INSTITUTE FOR FREE SPEECH

A Progress Report for 2017 to
Supporters of the Institute for Free Speech

February 5, 2018

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Mission

The Institute for Free Speech, through strategic litigation, communication, activism, training, research, and education, works to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment.

We are the nation's largest organization dedicated solely to protecting First Amendment political speech rights.

Scope of this Report

This report covers activities related to the use of funds in 2017 from supporters of our efforts to protect and advance free political speech and to protect donor privacy.

Strategic Litigation

Our strategic litigation, over the long run, seeks to win victories on key constitutional points that will constrain future legislation and regulation. As a tactical matter, we seek targeted cases that can be used to focus the courts on a narrow issue, while also limiting extraneous discovery and overall costs. We believe such cases are often more winnable than large, "omnibus" litigation, and we seek to use each victory and favorable precedent as a stepping stone in the next case.

During 2017, the Institute for Free Speech represented clients in eleven cases to defend or expand First Amendment rights to free political speech. The Institute for Free Speech also filed amicus briefs in nine other important cases.

Active Cases as of December 31, 2017:

Here is the title of each case, its general subject, and the date the case or our participation began:

- *Calzone v. Missouri Administrative Hearing Commission* (lobbying disclosure), April 14, 2016.
- *Calzone v. Missouri Ethics Commission* (lobbying disclosure), October 21, 2016.
- *Federal Election Commission v. Jeremy Johnson and John Swallow* (motion to dismiss filed on behalf of Mr. Swallow, challenging unconstitutionally vague regulation that was adopted in violation of the Administrative Procedure Act), our participation in this case began October 23, 2017.
- *Institute for Free Speech v. Becerra* (charity disclosure), March 7, 2014.
- *Holmes, et al. v. Federal Election Commission* (irrational contribution limits), July 21, 2014.
- *Howard Jarvis Taxpayers Association v. Brown* (constitutionality of passage of law to enable tax-financed campaigns), December 12, 2016.
- *Thomas v. Schroer* (constitutionality of state political sign regulations on private property) December 4, 2017.

Institute for Free Speech court wins in 2017 include:

- We obtained a final ruling that Colorado's ballot issue disclosure law violated the First Amendment for small, citizen groups. The case was formally closed on April 7, 2017 after Colorado paid us $220,000 in attorney's fees. After the lower court rulings, the state passed a new law to fix the defect identified by the courts. Now groups like CSG only need to file one short form until they spend more than $5,000, and no disclosure of donors or expenditures is required until that amount is reached.

- A California judge struck down a law on August 24 that would allow state and local governments to enact tax financing of political campaigns. The Court said the Legislature's attempt to bypass the voters violated the California Constitution and the 1974 Political Reform Act as amended.

  Institute for Free Speech attorneys represented former State Senator and retired Superior Court Judge Quentin Kopp and the Howard Jarvis Taxpayers Association. Kopp was a co-author of Proposition 73, the initiative measure that enacted the taxpayer-financing ban.

  The challenged law, adopted last year, amended part of a 1988 initiative measure known as Proposition 73. That initiative included a provision to prohibit taxpayer funding of candidate election campaigns. The court noted that Proposition 73 allowed the Legislature to amend the law by a two-thirds vote, but only if the amendment would "further the purposes" of the law.

  The court rejected arguments by California Attorney General Xavier Becerra that the law would "further the purposes" of the Political Reform Act.

  In his ruling, Judge Timothy M. Frawley noted that "the purpose of [Proposition 73] is straightforward: to ban taxpayer financing of political campaigns for elective office. [S.B. 1107] conflicts with the purposes of the Political Reform Act … because it violates this specific mandate." Judge Frawley wrote that "the issue in this case is not whether the Legislature's reversal on the ban on public financing of political campaigns is a good idea, it is only whether the amendment [by the Legislature] furthers the purposes of the Act…. [T]he court concludes it does not."

- The Mississippi Supreme Court rejected punishment for the speech of elected Judge Gay Polk-Payton for promoting a book and using the Twitter handle @JudgeCutie. The Institute was an amicus in this case, but we were granted oral argument time. Our brief noted in part that the appropriateness of candidate expression is properly evaluated by voters, not the government. An attorney who is a keen observer of the Court told us that "in my experience in over 100 appeals here, and after 25 oral arguments in various appellate courts, [the quick action taken by the Court] is unprecedented." We worked with the UCLA First Amendment Clinic on the case.

- The U.S. Supreme Court took a case that could have a far-reaching positive impact

on many other political free speech cases.

Should election officials be able to prevent you from voting if you wear a t-shirt with the message "Don't Tread on Me"? In Minnesota and nine other states, the law says they can. The Institute for Free Speech believes this is a violation of First Amendment rights.

Thanks in part to our amicus brief, the Supreme Court decided to review the Minnesota law and arguments will be heard February 28, 2018.

Minnesota's law bans any items "designed to influence and impact voting" or that "promot[e] a group with recognizable political views." That is true even when the items make no reference to any issue or candidate on the ballot. This could include clothes bearing the logos of groups across the political spectrum, such as the AFL-CIO, NAACP, or the Chamber of Commerce.

As our brief told the Court, "this case provides an opportunity for the Court to reaffirm that vague efforts to regulate mere 'political activity' cannot be reconciled with the First Amendment."

- The U.S. Supreme Court set aside a dangerous Fourth Circuit ruling endorsing a "welcome restraint" on candidate speech.

  The Institute for Free Speech and the Public Policy Legal Institute jointly filed an amicus brief in support of neither party in *International Refugee Assistance Project v. Trump*, commonly known as the "travel ban" case. We asked the Supreme Court to resolve a free speech dilemma created by a lower court ruling.

  The dilemma? The United States Court of Appeals for the Fourth Circuit reviewed campaign statements to infer the motivations behind the "travel ban," despite the fact that doing so was unnecessary. The court majority brushed off the chilling effect this would create, saying it was a "welcome restraint" on candidate speech.

  As our brief explained, the Supreme Court has never directed lower courts to review campaign statements in similar contexts. Moreover, candidate speech generally enjoys a high level of protection due to its importance to voters. For example, controversial, offensive, and false speech is protected in campaigns.

  Our brief noted that "today's supercharged and contentious political atmosphere almost guarantees that the Fourth Circuit's 'welcome restraint' analysis will resurface unless this Court speaks strongly against it… A wide variety of candidates, from presidential to local specialty districts, make statements that some may find offensive to religious sensitivities."

  Fortunately, in a victory for free campaign speech, the U.S. Supreme Court invalidated the lower court's ruling on October 10, 2017.

- In response to our litigation on behalf of a cross-ideological group of PR firms, the New York State Joint Commission on Public Ethics (JCOPE) agreed to change its regulations that required public relations professionals to register and report as lobbyists. That agreement came after an appeal was filed with the U.S. Court of Appeals for the Second Circuit. In response, the parties in the litigation agreed to end the lawsuit. The appeals court accepted the withdrawal without prejudice on May 17, 2017. That means we could reopen the case against JCOPE if the agency fails to revise the challenged regulations to comply with the First Amendment.

Here are short descriptions of each case we are currently litigating (in alphabetical order):

Calzone v. Missouri Ethics Commission **(lobbying disclosure)**

Our representation of Mr. Calzone, a citizen activist in Missouri, began in August 2015. Some legislators and lobbyists in the state attempted to silence Mr. Calzone, who has for many years advocated for individual liberty, free markets, and constitutionally limited government. Unfortunately, as Mr. Calzone says, "My activism has made some powerful enemies… Maybe high-paid lobbyists don't like having to explain to their clients why average citizens, using nothing more than facts, reason and speech, beat them at their own game time and again." In his own words, Calzone has "angered powerful legislators by opposing them when they were trying to advance unconstitutional bills or ignore constitutional limits on their power."

Mr. Calzone's difficulties with state regulators began on Election Day 2014, when the Society of Government Consultants, a lobbyist guild in Missouri, filed a complaint with the Missouri Ethics Commission. The complaint alleged that when Mr. Calzone spoke with legislators during his advocacy, he was acting as a lobbyist—despite having never been paid or in any way compensated—and that his failure to register as a lobbyist with the state was against the law, subjecting him to fines and possibly even jail time.

The Institute for Free Speech's legal team stepped in to defend Mr. Calzone against these absurd charges, representing Calzone in September 2015 when his case came before the Missouri Ethics Commission. The Commission hearing was a travesty of justice. For over four hours, behind closed doors, the Commission violated basic Constitutional guarantees and ignored the plain words of Missouri laws. Witnesses that the Institute for Free Speech's attorneys had never been informed about testified against Mr. Calzone, documents were entered as evidence that were never verified, and the investigator for the Commission quoted interviews she allegedly conducted with lawmakers, despite admitting that she had deleted all of her notes.

