this increase in political speech, there are still those that look to limit the influence of third party groups through expansive disclosure requirements

1. THE FEDERALIST NO. 10 (James Madison).
2. U.S. CONST. amend. I.
3. Citizens United v. FEC, 558 U.S. 310, 329 (2010).
4. *Id.* at 339; *see also* Carey v. FEC, 791 F.Supp.2d 121, 134 ("The right to speak effectively would be "diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'").
5. Citizens United v. FEC, 558 U.S. 310 (2010).
6. *Id.* at 311.
7. *See, e.g.*, Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After* Citizens United, 61 Cath. U. L. Rev. 97, 98-100 (2011) (discussing the "feared" *Citizens United* effect, where "non-candidate groups, carefully structured to take advantage of the limits to election-law disclosure requirements, spending potentially unlimited funds to air veiled partisan political ads without accountability to voters").
8. *See* Rachel Baye et al., *Non-Candidate Spending Increases in State Elections*, Ctr. for Pub. Integrity (Sep. 27, 2014), http://www.publicintegrity.org/2014/09/24/15551/non-candidate-spending-increases-state-elections.

for broadcasters which ultimately would abridge the speech of these groups in a way that is contrary to the Constitution.[9]

Organizations concerned about these third party ads and the donors behind them have sought the help of the Federal Communications Commission ("FCC") to increase sponsorship identification requirements in an attempt to bring more transparency to political advertising.[10] In July 2014, the Sunlight Foundation, Common Cause, and the Campaign Legal Center filed two complaints against two television stations that ran ads funded by Political Action Committees ("PACs") that were entirely funded by one person.[11] The complaints alleged that the stations violated Section 317 of the Communications Act of 1934, as amended,, as well as Section 73.1212 of the FCC's rules by not "fully and fairly disclos[ing] the true identity" of the ads' sponsors or using reasonable diligence to obtain information about the sponsors.[12]

While transparency in political advertising is certainly a reasonable objective, these recent complaints are problematic for several reasons. First, the complaints ask the FCC to require individual broadcasters to perform the inappropriate task of investigating third party organizations in order to determine their donation structure.[13] This is a job more properly placed within the Federal Election Commission's ("FEC") jurisdiction, since it handles the formation of Political Action Committees ("PACs") and disclosures of donations on a regular basis.[14] Second, there are already

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9. *See, e.g*., Media Access Project, Pet. for Rulemaking, PRM11MB, 1 (Mar. 12, 2001) (requesting that the FCC amend 47 C.F.R. § 73.1212 to require the "meaningful disclosure of the identity of those purchasing commercials relating to the election of candidates and other controversial issues of public importance"), http://apps.fcc.gov/ecfs/comment/view?id=6016374308.

10. *See, e.g.*, Compl. of Campaign Legal Ctr. et al., Against ACC Licensee, LLC, MB 13-203 (July 17, 2014) [hereinafter *ACC Licensee Complaint*], http://apps.fcc.gov/ecfs/comment/view;ECFSSESSION=8KLGW1sK81J gTcR2s6chlBFzysdRFvsVThh1pVnJ0WQ1p6JfmRLr!1951721665!-1566059965?id=6018182311; Compl. of Campaign Legal Ctr. et al., Against Sander Media, LLC, MB 13-203 (July 17, 2014), http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/KGW-Complaint-Final.pdf.

11. *See ACC Licensee Complaint*; see also Sander Media Complaint.

12. *See id.*

13. *See id.; see also* David Oxenford, *Identification of Sponsors of Non-Candidate Political Ads May Be More Controversial This Election Season as FCC Suggests that Broadcasters May Need to Determine Who is Behind Third Party Ads*, BROAD. L. BLOG (Sept. 2, 2014) (discussing the difficulties broadcasters would face in determining the "true sponsor" of third party political ads if the rules were to change), http://www.broadcastlawblog.com/2014/09/articles/identification-of-sponsors-of-non-candidate-political-ads-may-be-more-controversial-this-election-season-as-fcc-suggests-that-broadcasters-may-need-to-determine-who-is-behind-third-party-ads/.

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14. *See generally* FEC, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW (updated Jan. 2015) (explaining the Commission's duties under Federal Election Campaign Act), http://www.fec.gov/pages/brochures/fecfeca.shtml; *see also* 79 Fed. Reg. 62,797, 62,797-814

safeguards in place that ensure adequate disclosure to the public about third-party organizations who produce political advertising. Broadcasters must have information about the organization in their public and political files, including the name of the organization, the name and phone number of the donor who buys the ad time, and the specifics of when the ad aired.[15] Furthermore, it is in the broadcaster's interest to ensure the information in third party ads is true, because unlike the FCC's "no censorship" requirement, which protects broadcasters from liability with regard to the truthfulness of candidate ads,[16] third party issue ads may subject the station to civil liability if the information in the ad is defamatory, although this is a more remote possibility.[17] Thus, broadcasters must already engage in due diligence before they are presented to the public.

Third, and most importantly, extended disclosure requirements would chill political speech by providing another incentive for broadcasters to shy away from third party ads. Since they are not subject to the "no censorship" requirement,[18] stations may choose to forego third party ads partially or entirely. It is foreseeable that broadcasters would choose not to publish such ads if they are required to not only diligently create a public file on the ad buy, and investigate the content of the ad for defamation, but also investigate how the organization was funded and if the structure of funding would require further disclosure.[19] Thus, if the FCC places more disclosure requirements on broadcasters, it runs the risk of curbing political speech, chilling public debate, and curtailing liberty.

This Note argues that the FCC should not require television stations to further investigate PACs in order to determine the donors of organizations who buy airtime for political ads. The PACs complained of by the Sunlight

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(Oct. 21, 2014) (explaining the revisions to parts 11 C.F.R. § 104 and 114 which regulate campaign contributions by political committees, corporations and labor organizations).

15. *See* 47 C.F.R. § 73.1943 (2015) (explaining the political file requirements for broadcast stations' political files for broadcast; 47 C.F.R. § 73.1212(e) (2015) (explaining the public file requirements for third party organizations who advertise on an issue of public importance).

16. *See* 47 U.S.C. § 315 (a) (2012) (broadcasters "shall have no power of censorship over the material broadcast under the provisions of this section" and noting that the requirement of "no censorship" applies only to "legally qualified candidate[s]"); *see also* 47 C.F.R. §73.1940 (2015) (defining "legally qualified candidate," which does not include corporations, unions, or non-profit organizations).