In the end, by using a convoluted and irrational reading of "designated" and "employed," the Commission concluded that Mr. Calzone was a lobbyist, and seeks to fine him $1,000 for not properly registering with the state before expressing his opinions about Missouri legislative proposals to state legislators.

Mr. Calzone has never been paid a cent to lobby. He is a volunteer for a citizens group that has no budget, but it does have a website and Facebook page to spread the word about legislation being considered by the Legislature.

During the hearing, the Institute for Free Speech discovered that these trumped up charges against Mr. Calzone were nothing more than a thinly-veiled attempt to muzzle a citizen that lawmakers and lobbyists view as a thorn in their side. Indeed, a representative of the lobbyist guild that brought the complaint testified that two Missouri lawmakers, who had reason to dislike Mr. Calzone, had spoken with the lobbyists and strongly encouraged them to initiate the complaint.

No American, in Missouri or any other state, should be required to register with the government before expressing their political opinions.

Success in this case would protect the First Amendment right to petition government for a redress of grievances.

Case actions: The Missouri Ethics Commission (MEC) met September 3, 2015 and voted to fine Ron Calzone $1,000 and ordered him to file as a registered lobbyist. On September 28, 2015, we appealed that decision to the state Administrative Hearing Commission, which held a hearing on February 3, 2016. In response to our petition, the Nineteenth Judicial Circuit Court of Missouri issued a preliminary writ of prohibition on April 19, 2016, barring the MEC from taking any further action against our client. On September 23, 2016, an order and opinion was issued making permanent the writ of prohibition. The state appealed, and on July 18, 2017, the Missouri Court of Appeals, Western District reversed the decision. The Missouri Supreme Court declined to review it. On June 26, 2017, a federal court judge ruled that the state law was constitutional. An appeal and briefs have been filed with the United States Court of Appeals for the Eighth Circuit, but a date for oral argument has not yet been set. Six briefs were filed in this case in 2017.

Federal Election Commission v. Jeremy Johnson and John Swallow **(unconstitutionally vague regulation)**

Attorneys from the Institute for Free Speech asked a federal judge on October 23, 2017 to dismiss the Federal Election Commission's (FEC) case against former Utah Attorney General John Swallow. The filing said Swallow broke no law and that the regulation cited in the FEC complaint is itself illegal and violates the First Amendment.

The case, formally known as *FEC v. Jeremy Johnson and John Swallow*, stems from a 2015 FEC complaint against businessman Jeremy Johnson, who is alleged to have engaged in an illegal straw-donor scheme. The Institute for Free Speech is representing only Mr. Swallow in the case.

The FEC does not claim that Mr. Swallow participated in the unlawful behavior. Rather, the FEC alleges that Mr. Swallow gave advice that may have helped Mr. Johnson. However, Congress never enacted secondary liability – punishing someone for helping another – for this kind of offense. Swallow also denies the FEC's allegations, though the

involvement of the Institute's attorneys is limited to litigating against the illegally adopted regulation that violates the First Amendment.

"The FEC's pursuit of Mr. Swallow is a clear overreach of the agency's constitutional authority, made especially dangerous by the fact that it concerns his speech rather than his actions," said Institute for Free Speech Legal Director Allen Dickerson in a press statement. "Only Congress may create liability, and it spoke clearly: the only people liable for a prohibited contribution in the name of another are the person making the contribution and his or her knowing conduits."

Among other deficiencies, the regulation "fails review under the Administrative Procedure Act and fails constitutional scrutiny. The Supreme Court has unambiguously held that administrative agencies may not simply read secondary civil liability into a statute, and that the power to create secondary civil liability lies with Congress alone," the Institute for Free Speech's brief explains.

In protecting constitutional rights, courts have long prevented agencies from acting outside of the law. If Congress would like to create secondary liability for contributions made in the name of another, it can do so. The FEC cannot.

In addition to being outside granted authority, the FEC's regulation is itself unconstitutional under the First Amendment. It would chill a wide range of protected speech about candidates beyond the specifics of the case against Swallow. Such restrictions must survive "strict scrutiny," the most stringent standard of review used by courts. This regulation fails that test.

"The innocent activity the FEC would chill," the brief notes, "includes advising others about which candidate will best represent their interests, and notifying fundraisers that supporters with whom they were working had fallen through with their promises. Against this obvious First Amendment harm, the FEC can only suggest that by muzzling Mr. Swallow, Mr. Johnson would not have gone forward with an unlawful scheme. That connection is too attenuated, and the balance of harms too severe."

The Institute for Free Speech consistently holds administrative agencies accountable for regulatory overreach that harms First Amendment freedoms. The Institute's brief asks the court to immediately dismiss the complaint against Mr. Swallow and strike the FEC's unlawful regulation. The case is currently before the United States District Court for the District of Utah, Central Division.

***Institute for Free Speech v. Becerra* (charity disclosure)**

As in most jurisdictions, charities soliciting contributions in California are required to register with the state. Each year, registered charities are required to file a copy of their IRS Form 990 tax returns with the California Attorney General's office as a condition of maintaining their constitutionally protected ability to solicit contributions. On Schedule B of the Form 990, charities are required to report to the IRS the names, addresses, and amount donated for major contributors during the year. The Schedule B is submitted to the IRS on a confidential basis and, under federal law, the agency is prohibited from releasing

this information to anyone – including state officials. Similar privacy protections do not exist under California law.

Historically, the California Attorney General has not required registered charities to file copies of their confidential, unredacted Form 990 Schedule B donor lists with the state. The Attorney General only began demanding this information in recent years, and the sudden demands did not arise from any changes in, and are not specifically authorized by, the state's laws and regulations. The Attorney General also has not cited any recent change in circumstances warranting these demands. Because the Attorney General is not legally entitled to this information and has no good reason for demanding it, the Institute for Free Speech filed suit to stop this practice.

We argue that the California Attorney General's demand for our donor information is an infringement of the Institute for Free Speech and its donors' First Amendment rights to free speech and association. Donors who may not necessarily wish to speak on their own about an issue may choose to exercise their right to speak by giving to an organization speaking on their behalf. This is particularly true for unpopular or controversial issues: precisely the type of speech for which the First Amendment's protections are most important.

Donors must be free to give to any lawful cause of their choosing without government intrusion. If government officials are looking over citizens' shoulders and reviewing which groups they give to, they will chill donors' willingness to give to certain groups, thereby reducing their ability to speak, and the effectiveness of their association.

The Attorney General also claims that the default rule should be for individual charities opposing demands for their donor information to demonstrate that they will face particularized harm from turning the data over to the government. In effect, this creates a catch-22 in which organizations and their donors can claim an exemption only after they have already suffered harm or threats, but organizations and donors would have no protection against potential future harm. First Amendment case law does not support such a backwards-looking rule.

Success in this case will protect the First Amendment right to free association, and consequently the range of opinions available to the public. It will also protect the privacy of donors to charitable organizations, which will encourage the public to give generously to support the charitable missions of a wide variety of organizations.

Recent actions: We filed an amended complaint on August 12, 2016 and a motion for a preliminary injunction on August 19, 2016. On October 31, 2017, the federal district court ruled for the state. A notice of appeal has been filed with the United States Court of Appeals for the Ninth Circuit.

Holmes, et al. v. Federal Election Commission **(irrational contribution limits)**

This case raises an as-applied First Amendment challenge to a law that often allows congressional incumbents to raise twice as much for their general election campaigns as challengers. Federal campaign finance laws limit relevant campaign contributions to

$2,700 for the primary election and $2,700 for the general election. However, donations of $5,400 are permitted through the day of the primary, though only half that amount can be spent on the primary race.

Incumbents, who face competitive primaries at a lower rate than challengers, can raise up to $5,400 in a single contribution and often spend it all on the general election. A challenger, on the other hand, will usually have to defeat opponents in the primary election and have scant primary funds left to spend on the November contest. After winning a primary, challengers may raise just $2,700 per donor for the general election. This state of affairs effectively halves the general election contribution limit for candidates facing a competitive primary.

Success in this case will require the FEC to permit contributors to structure their non-corrupting contributions as they wish, and vindicate the principle that Congress may not privilege certain classes of candidates over others.

Recent actions: Oral argument on right to en banc review under the Federal Election Campaign Act was held in the D.C. Circuit on January 21, 2016. On April 26, 2016, the court ruled that our constitutional challenge of the structure of contribution limits to candidates must be heard by the Court of Appeals en banc, a major procedural victory. The Institute for Free Speech's brief was filed August 15, 2016. Oral argument was held March 29, 2017. On November 28, 2017, the Appeals Court upheld the law. A petition for review will be filed with the U.S. Supreme Court in February 2018.

***Howard Jarvis Taxpayers Association v. Brown* (constitutionality of passage of law to enable tax-financed campaigns)**

Can state legislators overturn the will of the people in order to institute tax-financed campaigns?

Under California law, the Institute for Free Speech believes the answer is clearly no. On behalf of the Howard Jarvis Taxpayers Association and retired State Senator and Judge Quentin L. Kopp, the Institute for Free Speech joins the Center for Constitutional Jurisprudence and Bell, McAndrews, and Hiltachk, LLP in a suit against California for enacting a law that would do just that, in violation of the state's constitution and law.

In 1974, voters passed the Political Reform Act of 1974 via the state's robust initiative process. In 1988, that initiative was amended, again by voters, with the passage of Proposition 73, which prohibited tax dollars to be used for the purpose of funding politicians' campaigns. In 2000, again by initiative, voters reaffirmed the ban on tax-financed campaigns by passing Proposition 34. In order to protect state legislators from tampering with the law, this initiative also revoked the ability of the Legislature to amend any part of the Political Reform Initiative without voter approval. Californians spoke clearly – any changes to the ban on tax-financed campaigns need to be approved by the voters, and not just with the passage of a bill by the Legislature.

But in 2016, California legislators ignored the voters of their state. They passed, and Governor Jerry Brown signed, S.B. 1107. That bill amended the Political Reform Act of

1974 to allow tax-financed campaigns at the state and local level, in direct contravention of the law, the California Constitution, and the clearly established desire of voters.

A Sacramento County Superior Court judge struck down the law on August 24, 2017. The Court ruled the Legislature's attempt to bypass a vote of the people prohibiting such legislation was a violation of the California Constitution and the 1974 Political Reform Act as amended. In his ruling, Judge Timothy M. Frawley noted that "the purpose of [Proposition 73] is straightforward: to ban taxpayer financing of political campaigns for elective office. [S.B. 1107] conflicts with the purposes of the Political Reform Act … because it violates this specific mandate." Judge Frawley wrote that "the issue in this case is not whether the Legislature's reversal on the ban on public financing of political campaigns is a good idea, it is only whether the amendment [by the Legislature] furthers the purposes of the Act…. [T]he court concludes it does not."

The Howard Jarvis Taxpayers Association (HJTA) is a nonprofit organization that, as part of its mission, represents California taxpayers in the courtroom. The illegal passage of S.B. 1107 is one such instance, and HJTA is the plaintiff along with Quentin L. Kopp, a California citizen, retired judge, and an original author of Proposition 73. That measure prohibited the Legislature from enacting tax-financed campaigns.

Success in this case will help protect the initiative process in California and ensure that tax-financed campaigns can become law only with approval by the voters.

Recent actions: The complaint was filed on December 12, 2016 with the Sacramento Superior Court. Our brief was filed May 15, 2017, and our reply brief was filed July 19, 2017. Oral argument was held August 4, 2017. The Court struck down the law August 24, 2017. The state appealed the decision January 9, 2018.

Thomas v. Schroer **(constitutionality of state political sign regulations on private property)**

The Institute for Free Speech is representing William H. Thomas Jr. in the state's appeal of a ruling that Tennessee's sign rules are unconstitutional. In March 2017 a federal judge ruled for Thomas, saying Tennessee law violated the First Amendment by creating "an unconstitutional, content-based regulation of speech."

Mr. Thomas owns several roadside signs. This appeal concerns one such sign, which Mr. Thomas has used to express various non-commercial messages and opinions, such as cheering on U.S. athletes during the Olympics and celebrating "the glory of the season" during the holidays. On a different sign not part of the case Mr. Thomas criticized two government officials.

Tennessee has sought to tear down Mr. Thomas's sign, but crucially, it would not attempt to do so had it advertised on-site commercial activity or the sale of his property. Such ads are exempt under the law governing billboards in Tennessee. So if a nearby auto body shop wanted to advertise its sale on tires with the same sized billboard, it could do so. As a result of this exemption, the state must look to a sign's content to determine whether it should be regulated. This creates a major First Amendment problem.

A law that permits a sign that says "cheap cigarettes here" but prohibits an identical sized sign that reads "cut the property tax" or "pass the clean water act" is a content-based restriction on speech. Such restrictions must survive strict scrutiny.

Tennessee appealed the lower court's ruling last October. The Institute for Free Speech is representing Thomas during the appeal but was not involved in the case previously.

The case, known as *Thomas v. Schroer*, is currently before the Sixth Circuit Court of Appeals. John Schroer, Commissioner of the Tennessee Department of Transportation (TDOT), is a defendant in his official capacity only.

As the lower court decision recognized, Tennessee has failed to prove a valid reason for its two-track regulatory system for billboards.

"In the instant case, the Court finds the State's interests in aesthetics and traffic safety are not compelling interests... The provisions at issue here concern the distinction between signs with content concerning on-premises-related activity versus other messages. The State fails to establish how this specific distinction relates to traffic safety and aesthetics," wrote Judge Jon P. McCalla.

In his opinion, Judge McCalla found that even if the state had proved the interests were valid, the law "is not narrowly tailored to those interests." He agreed that Thomas had suggested five possible alternatives that were less burdensome on speech.

Cases Closed in 2017

Coalition for Secular Government v. Williams (disclosure)

This case asked for declaratory and injunctive relief under the First and Fourteenth Amendments concerning Colorado's regulation of a nonprofit organization and its distribution of a public policy paper. Colorado resident Diana Hsieh, who holds a Ph.D. in Philosophy, organized the nonprofit Coalition for Secular Government (CSG) with her friend Ari Armstrong in order to promote a secular understanding of individual rights, including freedom of conscience and the separation of church and state. Because of unconstitutionally vague state laws, confusion as to what constitutes political speech, a lack of guidance concerning the scope of Colorado's press exemption, and a refusal by the state to abide by a federal court order, Hsieh and CSG have found it nearly impossible to carry out the activities of a small nonprofit group without fear of running afoul of complex Colorado campaign finance laws.

This litigation successfully sought to protect small issue-focused organizations, like CSG, from being laden with the burdens of campaign finance disclosure that serve no legitimate purpose, and challenged the constitutionality of Colorado's "issue committee" definition and related regulations. The Coalition won their challenge in district court after a day-long bench trial, with Judge John L. Kane writing that "any 'informational interest' the government has in mandating contribution and expenditure disclosures [is] so minimal as to be nonexistent [in this case], and certainly insufficient to justify the burdens compliance

imposes on members' constitutional free speech and association rights." The ruling provisionally awarded attorney's fees to CSG as the prevailing party. Later, that ruling was confirmed when the case was closed.

On March 2, 2016, the Tenth Circuit unanimously affirmed a lower court decision declaring that Colorado's ballot issue disclosure law violates the First Amendment for small, citizen groups. The state petitioned the U.S. Supreme Court for review of the decision on June 30, 2016. The Institute for Free Speech filed a brief in opposition on August 4, 2016. The petition was denied on October 3, 2016. The case was formally closed on April 7, 2017 after Colorado paid the Institute for Free Speech $220,000 in attorney's fees. After the lower court rulings, the General Assembly passed a new law to fix the defect identified by the courts. Now groups like CSG only need to file one short form until they spend more than $5,000.

Independence Institute v. Federal Election Commission **(disclosure)**

The Independence Institute wished to run an ad asking then-Colorado Senators Mark Udall and Michael Bennet to support a federal sentencing reform bill. The McCain-Feingold law effectively prevents the group from raising money for the ads without disclosing the donors.

Federal law treats speech about public issues as campaign speech whenever a candidate is mentioned in a broadcast ad within 60 days of the general election. Groups must either file public reports with personal details about donors who have provided funds for the ads, or refrain from speaking. The result is what First Amendment advocates call a "chilling" effect on advocacy, depriving the public of speech about issues of public importance.

Donors and speakers have many reasons to protect their privacy. Some fear retaliation from government officials who disagree with them. Others fear physical harm or threats to themselves and their families, vandalism to their property, loss of employment, or boycotts of their business if they support unpopular views. Some just value their privacy, or don't want their contributions to spur numerous requests for assistance from other groups discussing different issues. Nonetheless, federal law transforms issue speech into campaign speech whenever a candidate for office is mentioned within two months of the general election. As a result, many groups choose silence over advocacy.

This case presented an as-applied First and Fifth Amendment challenge to the Bipartisan Campaign Reform Act's provisions requiring a nonprofit airing an advertisement mentioning a candidate before an election, but neither supporting nor opposing that candidate, to register with the federal government and report its donors. The Institute sought to vindicate the public's right to seek official government action from officeholders without opening its books to public disclosure.