17. *See* David Oxenford, *Political Broadcasting Refresher Part 5–Why Don't TV Stations Pull More SuperPAC Ads? Is There Potential Liability for These Ads?*, Broadcast L. Blog (Oct. 16, 2012), http://www.broadcastlawblog.com/2012/10/articles/political-broadcasting-refresher-part-5-why-dont-tv-stations-pull-more-superpac-ads-is-there-potential-liability-for-these-ads/; *see generally* Catherine Hancock, *Origins of the Public Figure Doctrine in Defamation Law*, 50 N.Y.L. Sch. L. Rev. 81, 129-134 (discussing the origins of the public figure doctrine developed through *New York Times v. Sullivan* and the difficulty in winning defamation claims).

18. *See* 47 U.S.C. § 315 (a).

19. *See* David Oxenford, *Another FCC Complaint about the True Sponsor of a Political Ad: What's a Station to Do*?, BROAD. L. BLOG (Oct. 22, 2014), http://www.broadcastlawblog.com/2014/10/articles/another-fcc-complaint-about-the-true-sponsor-of-a-pac-political-ad-whats-a-station-to-do/.

Foundation were properly registered with the FEC,[20] and the FCC already has its own political advertising rules in place that require adequate disclosure of information about political issue ads and protect the public from defamatory information.[21] Most importantly, requiring broadcasters to investigate donors' contributions places an unnecessary burden on broadcasters that heightens the possibility of chilling political speech. A broadcaster may choose to forego running an ad that would enhance the risk of fines or criminal prosecution and the public would lose the value of the speech that would have been aired. Rather than focusing their energy on seeking expanded disclosure requirements from the FCC, groups like the Sunlight Foundation should focus on expanding disclosure about donations through the FEC. The FCC's political advertising rules already require enough information in sponsorship identification and provide adequate protection against defamation from third party groups.

This Note will proceed in three parts. First, it provides background on third-party political advertising. This will start with a discussion of the *Citizens United* case, the issues that arose, and the changes that were implemented. Next, it explores the rise of third-party issue ads. Then, it outlines the rules for broadcasters[22] surrounding political advertising of third party groups. This section concludes with an explanation of the Sunlight Foundation complaint and the FCC's dismissal of the issue. Second, this Note analyzes the current disclosure requirements and explores the reasons why expanded sponsorship identification requirements would be counterproductive. This section also proposes a solution for groups that seek more public disclosure from third party political organizations. Finally, this Note concludes by summarizing these major points and finding that expanded sponsorship identification requirements for broadcasters are not necessary or helpful.

II. BACKGROUND

While campaign finance has changed a great deal recently, as a result of *Citizens United*[23] and its progeny, the rules that guide political advertising have remained largely unchanged since the passage of the Communications Act of 1934. While some have suggested that the changes in campaign finance require more extensive disclosure rules for political advertisement

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20. *See* Thomas Adams, *NextGen Climate Action Committee Statement of Organization*, *FEC ID: C00547349*, FEC (filing the requisite forms to satisfy the FEC data requirements for establishing a political committee), http://docquery.fec.gov/pdf/542/13031094542/13031094542.pdf; *see also* FEC, QUICK ANSWERS TO PAC QUESTIONS (guiding the interested party through the instructions and necessary form to establish a PAC. FEC Form 1, the onlye form required to start off, is 4 pages long and only covers the bare minimum of pertinent information) (last visited Jan. 13, 2016), http://www.fec.gov/ans/answers_pac.shtml#connected.

21. *See* 47 C.F.R. Part 73.

22. This Note only focuses on broadcasters, not cable stations.

23. Citizens United v. FEC, 558 U.S. 310 (2010).

broadcasting, the current rules are actually extensive and sufficient to provide viewers with adequate information about the sponsors of political advertisements.

A. Citizens United *Changed the Political Campaign Landscape in Several Important Ways by Allowing Unlimited Political Expenditures by Third-Party Organizations, Corporations and Unions for the Purpose of Express Advocacy*

During the 1970's, campaign finance issues received a great deal of Congressional attention, resulting in the passage of the Federal Election Campaign Act of 1971 ("FECA"), which aimed to increase disclosure of campaign contributions and place limits on those contributions.[24] FECA was later amended through the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which reformed FECA by addressing soft-money contributions and electioneering communications.[25] The BCRA banned national party committees and candidates from using soft money contributions, which are funds not subject to federal limits, and also curtailed issue advocacy by banning electioneering communications paid for by corporations, including non-profits that focused on single issues like abortion or the environment.[26]

Initially, the Supreme Court upheld BCRA's provisions against constitutional challenges in its 2003 decision in *McConnell v. Federal Election Commission*.[27] However, the Court began to strike down parts of the act in several subsequent cases that preceded *Citizens United*. Three years after upholding BCRA in *McConnell*, the Court in *Randall v. Sorell*, found that Vermont's limits on campaign contributions were too restrictive and thus violated the First Amendment.[28] One year later, the Court partially dismantled BRCA's limit on electioneering communications through a plurality opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, paving the way for the proliferation of issue-advocacy advertisements by holding that the prohibition on using corporate funds to finance electioneering communications violated the corporations' free speech rights, as applied to issue-advocacy advertisements.[29] Finally, in *Davis v. Federal*

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24. *See generally* Federal Election Campaign Act of 1971 (FECA), Pub L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30,101-30,126).

25. *See generally* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended at 52 U.S.C. §§ 30,101-30,126).

26. *See id.*

27. McConnell v. FEC, 530 U.S. 93, 142 (2003). The Court in *McConnell* found that the BCRA provision banning national political parties from using "soft money" did not violate their free speech and association rights because the governmental interest in preventing actual or apparent corruption in federal candidates was sufficient to justify contribution limits. *Id.*

28. *See* Randall v. Sorrell, 548 U.S. 230, 232 (2006) (finding that, "Contribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.").

29. FEC v. Wis. Right to Life, Inc., 550 U.S. 449, 452 (2007) (asserting that "the Court should give the benefit of the doubt to speech, not censorship.").

Election Commission, the Court struck down BCRA's "Millionaire's Amendment," which had allowed candidates challenging individuals who self-funded more than $350,000 to operate under relaxed donor and political party donation limits.[30]

Citizens United followed the Court's line of earlier cases by striking down another BCRA provision that limited political speech.[31] *Citizens United* held that the government may not, under the First Amendment, suppress speech based on the speaker's corporate identity.[32] In that case, a non-profit organization, Citizens United, wanted to make a video portraying a negative view of then-Senator Hillary Clinton within thirty days of a primary.[33] Doing so would have violated Section 203 of the BCRA,[34] which bans the use of independent expenditures from corporations and unions for "electioneering communications."[35] The Court held that the BCRA Section 203 ban on the use of corporate treasury funds for express advocacy was unconstitutional.[36]

Justice Kennedy, writing for the majority, explained the dangers of limiting corporate expenditures for express advocacy by discussing the First Amendment implications of such a ban.[37] He wrote:

"Quite apart from the purpose or effect of regulating content . . . the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each."[38]

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30. Davis v. FEC, 554 U.S. 724, 735 (2008) (finding that the Millionaire's Amendment "impermissibly burdens his First Amendment right to spend his own money for campaign speech.").