Success in this case would have increased protections for the public's First Amendment right to free speech. It would have also helped protect the privacy of donors to causes, which encourages the public to give generously to support efforts to promote sound public policies.

On March 1, 2016, the United States Court of Appeals for the District of Columbia Circuit ruled that our constitutional challenge to federal electioneering communications disclosure requirements must be heard by a three-judge district court. This decision didn't reach the merits of our case – it ordered the lower court to give our clients the three-judge panel provided for by the law. As such, it was a key procedural victory, and it sets an important precedent in the D.C. Circuit, where nearly all federal campaign finance law challenges are brought.

In a sign of this case's importance, Bob Bauer, a former White House counsel who runs an influential blog on campaign finance law, wrote that this lawsuit "could prove to be highly significant. To date, the [Supreme] Court has not been confronted with well-argued as-applied challenges that force its engagement with the harder questions [on disclosure issues] that a suit like Independence Institute raises."

On November 3, 2016, the three-judge panel upheld the law. An appeal of the decision was filed with the U.S. Supreme Court on December 5, 2016. U.S. Senate Majority Leader Mitch McConnell, the U.S. Chamber of Commerce, the Philanthropy Roundtable, the State Policy Network and 24 affiliated state think tanks, and the Institute for Justice and the Cato Institute, among others, filed amicus briefs urging the Supreme Court to fully consider the case. Ten First Amendment scholars also filed a joint brief.

Unfortunately, on February 27, 2017, the U.S. Supreme Court affirmed without comment the lower court's ruling. The court's order reflects agreement with the lower court's result, but not necessarily its reasoning. The order does not indicate how any of the justices voted or why.

***Patriotic Veterans v. Indiana* (automated phone call ban for political speech)**

This case posed an as-applied First Amendment challenge to an Indiana statute prohibiting pre-recorded telephone messages containing political content. Pre-recorded phone calls are one of the most cost-effective ways a low-budget campaign can reach voters, and an outright ban on such calls deprives Indiana residents of information they may wish to receive to inform their votes. This case was not about reasonable restrictions on the hours that such calls may be made or citizens' ability to opt out. Because the law allows other messages not containing political content, it discriminates against speech based upon its content, a clear First Amendment violation.

Success in this case would have vindicated that First Amendment principle while protecting an important medium for small organizations that do not have the resources to buy expensive television and radio advertisements.

On September 27, 2011, the United States District Court for the Southern District of Indiana ruled in favor of our client, saying that the federal Telephone Consumer Protection Act preempted the Indiana law. The state appealed, and on November 21, 2013, the Seventh Circuit Court of Appeals reversed the decision and remanded the case to the district court to consider the First Amendment arguments. On April 7, 2016, the district court ruled against the First Amendment claims in the litigation. That decision was affirmed by the Seventh Circuit Court of Appeals on January 3, 2017. A petition for review

was filed with the U.S. Supreme Court on April 3, 2017. The petition was denied on June 26, 2017.

The November Team, et al., v. Joint Commission on Public Ethics **(lobbying disclosure)**

This lawsuit sought to block a new lobbying rule by the New York State Joint Commission on Public Ethics (JCOPE). That advisory opinion would have forced public relations professionals to register as lobbyists.

JCOPE's opinion was absurd, flagrantly unconstitutional, and a new low for one of the worst places in the country to express one's opinion about government.

The plaintiffs in the case included some of New York's most prominent public relations firms of all ideological persuasions and sizes: The November Team, Inc., Anat Gerstein Inc., BerlinRosen Public Affairs, Ltd., Risa Heller Communications LLC, and Mercury LLC. The filings in the case included sworn declarations from three leading public relations trade associations: the Public Relations Society of America, PR Council, and Arthur W. Page Society.

Emery Celli Brinckerhoff & Abady LLP, a New York law firm, and the Institute for Free Speech represented the plaintiffs.

The unprecedented and widely-criticized JCOPE opinion became final in January 2016, and said in part that "a public relations consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial would also be delivering a message" that would count as lobbying and would trigger burdensome filings by PR firms as lobbyists.

Here are some excerpts from the opening brief in the case:

> This case stands at the intersection of a citizen's right to free speech, the press's freedom to report and comment on such speech, and the narrow circumstances in which courts have upheld laws and rules that require the disclosure of lobbying activity. It raises the simple question whether a state agency can, consistent with the First Amendment, declare that private communications with the press constitute "lobbying," and then mandate persons who so communicate to submit to a burdensome regulatory regime that exposes them to criminal prosecution or fines for non-compliance.
>
> The answer, emphatically, is "no."
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> ***
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> [JCOPE's new ruling] mandates that anyone paid to communicate with reporters or editorial writers on matters that might implicate legislation, executive orders, or government procurements is a "lobbyist" and, as such, must comply with the same burdensome disclosure requirements, and risk the same draconian sanctions, as actual lobbyists. This expansive (indeed, nonsensical) definition of "lobbying,"

> which was created by administrative fiat, directly inhibits and chills the rights of public relations firms and their clients to participate in discussions of public matters with and in the press, to serve as anonymous sources to the press, and to exercise their core speech and associational rights free from government inspection or the threat of prosecution or sanction.

As the brief noted, "The Supreme Court and other courts created a 'bright line' rule concerning the regulation of lobbyists: Statutes that require disclosure of direct contact with public officials — either by way of 'buttonhole' lobbying or 'grassroots' lobbying [to artificially stimulate letter writing] — are constitutional, while statutes that reach further are presumptively unconstitutional." Instead of hewing to this precedent, the brief says that "In New York State, speaking to the press is now 'lobbying.' Speaking to editorial boards and reporters is now 'lobbying.' Influencing broad public opinion is now, improbably enough, 'lobbying.'"

New York's lobbying laws trigger burdensome reports, under threat of both civil and criminal penalties for noncompliance, which would chill speech. "In each year that a plaintiff is paid $5,000 or more by a client, it would have to file at least six reports, each time specifying the exact terms of its employment and accounting for every penny spent in granular $75 increments. For three years, plaintiffs would have to retain thousands of receipts reflecting any expense of a mere $50 or more. All of this information would be made available to public scrutiny. Plaintiffs would also have to pay fees to the government for the privilege of speaking with editorial boards."

When we brought the case, we believed a successful conclusion could limit the reach of lobbying disclosure laws and possibly help establish useful precedents for further litigation against New York's lobbying laws, among the worst in the nation.

On April 4, 2016, the U.S. District Court for the Southern District of New York ruled in our clients' favor that '[i]n order to preserve the status quo until [the Court can rule] … Defendants shall not take any enforcement action with respect to plaintiffs' activities." This ruling temporarily prevented enforcement until the court could reach the merits of the case.

On January 11, 2017, Judge Lorna Schofield ruled that her court would abstain "in this case, but retains jurisdiction pending a determination by a state court as to the meaning of the challenged state regulation." She noted that the law and JCOPE regulations and opinions were "unclear" and "subject to multiple, contradictory interpretations" and even "internally inconsistent."

After an appeal was filed with the U.S. Court of Appeals for the Second Circuit, JCOPE agreed in principle to change its regulations that required public relations professionals to register as lobbyists. In response, the parties in the litigation agreed to end the lawsuit. The appeals court accepted the withdrawal without prejudice. That means we could reopen the case against JCOPE if the agency fails to revise the challenged regulations to comply with the First Amendment.

Amicus Briefs

The Institute for Free Speech filed briefs as amicus curiae in the following sixteen cases that remained active in 2017 or in which the brief was filed during 2017 (dates listed are dates the brief was filed):

- *Lozman v. Riviera Beach*, U.S. Supreme Court, December 29, 2017. (Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?)
- *Blagojevich v. United States*, U.S. Supreme Court, December 2, 2017. (Campaign contribution motivations should not be susceptible to second-guessing under vague and overbroad standards.)
- *Carpenter vs. United States*, U.S. Supreme Court, August 14, 2017. (The impact of warrantless government access to cell phone location information on the First Amendment right to free association.)
- *Donald J. Trump v. International Refugee Assistance Project, et al.*, U.S. Supreme Court, merits brief in support of neither party, August 3, 2017. (Urges the Court to overturn the appeals court ruling that declared its decision might bring a "welcome restraint" on candidate campaign speech.)
- *State of Washington v. Grocery Manufacturers Association*, Washington State Court of Appeals, Division II, July 20, 2017. (Argues that an $18 million fine for a minor campaign finance filing error is unconstitutional and chills campaign speech.)
- *Minnesota Voters Alliance, et al. v. Joe Mansky, et al.*, U.S. Supreme Court, July 3, 2017. (Argues that the lower court erred when it ruled a ban on non-campaign messages printed on shirts was constitutional.)
- *Donald J. Trump v. International Refugee Assistance Project, et al.*, U.S. Supreme Court, brief in support of a petition for writ of certiorari, June 9, 2017.
- *Mississippi Commission on Judicial Performance v. Judge Gay Polk-Payton*, Mississippi Supreme Court, March 13, 2017. (Argued that the standard applied by the Commission on speech by judges was "too subjective to justify content-based speech restrictions.")
- *Alabama Democratic Conference, et al. v. Strange*, U.S. Supreme Court, January 30, 2017. (Argued that a ban on certain contributions to PACs was unconstitutional and would greatly complicate the state's law.)
- *Tennessee Republican Party, et al. v. SEC, et al.*, U.S. Sixth Circuit Court of Appeals, November 23, 2016. (Argued that a new SEC rule to drastically limit campaign contributions by certain financial advisors was unconstitutional.)
- *Bennie v. Munn*, U.S. Supreme Court, November 7, 2016. (Argued that government retaliation against a person for his political speech violated the First Amendment.)
- *Coloradans for a Better Future v. Campaign Integrity Watchdog, LLC*, Colorado Supreme Court, merits brief October 20, 2016. (Argued that pro-bono legal work on litigation to defend constitutional rights should not be counted as a campaign contribution.)
- *Coloradans for a Better Future v. Campaign Integrity Watchdog, LLC*, (Colorado Supreme Court, brief in support of a petition for writ of certiorari, August 16, 2016)

- *French v. Jones*, Ninth Circuit Court of Appeals, April 18, 2016. (Argued that a ban on political party endorsements of judges is unconstitutional.)
- *Holland v. Williams*, District Court for the District of Colorado, April 10, 2016. (Argued that Colorado's private enforcement of campaign finance law is unconstitutional.)
- *Public Citizen v. Federal Election Commission*, U.S. District Court for the District of Columbia. September 17, 2014. (The case relates to when an organization becomes a political committee under federal campaign finance laws. The amicus brief argued that the court should defer to the findings of the three FEC Commissioners who find no violation if their interpretation of the law is a permissible interpretation of the statute.)

***Lozman v. Riviera Beach* (Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim?)**

The City of Riviera Beach had Fane Lozman arrested because, to put it simply, the elected officials didn't like his agitation on eminent domain issues. Mr. Lozman filed a lawsuit seeking damages for a retaliatory arrest, but his claim was denied by the lower courts, which said that if probable cause can be found for the arrest, the claim must be denied.

This an interesting and critical free speech case. Legendary First Amendment lawyer Floyd Abrams wrote the brief for us.

Unfortunately, if the government believes it has "probable cause" to arrest you, in several areas of the country you are out of luck if you sue based on a First Amendment retaliation claim. You lose. We believe this is unconstitutional.

In our brief, we note that "In *Mt. Healthy City School District Board of Education v. Doyle*, the Court determined that to state a claim for First Amendment retaliation, a plaintiff must show that: (1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action. That decision further provides that once the plaintiff shows that her protected conduct was a motivating factor triggering the defendant's adverse conduct, the burden shifts to the defendant to show that it would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable.

"Application of *Mt. Healthy* neither requires nor permits lower courts to ignore the issue of probable cause. Rather, a court deciding a case governed by *Mt. Healthy* considers whether probable cause existed as a factor in its holistic assessment of the circumstances triggering the arrest. The more plausible the submission that the cause of an arrest was official disapproval of protected speech, the more likely it is that a First Amendment retaliation claim will succeed. The less plausible, the less likely a juridical determination will follow that a First Amendment claim will carry the day.

"Mt. Healthy focuses on the issue of motivation. What it does not do – what it rejects – is the notion that so long as there was probable cause for an arrest, it necessarily follows in all circumstances that a retaliation claim must fail. That result is all the more important in

a nation awash in criminal statutes, one in which, as the brief submitted by the Institute for Justice in this case points out, an average Florida driver could easily be arrested for at least one moving violation every time she drives."

The Court scheduled oral arguments in the case for February 27, 2018.

Blagojevich v. United States **(Campaign contribution motivations should not be susceptible to second-guessing under vague and overbroad standards.)**

There is a split among the United States courts of appeals on the standard for proving a violation of federal anticorruption laws. In five circuits, the government must prove there was an "explicit promise or undertaking" to take an official act in exchange for a campaign contribution. That standard is based on the Supreme Court's decision in *McCormick v. United States*. But in three circuits, these courts have said the Supreme Court's ruling in *Evans v. United States* controls. Under that case, the government must prove "only . . . that a public official has obtained a payment . . . knowing that [it] was made in return for official acts."

Our brief says that *Evans* should not "apply to political contributions, which implicate fundamental First Amendment rights. *Evans* asks the factfinder to apply an unpredictable and unreliable test about the beliefs of the contributor and candidate. Instead of deciding whether a contributor and candidate actually expressed their willingness to enter into a quid pro quo agreement – an objective test – *Evans* uses a subjective knowledge-based test: the factfinder must determine whether a public official believed a donor made a campaign contribution with the intent to pay the official for official acts."

The brief warns that the "application of the *Evans* standard to political contributions raises serious concerns for potential donors, large and small. *Evans* raises the spectre of a potential criminal investigation or prosecution of any political contribution or solicitation whenever the donor might benefit from an official act or legislative position the officeholder or candidate controls. Since, "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator," (*McCormick*) expansive application of *Evans* requires a potential donor to carefully consider whether expressing political belief through a contribution is worth the risk of a criminal investigation."

In *McCutcheon v. Federal Election Commission*, the Supreme Court said that the First Amendment protects the act of making campaign contributions. "[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association," the Court noted. "When an individual contributes money to a candidate, he exercises both of those rights."

Without clear guidance on the standard used to evaluate contributions, politically-motivated prosecutors would have too much leeway to bring prosecutions against donors and candidates, chilling this vital form of speech.

The Court is expected to review the petition in March 2018.

***Carpenter vs. United States* (associational privacy)**

An example of how the Institute for Free Speech takes a long view to protect free speech is our amicus brief in *Carpenter vs. United States*. When it accepted the case in June 2017, the Supreme Court ordered that it would rule "whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user" violates the Fourth Amendment. The Institute for Free Speech's brief argues that the answer to that question also has grave implications for the First Amendment.

The technological ability to precisely locate citizens over time – 127 days in Carpenter's case – could allow the government to determine a person's associations with advocacy groups opposing government policies. According to the Electronic Frontier Foundation, cell phone companies "store this data for up to five years."

Without a warrant requirement to get this information, the government having this capability threatens the right to free association. In the landmark 1958 case, *NAACP v. Alabama,* the Supreme Court unanimously held that the First Amendment's protections extend to the private gathering of "rank-and-file members to engage in lawful association in support of their common beliefs." The Court stressed the importance of associational rights two decades later in *Buckley v. Valeo,* when it relied on the *NAACP* ruling to narrow the reach of a campaign finance disclosure statute. In doing so, the Court made plain that "the right of association is a 'basic constitutional freedom.'" The Court ruled that it would give the "closest scrutiny" to "any governmental action which may have the effect of curtailing the freedom to associate."

Requiring a warrant for accessing this information would provide the best check against unreasonable or politically-motivated inquiries into individuals' private associations. The Institute for Free Speech's brief was the only one filed on this vital point.

Work on this brief enabled the Institute for Free Speech to establish new relationships with influential liberal organizations, including the NAACP Legal Defense Fund and Color of Change. If we are going to win future fights on donor privacy in court and in the court of public opinion, such groups could serve as essential allies.

Obviously, we hope that the Court rules for Carpenter and notes the implications for the First Amendment. That's our primary goal with this brief. But the case was also attractive for other reasons. It has become increasingly difficult to persuasively cite cases, including *NAACP v. Alabama* from the civil rights era, or even the landmark 1976 campaign finance case, *Buckley v. Valeo,* because these rulings are from another era. We hope that the Supreme Court will use the *Carpenter* case to rearticulate and reapprove the central holdings of those cases and give them new relevance. Even a few sentences, relying on *NAACP*, *Buckley*, or both will move the ball and give us language we can quote in coming donor privacy and free political speech cases.

We also view this case as a good opportunity to get the Court to think seriously about the important question of associational privacy. Supreme Court Justices who have typically sided against free speech rights on campaign finance cases may feel differently about a

case concerning civil society privacy. A positive ruling could move the debate at the Court in a direction friendlier to all kinds of speech, including political advocacy.

The Institute for Free Speech's work on this case enabled us to reach some of the groups that do not agree with us on campaign finance to make the case that there's a larger privacy issue at stake, and see us as good-faith intellectual players. Those relationships are themselves useful.