31. *Citizens United*, 558 U.S. at 365 (finding that BCRA § 203 violated the First Amendment political speech rights of a non-profit organization by barring the use of general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate for federal office within 30 days of a primary election).

32. *See id*. at 365 ("We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

33. *See id.* at 364 (noting that an electioneering communication is "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for federal office' and is made within 30 days of a primary or 60 days of a general election.'").

34. 52 U.S.C. § 30,104.

35. *See Citizens United*, 558 U.S. at 364 (noting that an electioneering communication is "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election.'").

36. *Id.* at 365.

37. *See id.* at 340.

38. *Id.* at 340-41.

Thus, the Court protected Citizens United and other like organizations from content censorship, and prevented the government from chilling speech under the guise of regulating campaign finance.

Until *Citizens United*, the government essentially favored other speakers over corporations and deprived listeners of their right to determine if that corporate express advocacy was worthy of consideration.[39] This was especially problematic to the majority in light of their holding that corporations do have First Amendment rights,[40] and that "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.'"[41] Thus, if corporations are banned from engaging in political speech, then the public misses out on information and opinions that could shape individuals' electoral decisions.[42] In addition, Justice Kennedy warned of the chilling effect on speech if more rules are applied to organizations wishing to engage in political speech, writing that, "[a]s additional rules are created for regulating political speech, any speech arguably within their reach is chilled."[43]

The Court, however, did not invalidate provisions of the BCRA that required disclosure of donations. The Court justified disclaimers and disclosures of advertising sponsorship, finding that, "[a]t the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party,"[44] and "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[45] The Court supported more transparency in the political process, and found disclosure to be in line with the First Amendment because it "is a less restrictive alternative to more comprehensive regulations of speech."[46]

Justice Kennedy also emphasized that effective disclosures of sponsorship would be aided by the rapid advances of the Internet, noting:

"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."[47]

Thus, inherent in the value of disclosures is the assumption that these disclosures, through public files and the like, would inform the electorate of the sources of funding responsible for the political ads on the air and the

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39. *See id.* at 340.
40. *See id.* at 342.
41. *Id.* at 343.
42. *See id.* at 342.
43. *Id.* at 334.
44. *Id.* at 368.
45. *Id.* at 371.
46. *Id.* at 369.
47. *Id.* (some internal quotation marks omitted).

advent of the Internet would make information about corporations engaged in express advocacy further available to those viewers who chose to undertake further research.[48] These effective disclosures would provide the electorate with information that would prevent the appearance of corruption without limiting the First Amendment rights of organizations that engaged in political speech.

B. Since Citizens United, There Has been a Proliferation of Issue Advocacy Campaigns

Through *Citizens United* and its preceding cases, the Court paved the way for more political speech from corporations and non-profit entities. The decision changed the landscape of political advertising dramatically, and was incredibly controversial. *Citizens United* had a substantial impact on the elections that followed. Since the ruling, outside groups spent significantly more on elections, and the cost of running a campaign soared.[49] Further, several subsequent cases that followed *Citizens United* also helped to change the landscape of political campaigning.

In *SpeechNow.org v. Federal Election Commission*, the District of Columbia Circuit held that a provision of FECA limiting individual contributions to political committees that only made independent expenditures (i.e., express advocacy not made in conjunction with a candidate or political party) violated the First Amendment principles established in *Citizens United*.[50] The Court further noted that, "the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow."[51] This decision paved the way for the creation of "Super PACs" or "independent expenditure only groups."[52]

Traditional PACs, or separate segregated funds ("SSFs"), are political arms of corporations, labor unions, membership organizations, or trade associations.[53] These political committees can solicit donations from individuals associated with the parent organization.[54] However, PACs are limited in the amounts that they can give to candidates and political parties,

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48. *See id.*

49. Chris Cillizza, *How Citizens United Changed Politics in 7 charts*, WASH. POST (Jan. 22, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/.

50. *See* SpeechNow.org v. FEC, 599 F.3d 686, 693 (D.C. Cir. 2010).

51. *See id.* at 695.

52. Gregory E. Krieg, *What Is a Super PAC, A Short History*, ABC NEWS (Aug. 9, 2012), http://abcnews.go.com/Politics/OTUS/super-pac-short-history/story?id=16960267.

53. *See* R. Sam Garrett, Cong. Res. Serv., R42042, Super PACs in Federal Elections: Overview and Issues for Congress 3-4 (2013); *see also* FEC, QUICK ANSWERS TO PAC QUESTIONS (last accessed Dec. 26, 2015), http://www.fec.gov/ans/answers_pac.shtml.

54. FEC, QUICK ANSWERS TO PAC QUESTIONS (last accessed Dec. 26, 2015), http://www.fec.gov/ans/answers_pac.shtml.

and can only receive a limited amount in donations from individuals.[55] Specifically, traditional PACs can only contribute $5,000 to each candidate per election, and can only receive $5,000 annually from individuals, among other requirements established by FECA.[56] Super PACs, by contrast, can raise unlimited sums, not only from individuals, but also corporations, unions, and associations.[57] Super PACs can also spend unlimited sums on independent expenditures, which advocate directly for or against a candidate.[58] Both PACs and Super PACs must disclose their donors to the FEC.[59]

Because of their unlimited spending abilities, Super PACs have come to dominate the modern American political campaign. After *Citizens United* and *SpeechNow*, about eighty Super PACs immediately formed and spent $90.4 million, with more than $60 million spent on advocating for or against specific candidates.[60] During the 2012 cycle, Super PACs raised about $826 million and spent $799.2 million.[61] The number of Super PACs jumped from eighty during the 2010 cycle to nearly eight hundred during the 2012 cycle, although only about four hundred and fifty were active in fundraising.[62] In 2010, these organizations spent about $65.8 million on independent expenditures that directly supported or opposed federal candidates, and spent nearly $620.9 million doing the same in 2012.[63] The spending was also far more likely to oppose rather than support a candidate.[64] During the 2014 election cycle, Super PACs accounted for nineteen percent of state-level political ad dollars, which translated to approximately 30,000 more political ads than in 2010.[65]

C. *The FCC Regulates Political Speech Through a Series of Rules for Radio, Broadcast Television and Cable*

The FCC has a great deal of sponsorship disclosure rules for political programming, all of which were upheld in *Citizens United* and its progeny.[66] Broadcasters have been subject to some form of sponsorship-identification

55. *Id.*
56. *Id.*
57. *See* Garrett, *supra* note 53, at 3-4.
58. *Id.*
59. *Id.*
60. *Id.* at 13.
61. *Id.*
62. *Id.* at 14.
63. *Id.* at 15.
64. *Id.* at 16.
65. Baye, *supra* note 8.
66. *See Citizens United*, 588 U.S. at 366 (finding that BCRA provisions that required televised electioneering communications to include a disclaimer identifying the person or entity responsible for the content of the advertising, as well as provisions that required any person spending more than $10,000 on electioneering communications to file a disclosure statement with the FEC did not violate the First Amendment protection of political speech).

requirements since the passage of the Radio Act of 1927.[67] The goal of these early requirements was to prevent radio stations from disguising advertising as program content,[68] not to impose significant investigation obligations on broadcasters.[69]

Section 19 of the Radio Act of 1927 provided guidance on sponsorship identification, stating that:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.[70]

Although the Federal Radio Commission, and its successor, the FCC, did not deal with sponsorship identification in their initial supervision of radio, the provision still made its way into the Communications Act of 1934, with only minimal changes in language.[71] The current provision, Section 317, which governs sponsorship identification, states:

"[a]ll matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished as the case may be, by such person."[72]

This is the most basic rule of sponsorship identification, which serves to inform the public of the funding source behind advertisements on radio and television.

Section 317 also contains a "reasonable diligence" standard, in which it requires broadcasters to gather "information to enable such licensee to make the announcement required by this section," from its employees and others with whom it deals [73] However, the "reasonable diligence" requirement, like the requirements in the Radio Act of 1927, does not require a significant investigation on the part of the broadcaster to determine the

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67. Radio Act of 1927, Pub. L. No. 69-632, § 19, 44 Stat. 1162, 1170.

68. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials In Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 333-34 (2004) (explaining Congress's motivation behind Section 19).

69. *See* Loveday v. FCC, 707 F.2d 1443, 1451 (D.C. Cir. 1983) (explaining that "[t]he legislative history of the Radio Act of 1927 shows that the sponsorship identification provision imposed only a very limited obligation upon broadcasters: to announce that a program had been paid for or furnished to the station by a third-party and to identify that party. We have neither found nor been pointed to any indication that Congress contemplated that section 19 might require broadcasters to investigate whether a party purchasing commercial time was acting on his own behalf or as an agent for someone else.").

70. Kielbowicz, *supra* note 68, at 334.

71. *Id.* at 335.

72. 47 U.S.C. § 317 (2012). This requirement applies to television and radio. *See id.* Cable operator-originated programming was incorporated into this requirement through 47 C.F.R. § 76.1615 in 1969. *See* Kielbowicz, *supra* note 68, at 334.

73. 47 U.S.C. § 317 (a)(2)(c).

truthfulness of the sponsor's statements in buying the ad time.[74] As noted by the District of Columbia Circuit in *Loveday v. FCC*:

"Congress' ratification of these Commission regulations did not impose any burden of independent investigation upon licensees. We have seen that the language of section 317, of itself, does not do so, and it is equally plain that the regulations do not. Subsection (c) of the regulations requires disclosure by the licensee but does not require investigation. The inference that the licensee is required to disclose only what he knows without investigation is fortified by the further statement in subsection (c) that where an agency relationship exists "and such fact is known to the station," the licensee must identify the principal rather than the agent."[75]

The *Loveday* Court made clear that the requirement of "reasonable diligence" does not place an investigatory burden on broadcasters, but merely ensures that the station is disclosing what it actually knows about the sponsor paying for the ad.[76] In the interest of not placing an excessive burden on broadcasters, Section 317 also provides an avenue for the FCC to waive the requirement of a sponsorship announcement if, "in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement."[77]

As advertising expanded throughout the mid-twentieth century, the FCC took a renewed interest in disclosure laws following several scandals surrounding political programming.[78] As a result, the FCC promulgated a new regulation to guide the enforcement of Section 317 in 1944.[79] The initial rules, which remain largely unchanged today, include the requirement that stations denote the nature of support received from the sponsor.[80] For programs with corporate sponsors, or other similar groups, the station had to supply the source, as well as a public file with information about the organization's leaders.[81] Later, after the payola scandals in the 1950s, in which record promoters paid radio stations to play certain music on the air without the public's knowledge, Congress amended Section 317 to criminalize non-disclosure of the true sponsor and extended the requirement to station employees.[82]

74. *Loveday*, 707 F.2d at 1454.

75. *Id.*

76. *See id.*

77. 47 U.S.C § 317 (a)(2)(d).

78. Kielbowicz, *supra* note 68, at 338. During the Presidential election of 1944, both parties created ads to be distributed for radio. *Id.* However, some stations labeled the ads "political announcements," and did not identify the sponsor. *Id.* After a complaint, the FCC reminded stations that Section 317 applied to political advertisements, and then issued further rules to guide the enforcement of the section. *Id.*

79. *See id.* at 342; *see also* 47 C.F.R. § 73.1212 (2015) (containing the current administrative rules which guide sponsorship identification).

80. *See* 47 C.F.R. § 73.1212.

81. Kielbowicz, *supra* note 68, at 342.

82. *See* Levi, *supra* note 7, at 136 (explaining the scope of Section 317 and the development of criminal sanctions for non-disclosure after the payola scandals).

The current rules that guide sponsorship identification stipulate that when a station is provided "money, service, or other valuable consideration [that] is either directly or indirectly paid or promised to, or charged or accepted by such station," then the station shall announce, "that such matter is sponsored, paid for, or furnished, either in whole or in part."[83] The rules also require that the sponsorship announcement shall:

"fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made"[84]

Furthermore, when an agent makes arrangements with the station on behalf of another person, and the fact is known to the station "by the exercise of reasonable diligence," then the announcement should include the name of the person or persons who are sponsoring the commercial, not the agent.[85]

The rules also require that a station maintain a public file, containing information about political ads that viewers and other individuals can access.[86] The rules require that:

"Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection."[87]

Shortly after the rules were adopted, the FCC considered a complaint that prompted clarification of what was "reasonable" with respect to investigating the true identity of a person or persons that paid for broadcast time.[88] The FCC found that whether a broadcaster's investigation is "reasonable" requires a case-by-case determination.[89] The FCC further noted that the possible difficulty in identifying the true sponsor "does not justify a station licensee in adopting a general rule that it will not make time available for the discussion of controversial subjects or for broadcasts by duly qualified candidates for public office."[90]

There are additional requirements for ad time devoted to candidates for public office.[91] Specifically, broadcasters are bound by an equal

83. 47 C.F.R. § 73.1212 (a)(1) (2012).