Recently, one significant issue with cases about associational and donor privacy is proving harm. The Ninth Circuit suggested that compelled disclosure, standing alone, can never be a First Amendment harm. A win in this case might allow the High Court to say otherwise, since the harm in this case is the mere governmental access to this information. Of course, it's a Fourth Amendment harm, but if the Court – or one of the justices who does not often support free speech rights – agrees with our point, then we may have a very important First Amendment opening we can try to expand in the future. Because this information is just going privately to the government, rather than being made public as is the case with most disclosure rules, we could argue for an expanded concept of the harm compelled disclosure imposes.

We expect the Supreme Court will rule on the case by June 2018.

Donald J. Trump v. International Refugee Assistance Project, et al. **(regulation of candidate campaign speech)**

The Institute for Free Speech and the Public Policy Legal Institute (PPLI) filed two friend-of-the-court briefs to the U.S. Supreme Court in this case, commonly known as the "travel ban" case. The first brief urged the Court to take the case, while the second brief was filed after the Court agreed to review the lower court ruling. The merits brief was filed "in support of neither party" to the case.

The brief asked the Supreme Court to resolve a free speech dilemma created by a lower court ruling. The United States Court of Appeals for the Fourth Circuit reviewed campaign statements to infer the motivations behind the President's proposed "travel ban," despite the fact that doing so was unnecessary. Making matters worse, the majority brushed off the chilling effect this would create as a "welcome restraint" on candidate speech.

As the brief filed by the Institute for Free Speech and PPLI explained, the Supreme Court has never directed lower courts to review campaign statements in similar contexts. Moreover, candidate speech generally enjoys a high level of protection due to its importance to voters. For example, controversial, offensive, and false speech is protected in campaigns.

We believe that the Supreme Court should reiterate its longstanding protection of robust campaign speech by rejecting the Fourth Circuit's analysis. The majority's hopeful prediction that this case is "highly unique" and unlikely to apply in other circumstances ignores the contentious reality of political campaigns. The potential applications of the "welcome restraint" analysis extend far more broadly than the majority realizes.

As the brief explained, "today's supercharged and contentious political atmosphere almost guarantees that the Fourth Circuit's 'welcome restraint' analysis will resurface unless this Court speaks strongly against it… A wide variety of candidates, from presidential to local specialty districts, make statements that some may find offensive to religious sensitivities."

Fortunately, in a victory for free campaign speech, the U.S. Supreme Court invalidated the lower court's ruling on October 10, 2017.

State of Washington v. Grocery Manufacturers Association **(enforcement)**

Can a group be fined $18 million for not properly filing campaign finance reports? The Institute for Free Speech's brief said no. Such a massive penalty is unconstitutional under the Eighth Amendment to the Constitution that bars "excessive fines." Large fines like this also harm the First Amendment right to free speech.

The case started in 2013 when the Grocery Manufacturers Association (GMA), a national trade group, opposed a ballot measure that would have mandated GMO labeling. To do so, the group contributed to a Washington State ballot committee, and was properly reported as a donor. The funds were fully under the trade group's control, and GMA said it consulted multiple lawyers to ensure it complied with Washington law.

Nevertheless, the State of Washington, pursuing a complaint filed by supporters of the ballot measure, thought the group had acted improperly. The state demanded that GMA file as a political committee and disclose all of its donors. GMA promptly complied, filed the appropriate paperwork, and disclosed all of its contributions and spending involving the Washington ballot measure.

Despite this, the State of Washington sued the trade group. In a shocking decision, Judge Anne Hirsch of the Thurston County Superior Court found that not only was GMA guilty of violating Washington's campaign reporting rules, it also intentionally evaded the law, allowing for the fine to be tripled. The court fined GMA an unprecedented $18 million.

Such a decision, were it to stand, would have incalculable First Amendment harms. As the Institute for Free Speech's brief noted, "the Superior Court has imposed a massive fine – a death sentence for most groups – with tremendous potential to chill specially protected speech. That decision was in error and should be reversed."

Fines of this severity are only reasonable to punish truly reprehensible conduct. Even if one fully supports Washington's broad disclosure laws, this mammoth penalty "for a reporting violation … has no place in the context of core First Amendment activity, where 'it is our law and our tradition that more speech, not less, is the governing rule.'"

The case is still pending.

Minnesota Voters Alliance, et al. v. Joe Mansky, et al. **(speech restrictions at polling places)**

The Institute for Free Speech has urged the Supreme Court to take a case involving speech restrictions at the voting booth in Minnesota. In that case, *Minnesota Voters Alliance, et al. v. Mansky, et al.*, the Eighth Circuit upheld a law prohibiting a voter from wearing a T-shirt that depicted the Gadsden flag, the historic American emblem depicting a coiled rattlesnake and the words, "don't tread on me." Minnesota argued, and the Eighth Circuit agreed, that apparel displaying a political message would cause chaos at the polling place.

The Institute for Free Speech has asked the Supreme Court to correct this error. While the Court has carved out a very specific First Amendment exception for explicit campaigning at the polling place, we should not extend that exception to general statements of political belief. As the brief argues, "[the Supreme Court's] storied precedents have long preserved and celebrated the right of Americans to wear political messages." That should include proud historic symbols like the Gadsden flag.

The Court accepted the petition for review and will hear oral arguments February 28, 2018. The Institute for Free Speech also filed a brief on the merits of the case in early January 2018.

Mississippi Commission on Judicial Performance v. Judge Gay Polk-Payton **(restraints on speech by judicial candidates)**

On June 15, 2017, the Mississippi Supreme Court dismissed an attempt to discipline a judge over constitutionally protected speech. The Institute for Free Speech, represented by the UCLA Scott & Cyan Banister First Amendment Clinic, filed a brief in the case supporting robust First Amendment rights for judicial candidates.

The Mississippi Commission on Judicial Performance had argued that Forrest County Justice Court Judge Gay Polk-Payton had engaged in expression "undignified and demeaning" to the judicial office. Specifically, the Commission pointed to Judge Polk-Payton's use of the Twitter handle @JudgeCutie and the cover photo on a book she authored, which features a photo of her in ordinary clothes with her judge's robe partially on.

The Institute for Free Speech's brief noted that the Commission's "undignified and demeaning" standard was "too subjective to justify content-based speech restrictions. The United States Supreme Court has recognized that subjective matters of 'taste and style' are not for the government to determine."

The brief further explained that Judge Polk-Payton is an elected official accountable to voters: "To be sure, there is an important constraint on undignified behavior by elected judges: the reaction of the judges' constituents. They, not the Commission, are in the best position to determine whether a judge's speech is 'demeaning' under their community's standards."

The Mississippi Supreme Court summarily dismissed the case, writing that "no violation of the Mississippi Code of Judicial Conduct by the respondent, Forrest County Justice Court Judge Gay Polk-Payton, has been proven by clear and convincing evidence… these proceedings therefore should be, and they hereby are, dismissed with prejudice."

***Alabama Democratic Conference, et al. v. Strange* (PAC-to-PAC contribution ban)**

The State of Alabama wanted to ban contributions from one political group to another. The Institute for Free Speech filed an amicus brief with the U.S. Supreme Court, urging the justices to take a case that would overturn this law.

The case was about a political action committee that runs its own ads supporting and opposing state politicians. While Alabama has no contribution limits on giving to candidates, a complex Alabama law does restrict giving from one PAC to another, if the PAC intends to engage in independent spending. As the Institute for Free Speech made clear in its amicus brief, there is no reason for the State of Alabama to prohibit such donations. The State of Alabama must, "demonstrate that its PAC-to-PAC contribution ban actually advanced the anti-corruption interest," the brief explained. Since the Supreme Court ruled in *Citizens United* that independent expenditures cannot be prohibited, it stands to reason that donations for independent spending also cannot be prohibited. Unfortunately, the Court denied review of the case on April 24, 2017.

***Tennessee Republican Party, et al. v. SEC, et al.* (contributions by financial advisors)**

Institute for Free Speech represented the Financial Services Institute, a 501(c)(6) trade association, arguing that a new SEC rule, which limits the ability of registered Investment Advisers to contribute to state and local candidates, was unconstitutional. Unfortunately, the Sixth Circuit ruled on July 13, 2017 that the state Republican parties lacked standing, and denied their petition for review of the rule.

***Bennie v. Munn* (government retaliation for political speech)**

Bob Bennie worked for a financial services firm regulated by the State of Nebraska and was respected in the financial planning industry. *Barron's Magazine* rated him as one of the top 1,000 financial planners in the United States. But some of the regulators didn't like Bennie's harsh criticism of President Obama and other political leaders, so they subjected both Bennie and his employer to unusual scrutiny. The company eventually fired Bennie. He sued the regulators, and the court agreed their actions were improper under the First Amendment. However, the court said he had to prove that the actions would deter an average person from continuing to speak out. Incredibly, the court said the retaliation by the regulators was not enough. The appeals court then refused to review the district court's findings.