84. 47 C.F.R. § 73.1212(e) (2015).

85. *Id.*

86. *See id.*

87. *Id.*

88. *Albuquerque Broad. Co.*, Pub. Notice 93622, 40 F.C.C. 1, 1-2 (May 17, 1946).

89. *See id.* (explaining an example that would require further broadcaster investigation as follows: "[f]or example, if a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment.").

90. *Id.*

91. *See generally* 47 U.S.C. § 315 (2012).

opportunities requirement, a censorship prohibition, and an allowance of station use requirement.[92] Stations are required to allow all legally qualified candidates for public office to use their station for advertisements.[93] The station is also required to afford equal opportunities for ad time to all other candidates for that office.[94] Furthermore, the station has no power to censor the material that the candidate puts forth, and must air the ads as they receive them.[95]

Broadcasters must also maintain, for public inspection, a political record of broadcast time that is made by a legally qualified public office candidate, or broadcast time that "communicates a message relating to any political matter of national importance," including messages that relate to a legally qualified candidate, election to federal office, or an important national legislative issue.[96] Political files must contain detailed information, added immediately and maintained online for two years,[97] including information such as the rate charged for the broadcast time, the time the ad is aired, the candidate to which the ad refers and the office sought by that individual, as well as information about the purchaser such as the name, address, and a list of executive officers if it is an organization purchasing the time.[98]

The FCC created new rules for the political file requirement in 2012, which enhance the transparency in disclosure.[99] The FCC rules require major television broadcasters affiliated with ABC, CBS, Fox, and NBC networks in the top 50 designated market areas to post their political file date on the FCC's website, and this regulation took effect on August 2, 2012.[100] Other stations were required to join in this requirement by July of 2014.[101]

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92. 47 U.S.C. § 315(a) (2012).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Second Report and Order*, FCC 12-44, 27 FCC Rcd 4535, paras. 2, 46 (2012) [hereinafter *Enhanced Disclosure Order*].

98. *See* 47 U.S.C. § 315(e)(2) (2012). The full list of requirements states that the political file must contain the following: "(A) whether the request to purchase broadcast time is accepted or rejected by the licensee; (B) the rate charged for the broadcast time; (C) the date and time on which the communication is aired; (D) the class of time that is purchased; (E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable); (F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee; and (G) in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person." *Id.*

99. *See Enhanced Disclosure Order*, 27 FCC Rcd 4535, para. 16.; *see also* R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS PACS 10-11 (2014).

100. *See* GARRETT, *supra* note 99, at 10-11.

101. *Id.*

Overall, the rules that guide political broadcasting are quite extensive, especially in the realm of online public and political files. Broadcasters must make available a great deal of information about sponsors who purchase airtime, whether that sponsor is an organization, a candidate, or a political party, even when the viewer only sees a small disclaimer on the screen during the ad. This is required because, as the FCC put it in 1946, "[a] listener is entitled to know when the program ends and the advertisement begins."[102]

D. *Several Organizations Sent Complaints to the FCC Regarding Compliance with the Sponsorship Identification rules for Political Advertising*

In July 2014, the Sunlight Foundation, Common Cause, and the Campaign Legal Center filed two complaints against two television stations, which ran ads funded by Super PACs that were entirely funded by one person.[103] The complaints allege that the stations violated Section 317 of the Communications Act, as well as Section 73.1212 of the FCC's rules by not "fully and fairly disclos[ing] the true identity" of the ads' sponsors or using reasonable diligence to obtain information about the sponsors.[104]

The first complaint concerned ads that aired on WJLA-TV in Washington D.C. in September and October of 2013.[105] The ads were sponsored by NextGen Climate Action Committee Super PAC, and contained the required sponsorship identification at the end of the commercial to indicate the Super PAC's sponsorship, as well as the website where viewers could find out more information about NextGen.[106] The ads negatively portrayed then-Virginia gubernatorial candidate, Ken Cuccinelli as a corrupt individual who accepted lavish gifts and helped an out-of-state energy company avoid paying for drilling on Virginians' land.[107]

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102. Kielbowicz, *supra* note 68, at 343 (quoting FCC, Pub. Serv. Responsibility of Broad. Licensees 47 (1946) (discussing the necessity of broadcasters' responsibility to differentiate between advertisements and programming, especially where the start of a sponsored advertisement is unclear), http://reboot.fcc.gov/c/document_library/get_file?uuid=9f04f8f3-0ef9-485e-bbdb-544e29bc70a6&groupId=101236).

103. Compl. of Campaign Legal Ctr. et al., Against ACC Licensee, LLC, MB 13-203 (July 17, 2014) [hereinafter Compl. Against ACC Licensee], http://apps.fcc.gov/ecfs/comment/view;ECFSSESSION=8KLGW1sK81J gTcR2s6chlBFzysdRFvsVThh1pVnJ0WQ1p6JfmRLr!1951721665!-1566059965?id=6018182311; Compl. of Campaign Legal Ctr. et al., Against Sander Media, LLC, MB 13-203 (July 17, 2014) [hereinafter Comp. Against Sander Media], http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/KGW-Complaint-Final.pdf.

104. *See* Compl. Against ACC Licensee, MB 13-203, at 1-2; *see also* Compl. Against Sander Media, MB 13-203, at 2.

105. Compl. Against ACC Licensee, MB 13-203, at 1.

106. *See id.* at 5-6. The second ad's disclaimer reads: "PAID FOR BY NEXTGEN CLIMATE ACTION COMMITTEE, WWW.VACLIMATEVOTERS.ORG."

107. *See id.* at 4-6.

The complaint alleged that WJLA did not disclose the "true identity" of the sponsor as required by the FCC because Tom Steyer, NextGen's founder, not NextGen as an organization, was the true identity that should have been portrayed on the ad.[108] The complaint further alleged that WJLA failed to exercise reasonable diligence because they did not research NextGen to find out that Steyer was the only donor, and thus failed to publish Steyer's name in the ad as its sponsor.[109] As evidence of the station's lack of reasonable diligence, the complaint pointed to a WJLA news report that talked about Steyer's funding of a Super PAC, readily available information from FEC disclosures, and NextGen's website, which indicated Steyer's fundamental role in the Super PAC.[110]

The Sander Media complaint concerned ads that aired on KGW in Portland, Oregon between May 5 and May 19, 2014.[111] The ads were placed by the American Principles Fund, a Super PAC founded and primarily funded by Sean Fieler, a New York hedge fund manager.[112] The ad in question attacked then-Senate candidate Monica Wehby for not being as conservative as another candidate, Jason Conger.[113] The ad contained the required sponsorship disclosure at the end; stating, "American Principles Fund is responsible for the content of this advertisement."[114] Similar to the WJLA complaint, the KGW complaint alleges that the station neither identified the true sponsor, whom it believed to be Sean Fielder, nor engaged in reasonable diligence, because this information was readily available from the group's FEC filings.[115]

Both complainants contend that, "[w]hen an organization has a single donor, that organization represents the will and opinion of only that single donor because that person controls the purse strings."[116] Thus, the complaints conclude that it is misleading to tell the public that an organization, rather than a natural person, is sponsoring a political ad, because then the public is clueless that the ad is funding an individual's political agenda.[117]

The FCC found that there was not a "sufficient showing that the stations had credible evidence casting into doubt that the identified sponsors

108. *See id.* at 6-8.

109. *See id.* at 8-10.

110. *See id.*

111. *See* Compl. Against Sander Media, *supra* note 107, at 2.

112. *See id.* at 4. Fielder represented 98.6% of the Super PAC's donations.

113. *See id.* at 4-5.

114. *See id.* at 6. The disclaimer reads: "AMERICAN PRINCIPLES FUND IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERSTISING. PAID FOR BY AMERICAN PRINCIPLES FUND. NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE."

115. *See id.* at 6-9.

116. *See* Compl. Against ACC Licensee, at 7; *see also* Compl. Against Sander Media, at 7.

117. *See* Compl. Against ACC Licensee, at 7-8; *see also* Compl. Against Sander Media, at 7-8.

of the advertisement were the true sponsors."[118] Further, the FCC essentially denied the reasonable diligence claim even though they found the complaint against WJLA presented some evidence that WJLA had knowledge about the relationship between Tom Steyer and NextGen Climate Action Committee in stating, "we exercise our discretion not to pursue enforcement in this instance, given the need to balance the 'reasonable diligence' obligations of broadcasters in identifying the sponsor of an advertisement with the sensitive First Amendment interests present here."[119] The FCC however, did note that their approach may have been different if the complainants had notified the stations of the true sponsors.[120] Thus, the FCC left the question of further sponsorship identification requirements for single-donor and primarily single-donor super PACs, where the licensee has actual notice that an individual is sole-funder of an organization open-ended. While the FCC considered the actual knowledge of the broadcaster, it also carefully tiptoed around the First Amendment issues at play.

III. ANALYZING THE FCC'S SPONSORSHIP IDENTIFICATION RULES: WHY LESS IS MORE

The current rules guiding broadcasters in sponsorship identification are sufficient to provide adequate disclosure of political ad sponsors. The complaints from Sunlight Foundation, Common Cause, and the Campaign Legal Center problematically seek to place an vague investigatory burden on broadcasters to question the legitimacy of properly FEC registered organizations by insisting that their organization should not be the only disclaimer in the ad. Requiring further on-air disclosure would be unnecessary, given the existing requirements of the public and political files. Viewers already have access to information about the ad buy, the donations to the organization, and further information readily available on the organization's website. Furthermore, it is already in the best interest of the station to only responsibly air third party issue ads because those ads are not subject to the no censorship rule, and broadcasters can be liable for defamatory information contained in those ads. Most importantly, further requirements for disclosure would have the negative effect of chilling political speech because forcing broadcasters to further investigate third party ads that were the product of Super PACs would provide an incentive to simply not air such ads. Some stations may even refuse to air any third party ads, as some already do.

This result would be contrary to the goals of the FCC, as noted in its response to the above complaints, as well as the Supreme Court in *Citizens United*. Protecting political speech is of the utmost importance, and since the current regulations provide sufficient transparency in political advertising,

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118. Compl. Against ACC Licensee, LLC & Sander Media, LLC, Letter, DA 14-1267, 29 FCC Rcd 10427, 10427-28 (Media Bur. 2014).

119. *Id.*

120. *Id.*

further requirements are unnecessary. The FCC should not require individual donors of third party organizations, like PACs or Super PACs, to be identified on air as sponsors of political advertisements. Under Section 317(d) of the Communications Act of 1934, the FCC can waive the announcement requirement in cases in which it "determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement."[121] While these three considerations would not support removing sponsorship identification here, they do weigh against further requirements on broadcasters with regard to political advertising from third parties.

Furthering the sponsorship identification requirements for third party ads would first be inconvenient to broadcasters, as it would put them in an inappropriate and seemingly vague investigatory role, even where they have no legitimate reason to believe that the named sponsor is not the true sponsor of the ad. This lack of clarity would dis-incentivize broadcasters from airing Super PAC ads. Furthermore, it is unnecessary to publish the names of individual donors, even where there is only one principal donor to the organization, because that information is readily available to individuals on the station's political file, the organization's FEC disclosures, or even other easily searchable alternatives Lastly, the public interest in protecting political speech weighs against further requirements because of the chilling effect it would have on political speech. Stations may decide not to run third party ads if they run the risk of being non-compliant by not researching and publishing donor names. Further, organizations may be less likely to engage in political speech if they fear that donor names would become the entire focus of their advocacy, as opposed to the organization's message. Ultimately, necessity, convenience, and the public interest favor the sponsorship identification requirements that are already in place.

A. *The FCC Should Not Require Broadcasters to Publish Individual Donor Names in Sponsorship Identification for Political Advertisements Because Such a Requirement Would be Inconvenient for Both Broadcasters and Organizations That Wish to Engage in Political Speech*

The FCC should not require broadcasters to add individual donor names to its sponsorship identification because such a requirement would place an inappropriate investigative burden on broadcasters that would conflict with their normal duties.

Section 317 of the Communications Act requires that broadcasters engage in "reasonable diligence" when attempting to ascertain information from individuals and organizations wishing to publish political issue ads.[122]

121. 47 U.S.C § 317(d) (2012).