The Institute for Free Speech's brief argued that "In falling short of its duty of independent review, the Eighth Circuit failed to provide the protections, guaranteed by the First Amendment. That is unfortunate for [Bennie], of course, but it also undermines our national effort to build and sustain a thriving civil society… The State's attacks on

[Bennie's] speech and associational freedoms, and the Eighth Circuit's failure to properly police those attacks, consequently imperil interests of the highest importance."

Unfortunately, the Supreme Court on January 17, 2017 denied the appeal to hear the case.

Coloradans for a Better Future v. Campaign Integrity Watchdog, LLC **(whether pro bono legal work can be counted as a campaign "contribution")**

A lower court ruling counted pro bono legal work as a campaign "contribution," which creates several important problems. It would create filings that would imply that attorneys providing pro bono help support their clients' political views. Additionally, since Colorado has very low contribution limits, hardly any meaningful legal work could be done to defend a committee's constitutional rights. Our brief urged reconsideration of the ruling. In a victory for free speech, on January 29, 2018, the Colorado Supreme Court agreed with our brief that pro bono legal work is not a campaign contribution.

French v. Jones **(ban on political party endorsements of judicial candidates)**

Here are some excerpts from the brief:

> Few things matter as much to voters as a party's endorsement of a candidate. A sign saying "John Smith for Judge" communicates only that someone named John Smith is running for judge. But adding "Endorsed by the Republican Party" communicates something much more important: The party has determined that Smith is well qualified and shares the party's judicial philosophy.
>
> By barring candidates from saying that they have been endorsed by a party—and by barring candidates from asking the party to offer such endorsements—Rule 4.1(A)(7) of Montana's Judicial Code violates candidates' First Amendment rights. It violates voters' First Amendment rights to receive information. It interferes with the democratic process, by blocking one of the few tools that unknown candidates can use to effectively challenge incumbents and political veterans. And it interferes with judges' freedom of association, by barring them from soliciting party endorsements and from associating themselves with such endorsements even if they are freely offered.

The Ninth Circuit upheld the code on December 7, 2017, but we expect the case will be appealed to the U.S. Supreme Court.

***Holland v. Williams* (enforcement)**

Here are some excerpts from the brief:

> Colorado law authorizes private citizens to bring campaign finance enforcement actions. Anyone – including a speaker's political opponents – can allege a violation and trigger the adjudicative process; Colorado's Secretary of State is legally obligated to forward these private complaints for legal proceedings. Thus, anyone can force a speaker into an administrative proceeding, with all the accompanying time, effort, worry, and expense, simply by filing a complaint.
>
> The Supreme Court has recognized that even substantively constitutional speech restrictions are unconstitutional when their enforcement procedures unnecessarily burden protected speech. Federal judges have specifically applied this general rule to private enforcement provisions burdening speech. And the logic of those arguments equally applies to Colorado's private enforcement scheme for campaign finance violations.
>
> Consider, for instance, the experience of plaintiff Tammy Holland. Holland bought ads in a local newspaper urging members of her community to educate themselves about all the candidates running in an upcoming school board election. In retaliation, the superintendent of the school district filed a complaint alleging that Holland violated campaign finance law by failing to register as a political committee or include disclaimers on her ads. Holland was forced to hire an attorney and prepare her defense, but at the last minute, the superintendent withdrew his complaint.
>
> But that did not end her ordeal. After Holland requested attorneys' fees from the school district, another sitting school official retaliated a second time by refiling the initial complaint. Colorado's private enforcement system thus allowed two public officials, who disliked Holland's speech, to generate an enforcement proceeding against Holland and force her to spend time, money, and effort defending her speech….
>
> The Colorado system lets a speaker's ideological opponents wage political battles in the courts rather than in the political arena. It thus tends to chill political speech, potentially frightening individual speakers and small-scale grass roots campaigns away from the political process. And it does so unnecessarily: other states, which use the traditional model of leaving prosecutors (criminal or administrative) with the decision whether to initiate a proceeding, have shown themselves able to enforce their election laws without such a speech-deterring enforcement system.

The case is still pending.

***Public Citizen v. Federal Election Commission*, (deference to the FEC when dismissing complaints, PAC status)**

Public Citizen filed a complaint alleging that Crossroads GPS, a social welfare group organized under Section 501(c)(4) of the Internal Revenue Code, had conducted enough political activity to become a political committee under the Federal Election Campaign Act. After the FEC dismissed the complaint, Public Citizen filed this lawsuit, arguing that the dismissal was "contrary to law."

The brief agrees with the FEC that "extensive precedent that the decision of the 3 Commissioners voting not to proceed is entitled to full *Chevron* deference because those Commissioners constitute the controlling group preventing an investigation from proceeding." The "traditional administrative law rubric, however, ignores certain aspects of the Act that in fact support an even more deferential approach to Commission decisions (including evenly split [3-3] decisions) to refrain from exercising its powers."

The brief goes on to note that "[t]here is good reason to have both an evenly divided bi-partisan Commission and a requirement that ties go to the accused rather than the accuser. Campaign finance regulation poses a heightened danger that complaints will be used for partisan advantage to silence or hamper a political opponent. Allowing either party to bring the weight of the Commission down on a speaker without bi-partisan support is an invitation for abuse. The requirement of 4 votes to initiate an investigation is an important safeguard against such abuse."

Later, the brief says that First Amendment "concerns rightly place a heavier burden on the Commission when it seeks to burden, punish, or restrict election speakers and conversely provide ample inherent support for Commission decisions declining to so impinge on free speech and association. The asymmetrical First Amendment impact of decisions to proceed or not proceed with investigations is entirely consistent with the asymmetrical voting requirements for proceeding (4 votes) or not proceeding (3 votes)."

"In short," the brief concludes, "the history and structure of our limited government places a significant thumb on the scale favoring inaction over action. Even where, as here, Congress has expressly provided for limited review of a Commission decision to take no further action on a complaint, the historical thumb limiting government action supports keeping such review in this case narrowly confined and not implying greater powers of review that would effectively turn this Court into a tie-breaking vote."

The case is still pending.

Research and External Relations

The Institute for Free Speech firmly believes that long-term success cannot come solely though court action, but must include moving both the law and public opinion. It is not necessary to win over majorities (though we strive to do so), but it is necessary to have strong minorities interested in preserving speech rights if we are to improve existing laws or block bad bills from becoming law and get good court decisions over time.

To stop bad legislation or to improve bad laws, it is essential that lawmakers understand their constitutional responsibilities and that organizations that strongly support the First Amendment rights to free political speech be informed of legislative threats and opportunities.

Supreme Court – Free Speech Records of Judges on President Trump's List

Institute for Free Speech staff researched and reported on the free speech records of President Trump's list of potential nominees to the U.S. Supreme Court. We know that the President's top advisors were aware of our reports. Overall, the Institute for Free Speech published 19 reports on nine judges thought to be on President Trump's short list – and seven analyses of eventual confirmed nominee Justice Neil Gorsuch's writings on free speech and the First Amendment. *The Washington Post*'s "Volokh Conspiracy" blog and other publications also cited our research. The Institute for Free Speech was the only organization to inform the public of the known free speech-related decisions of President Trump's potential Supreme Court nominees and authored op-eds in *The American Spectator*, *National Review*, and the *Washington Examiner* on Justice Gorsuch's free speech jurisprudence.

Expert Commentary and Analysis in 2017

Institute for Free Speech experts filed comments with federal and state regulators and published analyses of proposed legislation more than 34 times in 2017. These analyses were submitted to legislatures or regulatory bodies in 15 states on 28 different proposals. Institute for Free Speech experts were invited to testify on legislation impacting First Amendment speech rights in South Carolina, South Dakota, and West Virginia. Also in 2017, the West Virginia Senate passed a bill with many provisions modeled on Institute for Free Speech recommendations for key campaign finance law terms that do not infringe on free speech rights.

Speaking Engagements

Institute for Free Speech staff spoke at approximately 20 meetings, conferences, and forums at groups, including the American Legislative Exchange Council, American University Washington College of Law Administrative Law Review, Council on Governmental Ethics Laws (COGEL) 39th Annual Meeting, Federalist Society, Federalist Society National Student Symposium, Heritage Foundation, LANCAR Ink, Missouri Supreme Court Conference, National Press Foundation, the United States Court of Appeals for the Ninth Circuit Judicial Conference, several Federalist Society Chapters across the country, University of Missouri School of Law, and at numerous other events.