122. *See* 47 U.S.C. § 317(a)(2)(c) (2012) (requiring that the broadcaster "shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals

However, this requirement has not been construed to require a great deal of investigation on the part of the broadcaster.[123] In further defining the reasonable diligence requirement, the FCC found that broadcasters must fully and fairly disclose the true identity of the sponsor,[124] but that a "reasonable" investigation could only be determined on a case-by-case basis.[125] The example the FCC provided for a situation that required more investigation than simply gathering information from the sponsor was when "a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay."[126] Thus, the FCC placed a limited duty on broadcasters, primarily requiring them to gather information from the sponsor and take them at their word, provided that there were no obvious signs of deceit.

Adding to the reasonable diligence requirements of Section 317 would be inconsistent with FCC precedent, because it would require the broadcaster trying to air the ad to investigate a properly FEC registered organization, regardless of signs of deceit. The burden would come in the form of changing the broadcaster's role from a business accepting bids for air time to an investigator of an organization's funding and a judge of who is fit to censor content which contains political speech. In *Loveday*, the District of Columbia Circuit noted that, "Section 317 can hardly have been designed to turn broadcasters into private detectives."[127] Doing so would require them to engage in activities they are not equipped to handle, like "subpoena[ing] documents or compel[ling] the attendance of witnesses."[128] Because broadcasters are not investigators nor judges, they should not be burdened with the task of determining which donors need to be disclosed on air, or questioning legitimate organizations whose only goal is exercise their right to engage in political speech. In fact, there is already an organization which authorizes these organizations and requires them to submit information about their donations. Broadcasters should not be doing the FEC's job.

Further sponsorship identification requirements would also inconvenience both broadcasters and organizations wishing to engage in political speech by delaying or even prohibiting their ad from airing. By making broadcasters investigate each organization that wishes to buy ad time, "the result would be to judicialize the process of being allowed to utter a political statement."[129] If the broadcaster is required to investigate every organization, then the broadcaster must take the time to conduct such an

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directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.").

123. *See Loveday*, 707 F.2d at 1454 (finding that "Congress' ratification of these Commission regulations did not impose any burden of independent investigation upon licensees.").

124. *See* 47 C.F.R. § 73.1212(e) (2012).

125. *Albuquerque Broad. Co.*, Pub. Notice 93622, 40 FCC 1, 1-2 (1946).

126. *Id.*

127. *Id.* at 1457.

128. *Id.* (noting that "Broadcast companies are not grand juries.")

129. *Id.*

investigation, and the organization buying the ad time runs the risk of their ad being delayed, and even not run at all.[130]

In their complaints to the FCC about the single-donor Super PACs, Sunlight Foundation and the other organizations essentially fault the television stations for not being investigators into the "true" sponsors of the ads in question.[131] Particularly in the NextGen Climate Action complaint, the complainants point to the station's own news program covering Tom Stayer's involvement in the Super PAC as proof that they should have known he was the true sponsor, and thus should have published his name.[132] This argument ignores an important possibility: maybe the broadcaster *did* know about Stayer, but, knowing that NextGen was a legitimate organization, found no reason to question its purchase of ad time or require further sponsorship identification. Expanding the sponsorship identification requirement wouldn't necessarily require a broadcaster to go to extraordinary lengths to find out about about the donation structure of a Super PAC, as this information is available in many places. But this requirement is still inconvenient because it puts the broadcaster in a role it has not been in as a constant investigator and judge, and a role where there is already another federal agency to do that job.

In order to exercise due diligence, the complainants would have required the stations to supplant information that is already provided by the FEC and question legitimate organizations in order to ensure that individuals, rather than organizations, appear as sponsors. [133] Without more indicia of deceit by the organization, this kind of inquiry is not required by Section 317, and is inconvenient for the broadcaster. Thus, requiring further investigation from broadcasters would be inconvenient because broadcasters are not investigators nor judges.

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130. *See id.* (finding that, "Congress cannot be presumed to have intended to place that burden, expense, and delay upon political speech. In the absence of such cooperation by the parties with whom stations deal, the alternative would be a field investigation by agents of the stations, involving requests for documents and interviews and, perhaps, observation of suspected persons.").

131. Compl. of Campaign Legal Ctr. et al., Against ACC Licensee, LLC, MB 13-203 (July 17, 2014), http://apps.fcc.gov/ecfs/comment/view;ECFSSESSION=8KLGW1sK81JgTcR2s6chlBFzys dRFvsVThh1pVnJ0WQ1p6JfmRLr!1951721665!-1566059965?id=6018182311; Compl. of Campaign Legal Ctr. et al., Against Sander Media, LLC, MB 13-203 (July 17, 2014), http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/KGW-Complaint-Final.pdf.

132. *See* Compl. Against ACC Licensee, at 8-9.

133. *See id.*

B. The FCC Should Not Require Broadcasters to Publish Individual Donor Names in Sponsorship Identification for Political Advertisements Because Such a Requirement is Unnecessary Given the Current Public File Requirements and the Readily Available Nature of the Information

It is unnecessary to publish individual donor names on the ads because announcing the name of the Super PAC behind the ad provides sufficient information to viewers who may want to determine the organization's purpose in funding that commercial. For additional information about the organization behind the political ad, viewers are able to access the broadcaster's public file for information on the ad, the FEC filings on the organization, or simply use an Internet search to easily obtain the information.

Broadcasters are required to keep additional information that is not aired in political ads in a file, which can be viewed by the public online.[134] The broadcaster must publish a great deal of information about the ad and the organization, including the name of the candidate the ad concerns, the name of the person and organization purchasing the ad time, the contact information for the organization, and a list of the chief executive officers of the organization.[135] Armed with only the name of the organization behind the ad in the television disclosure, viewers are able to search for the organization online, access its FEC donation disclosures, and view the station's political file on that organization, which would contain pertinent information such as the name of the person who purchased the time, the contact information for the organization, and a list of the chief executive officers for the organization.[136]

The complainants seem to contend that the broadcasters were not reasonably diligent in researching the Super PACs behind the ads because the name of the groups' sole donors were not disclosed in the ad itself.[137] But, as discussed above, the broadcasters may have had the information, but did not think it was their role to investigate a legitimate organization. Additionally, the broadcasters may have concluded that it was unnecessary to put the donor name in the ad because the information was so obvious and widely available. For example, through WJLA's public file on Next Gen,[138]

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134. *See* 47 U.S.C. § 315(a) (2012); *See* Standardized and Enhanced Disclosure Requirements for Television Broad. Licensee Pub. Interest Obligations (Enhanced Disclosure Order), *Second Report and Order*, FCC 12-44, 27 FCC Rcd 4535, paras. 2, 46 (2012).

135. 47 U.S.C. § 315(e)(2) (2012).