Selected Legislative Analyses

- Constitutional and Practical Issues with Washington Senate Bill 5991 (501(c) Disclosure)
- Analysis of Klobuchar-Warner-McCain Internet Ads Legislation (S. 1989) (Online Speech)

- Analysis of the "DISCLOSE Act of 2017" (S. 1585): New Bill, Same Plan to Crack Down on Speech (Disclosure)
- House Floor Amendment 1 to Kentucky Senate Bill 75: A Threat to Nonprofit Groups' Speech and Kentuckians' Privacy (501(c) Disclosure)
- Significant Constitutional and Practical Issues with Connecticut House Bill 5589 (Disclosure)
- Statement of Tyler Martinez on B22-0919, the "Fair Elections Act of 2017" Before the Committee on the Judiciary and Public Safety of the Council of the District of Columbia (Tax-Financing)
- Oregon H.B. 2578; Taxpayer-Financed Campaigns – A Failed and Costly Policy (Tax-Financing)
- Constitutional and Practical Issues with Colorado House Bills 17-1261 and 17-1262 (Electioneering Communication Window Expansion)
- Constitutional and Practical Issues with Maryland House Bill 898 (Coordination)
- Constitutional and Practical Issues with California Assembly Bill 1104 (False Speech Online)
- Significant Constitutional and Practical Issues with Oklahoma Senate Bill 579 (Electioneering Communication Disclosure)
- Constitutional and Practical Issues with Nebraska Legislative Bill 252 (Electioneering Communication Disclosure)
- Constitutional and Practical Issues with Maryland House Bill 1498 (501(c)(4)/501(c)(6) Disclosure)
- Constitutional and Practical Issues with New Mexico Senate Bill 96 (Independent Expenditure Disclosure and Coordination)
- Analysis of South Carolina S. 255: An Unconstitutional Bill Seeking to Reshuffle the Titanic's Deck Chairs – After the Ship Has Sunk Already (Electioneering Communication Disclosure)
- Significant Constitutional and Practical Issues with Washington House Bill 1807 ("Incidental Committee" Disclosure)
- Significant Constitutional and Practical Issues with Washington Senate Bill 5219 ("Incidental Committee" Disclosure)
- Constitutional and Practical Issues with Arkansas House Bill 1005 (Electioneering Communication Disclosure and Coordination)

Selected Regulatory Comments

- Letter in Support of Repeal of the Internal Revenue Service's Form 990, Schedule B
- Comments to FEC on Potential Rulemaking on Internet Communications Disclaimers
- Testimony of Allen Dickerson to the U.S. House Oversight and Government Reform Committee's Subcommittee on Information Technology on Internet Speech Regulation

- Constitutional and Practical Issues with New Mexico Secretary of State Revised Proposed Rule 1.10.13 NMAC (Electioneering Communication Disclosure)
- Constitutional and Practical Issues with New Mexico Secretary of State Proposed Rule 1.10.13 NMAC (Electioneering Communication Disclosure)
- Preliminary Analysis of Minnesota Campaign Finance and Public Disclosure Board Proposed Rules "SC 3052" and "4503.0XXX Coordinated Expenditures"
- Comments to FEC Regarding Notice 2016-11: Rulemaking Petition: Political Party Rules
- Comments to FEC Regarding Notice 2016-10: Rulemaking Petition: Implementing the Consolidated and Further Continuing Appropriations Act, 2015

ProxyFacts.org

The Institute for Free Speech unveiled this website in 2013, which is regularly updated and dedicated to the facts surrounding activist investing and corporate political spending. The site, ProxyFacts.org, is a compendium of information on the issue, and includes insight and analysis from experts such as Institute for Free Speech Founder and former FEC Chairman Bradley A. Smith, former SEC Commissioner Paul Atkins, and James R. Copland, Director of the Manhattan Institute's Center for Legal Policy.

This website is intended to be a resource that explores the reality behind efforts aimed at limiting corporate speech. Often, the facts regarding political spending disclosure are very different from the picture painted by narrow interest groups for the media, investors, and policymakers.

This site examines and debunks common myths spread by activists seeking to silence corporations. The public benefits from more speech and more speakers, and any effort to target and suppress speech by any group should be rejected. Thus far, the debate has been defined by a small, coordinated group who are using the shareholder proxy process and other tactics to silence corporate speech and achieve their narrow and unrelated public policy goals.

Communications and Media Outreach

A crucial component of the Institute for Free Speech's overall mission is to educate and persuade the public regarding the danger to liberty from excessive regulations on political speech. In the long term, without an informed public that shares our skepticism of laws limiting political rights, there is little possibility of holding back the most excessive and extreme demands of anti-First Amendment activists.

The Institute for Free Speech's communications efforts strengthen and are complementary to our other work. For example, the lawsuits we file provide excellent opportunities for news coverage. This helps to influence public opinion about campaign restrictions and how they impact First Amendment rights.

An important aspect of our media outreach and communications efforts is the daily distribution of our signature Media Update. It compiles the top stories of the day on political speech issues and also promotes the Institute for Free Speech's litigation, op-ed placements, original blog posts, and research. The Media Update is distributed by email to nearly 400 reporters, nonprofit attorneys, campaign finance experts, and other influencers of public policy on free speech every weekday morning.

Institute for Free Speech experts also write regular posts of our pro-First Amendment views on the influential Election Law Listserv hosted by University of California Irvine School of Law, which is monitored by many reporters who cover campaigns or campaign finance issues.

In addition, Institute for Free Speech Chairman Bradley A. Smith and President David Keating are bi-monthly contributors on topical political speech issues to the *Washington Examiner*. The Heritage Foundation's InsiderOnline website also re-publishes select Institute for Free Speech blog posts. Both partnerships allow us to broaden the reach of our arguments to a large audience.

In 2017, Institute for Free Speech staff op-ed articles have been published in over 65 outlets. These include the *Albuquerque Journal, American Spectator, Argus Leader, Charleston Post and Courier, Columbus Dispatch, CT Mirror, Daily Caller, Forbes, Huffington Post, Milwaukee Journal Sentinel, Missoulian, National Review, New York Post, Providence Journal, Richmond Times-Dispatch, Santa Fe New Mexican, Scranton Times-Tribune, St. Louis Post-Dispatch, The Hill, The Seattle Times, The Washington Post, USA Today, Wall Street Journal, Washington Examiner,* and *The Washington Times*. Several of these outlets have published multiple Institute for Free Speech op-eds as well.

Over the past year, Institute for Free Speech experts have been quoted on a variety of political speech issues by the *ABC News,* ACLU, *Albuquerque Journal, Associated Press, BillMoyers.com, Bloomberg Radio, Bloomberg View,* Campaign Legal Center, Capital Research Center, Cato Institute, *CBC News,* Center for Individual Freedom, Center for Public Integrity, Center for Responsive Politics, *Charleston Gazette-Mail, City Journal, Click Lancashire, Colorado Independent, Columbus Dispatch, Courthouse News Service, CT Viewpoints, Daily Caller, Deseret News, Fast Company, Indianapolis Star, International Business Times, NPR, Los Angeles Times, Morning Consult, Mother Jones, National Law Journal, NBC News, New Orleans Times-Picayune, New York Times, Oregon Public Broadcasting, Philanthropy Daily, Portland Tribune, Reason, Reuters, Richmond Times-Dispatch, Sacramento Bee, Salt Lake Tribune, San Antonio Express-News, San Francisco Chronicle, San Francisco Examiner, Santa Fe New Mexican, St. Louis Post-Dispatch, The Hill, The Oregonian, The Village Voice, The Weekly Standard, USA Today, Wall Street Journal, Washington Examiner, Washington Post, Washington Times,* among other national, state-based, and online publications.

Institute for Free Speech Again Awarded 4-Star Rating, the Top Ranking, from Charity Navigator

For the third year in a row, the Institute for Free Speech was awarded the highest possible rating by Charity Navigator for "demonstrating strong financial health and commitment to accountability and transparency."

Charity Navigator's coveted 4-star rating indicates that the Institute for Free Speech exceeds industry standards in pursuing our mission in a financially efficient way. In terms of points, the Institute for Free Speech earned its highest rating to date, 95 out of a possible 100 points.

Charity Navigator first started rating the Institute for Free Speech in 2015, and the initial rating started at 4 stars. The new rating became official on May 1, 2017.

2016 Support and Revenue (from Audited Statement)

Contributions and Grants:	$2,021,188
Litigation Award:	125,000
Donated Services:	90,720
Miscellaneous:	8,381
Interest:	217
Total:	**$2,245,506**

Expenses:

Program Services:	
Litigation and Legal Services:	$798,825
Research and External Relations:	519,453
Communications:	335,669
Total Program Services:	**$1,653,947**
Supporting Services:	
General and Administrative:	$58,891
Development:	193,629
Total Expenses:	**$1,906,467**
Total Net Assets, End of Year:	**$2,744,825**