136. *See id.*

137. *See* Compl. Against ACC Licensee, at 8-10; *see also* Compl. Against Sander Media, at 8-9.

138. *See* FCC, WJLA-TV STATION PROFILES & PUB. INSPECTION FILES (last visited Apr. 8, 2015), https://stations.fcc.gov/station-profile/wjla-tv/find/nextgen_climate.

the FEC disclosures,[139] and NextGen's own website,[140] it is very easy to see that Tom Steyer plays a central role in the Super PAC. Because that information is so easy to obtain, it is similarly easy for viewers to find that information, and thus they are not "misled," as the complaints claim,[141] if the ad they see only contains NextGen as the sponsor.

The complaints in question simply do not target the correct problem, nor do they identify the correct remedy. Rather than lobbying the FCC to expand its disclosure requirements, it may be more worthwhile to make sure the FCC keeps broadcasters diligent about their existing responsibility to maintain thorough public files, which can be utilized by the public to gain more information about the organizations that run ads on a particular station. Because broadcasters are required to keep pertinent information about political ads and organizations behind them in their public files, it is unnecessary to require the broadcaster to provide this information in the sponsorship identification.

C. *The FCC Should Not Require Broadcasters to Publish Individual Donor Names in Sponsorship Identification for Political Advertisements Because Such a Requirement Would be Contrary to the Public Interest in Encouraging and Airing Political Speech*

Lastly, and most importantly, the public interest in protecting political speech weighs against requiring broadcasters to publish individual donor names. Stations already have the discretion to decide whether or not to publish third-party non-candidate political ads, because there is no requirement to run those ads, unlike ads that come directly from candidates.[142] Putting an extra burden on broadcasters to investigate the individuals who fund these ads provides another disincentive to broadcasters who might consider airing these ads. If the barriers to PACs wishing to have their political speech heard through broadcasting are too high, then the FCC would be chilling political speech.

The regulations currently guiding broadcasters when publishing political ads weigh heavily in favor of broadcasting such material. In the case

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139. *See* FEC, ITEMIZED INDIVIDUAL CONTRIBUTIONS - NEXTGEN CLIMATE ACTION COMMITTEE (July 9, 2014) (providing a list of itemized individual contributions), http://www.fec.gov/fecviewer/CandCmteTransaction.do

140. *See* NextGen Climate (Apr. 9, 2015), https://nextgenclimate.org/.

141. *See* Compl. of Campaign Legal Ctr., Common Cause, and Sunlight Found. Against ACC Licensee, LLC, licensee of WJLA-TV, http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/WJLA-Complaint-Final.pdf; Compl. of Campaign Legal Ctr., Common Cause, and Sunlight Found. Against Sander Media, LLC, Licensee of KGW, Inst. for Pub. Representation, http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/KGW-Complaint-Final.pdf.

142. *See* 47 U.S.C. 315(a) (noting that the requirement of "no censorship" applies only to "legally qualified candidate[s]"); 47 CFR §73.1940 (defining "legally qualified candidate," which does not include corporations or non-profit organizations); *see also* Oxenford, *supra* note 16.

of candidates' ads, broadcasters are required to give access to the airwaves and are prohibited from censoring content put forth by candidates and their respective committees.[143] Even though other types of political ads are not included in this "no censorship" requirement, the FCC has still noted that sponsorship identification difficulties do not "justify a station licensee in adopting a general rule that it will not make time available for the discussion of controversial subjects."[144]

However, unlike candidate ads, third party political ads carry extra responsibilities for the broadcaster. In addition to sponsorship identification requirements, the broadcaster carries liability if the content in the ad is untrue or defamatory.[145] This requirement helps to ensure that broadcasters are careful in putting forth truthful and useful political commentary for the public. Thus, there is no need to require broadcasters to further investigate organizations behind these ads because they already have a duty to do so.

If sponsorship identification requirements were extended, political speech would be chilled in the process. Because broadcasters have a choice not to air political ads that are not from candidates, they may choose not to publish certain ads if it appears that investigating the organization behind that ad would entail too many expenses or too much time. The result of this kind of determination would be the censorship of political speech that would be useful to the public when they are making decisions in voting. Broadcasters engaging in this type of censorship would contradict the Supreme Court's policy in *Citizens United*, which sought to extend political speech to more organizations.[146] Broadcasters would be engaging in identifying "preferred" political speakers, based on their ability to be investigated, rather than by the speech they are engaging in.

If sponsorship identification requirements were extended for stations, like those in the complaints, then the broadcasters may have chosen not to air ads from Super PACs that were funded primarily by one person. Even though the Super PACs were properly registered with the FEC and sought to publish truthful information about candidates for office to the public, they could have been censored simply because their organization would have required too much investigation. The public would have then lost out on a political ad that helped them make their voting decision, and the Super PAC would have lost its ability to engage in political speech. Because extending sponsorship identification requirements goes against the public interest in encouraging and airing political speech, then the FCC should not make extra sponsorship identification requirements for broadcasters.

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143. *See* 47 U.S.C. § 315(a) (2012).

144. *Albuquerque Broad. Co.*, Pub. Notice 93622, 40 F.C.C. 1, 1-2 (1946).

145. *See* 47 U.S.C. 315(a) (noting that the requirement of "no censorship" applies only to "legally qualified candidate[s]"); 47 CFR §73.1940 (defining "legally qualified candidate," which does not include corporations or non-profit organizations); *see also* Oxenford, *supra* note 16.

146. *Citizens United*, 588 U.S. at 365.

IV. CONCLUSION

Political advertising has seen amazing changes since *Citizens United*. More organizations are able to effectively fundraise from individuals and make independent expenditures in the interest of advocating for or opposing a candidate for public office. These organizations have spent a great deal of money on ads that inform the public about the candidates for whom they may consider voting. What has not changed are the FCC's regulations regarding political issue ads. Broadcasters still carry the same responsibilities, and are thus not overburdened with the influx of these kinds of ads.

However, if the FCC were to extend its sponsorship identification requirements to address some of the complaints it has received, the result would be an extra investigatory burden on broadcasters, a limit on political speech for the organizations trying to buy ad time, and a loss of useful political information for the public. Because of these problems, the FCC should not require television stations to further investigate PACs in order to determine the "true" sponsors of political ads. The requirements of the FCC are already sufficient to ensure that there is transparency in the political advertisement process. Furthermore, requiring more extensive disclosure would cut against the convenience, necessity, and public interests that the FCC has in protecting political speech. To extend the sponsorship requirements would only help to abolish the liberty of political speech, and cut off essential access to the airwaves just because some see the donors behind them as destructive.