A Progress Report for 2019
to Supporters of the Institute for Free Speech

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Mission

The Institute for Free Speech (IFS), 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.

Vision

Free speech. It's fundamental to American democracy. The First Amendment to the Constitution says we have the right to freely speak, associate, assemble, publish, and petition the government. Government and society can't be improved without free speech. Equally important, our free political speech rights help protect every citizen from abuse of governmental power. Free speech can mean the difference between liberty and tyranny.

Today, our free speech rights are under assault. Some politicians seek to stifle dissent, quash opposition, and expand their power. They do this by passing laws that aim to suppress and limit speech about government and candidates, threaten our privacy if we speak or join groups, and impose heavy burdens for organizing. To further their agendas, some organizations want powerful politicians to decide what speech is acceptable and what is not. Others want the government to decide how much can be spent on speech or organizing groups. Such limits make it difficult or impossible for those with differing views to make their voices heard. And if we cannot speak, others cannot hear our ideas, consider them, and act. The result is a democracy that is less vibrant, less dynamic, and less free.

The *Institute for Free Speech* exists to protect and defend the First Amendment's speech freedoms. We believe that differing opinions and new, challenging ideas make for a more robust democracy. We believe free speech makes it possible to improve our country and our lives. We believe free speech makes those in power more accountable to the people. We believe government should never decide who can speak and who can't. We believe government should never decide how much speech is too much.

We put those beliefs into practice by championing free speech for all: those less powerful, those who think differently, those with ideas that may be unpopular at the moment, and those who believe there may be a better way forward. Every day, we go to work and dedicate ourselves to protecting and defending every American's ability to exercise their First Amendment rights to free political speech.

The nonpartisan *Institute for Free Speech* defends the First Amendment on many fronts. We go to court to help clients protect their rights and set new precedents. We work with government officials to craft laws that expand free speech and are consistent with the Constitution. We produce research on which we build a strong case for speech rights. We

communicate with and educate the public, legislators, organizations, and the media to enable every American to understand the importance of the First Amendment's speech freedoms. Our many successes in these areas have served to expand free political speech protections for individuals and organizations.

Free speech for all. That is our vision, our goal, our quest. If you believe in that vision as well, we ask for your support and assistance. Please join us in enhancing and defending free speech rights.

Scope of this Report

This report covers activities related to the use of funds in 2019 from supporters of our efforts to protect and advance free political speech and donor privacy.

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Strategic Litigation

During 2019, the Institute for Free Speech represented clients in nine cases defending and/or expanding free speech. IFS also filed 12 amicus briefs in other important cases in 2019. Much of this litigation is aimed specifically at protecting citizen privacy rights.

Active Cases as of December 31, 2019

The title of each case, the date our participation began, and its general subject follows:

- *Calzone v. Missouri Administrative Hearing Commission,* April 14, 2016. (Lobbying disclosure.)
- *Calzone v. Missouri Ethics Commission*, October 21, 2016. (Lobbying disclosure.)
- *Howard Jarvis Taxpayers Association v. Governor of the State of California,* December 12, 2016. (Constitutionality of passage of law to enable tax-financed campaigns.)
- *Institute for Free Speech v. Becerra*, March 7, 2014. (Disclosure of giving to charities.)
- *Joe Markley and Rob Sampson v. State Elections Enforcement Commission,* May 7, 2018. (Limits on candidate speech.)
- *South Dakota Newspaper Association, et al. v. Barnett, et al.,* April 17, 2019. (Constitutionality of ban on out-of-state contributions.)
- *Thomas v. Bright,* January 25, 2018. (Constitutionality of state political sign regulations on private property.)

Notable Institute for Free Speech court and agency wins during 2019 include:

- On December 6, 2019, the United States Court of Appeals for the Fourth Circuit affirmed a district court ruling striking down a law requiring online platforms (including news outlets) to amass and publish vast amounts of personal information in order to run ads, allegedly to find Russians posing as Americans.

  IFS was the first organization to warn that the proposal was unconstitutional before the Maryland Legislature passed this legislation. We were also the first to offer amicus support to the group of Maryland newspapers challenging the law. The court rejected the state's argument that online publishers could avoid the law's burdens by refusing political ads and wrote that the law imposed "layer upon layer of excessive burdens."

- On November 25, 2019, the U.S. Supreme Court issued a unanimous opinion strengthening a 2006 ruling defining factors which determine whether contribution limits are unconstitutionally low. In a rare move, the Court ruled in *Thompson v. Hebdon* without even hearing oral arguments. Our brief was one of only three filed in the case, which challenged Alaska's very low contribution limits.

- On November 1, 2019, the full Eighth Circuit Court of Appeals ruled in favor of our client Ron Calzone's right to petition the government. The Court set a new precedent establishing that unpaid volunteers like Calzone who talk to state legislators, without trying to influence them with gifts, cannot be fined for failing to register as lobbyists.
- IFS, acting as plaintiff on its own behalf, successfully obtained a permanent injunction in federal court on October 17, 2019 barring South Dakota from prosecuting us for publishing an educational analysis of two ballot measures affecting speech rights. The law could have punished IFS (and other nonprofits in the future) for not listing our top donors in the analysis. The court had previously approved a preliminary injunction on October 16, 2018.
- On October 2, 2019, U.S. District Judge Brian R. Martinotti struck down a New Jersey law exposing the personal information of donors to nonprofit groups that speak about public policy or government actions. In an article for the state's largest news website NJ.com, IFS President David Keating and ACLU-NJ Executive Director Amol Sinha had previously criticized lawmakers' efforts to expose nonprofit donors.
- On September 30, 2019, U.S. District Judge Denise Cote struck down a New York state donor disclosure violating the right to private association. The state agreed to settle the case and not appeal the ruling. The Institute for Free Speech was the only group to file an amicus in support of this challenge.
- On September 11, 2019, the United States Sixth Circuit Court of Appeals ruled that the Tennessee Billboard Act is unconstitutional. This ruling set a new precedent in the Sixth Circuit and will be influential in other federal courts. The Court barred Tennessee from tearing down a sign praising Team USA that belonged to our client.

  The key principle at stake in this case goes far beyond a patriot prohibited from saluting the Olympic team. As the court noted in its opinion, "The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech." As such, the state's law enabled outrageous discrimination against political and public policy speech.
- On August 27, 2019, a California Court of Appeal ruled that the California Legislature could not pass legislation authorizing taxpayer-funded campaigns. The court agreed with our arguments that such a law requires voter approval.
- On May 9, 2019, a federal judge ruled that South Dakota's Initiated Measure 24, which bans out-of-state contributions to state ballot question committees, was unconstitutional. IFS represented the South Dakota Newspaper Association and five other plaintiffs in conjunction with former South Dakota Attorney General Marty Jackley. The judge agreed with us that the initiative was unconstitutional under both the First Amendment and the Commerce Clause of the Constitution. We filed this lawsuit in April 2019. On January 9, 2020, the judge awarded IFS $23,075.00 in attorney's fees for our work on the case.

Amicus Briefs

The Institute for Free Speech filed briefs as *amicus curiae* in the following cases that were active for at least a portion of 2019 (dates listed are dates the brief was filed). These cases are described in detail in the appendix.

- *Amawi v. Pflugerville*, United States Court of Appeals for the Fifth Circuit, December 6, 2019. (Texas law violates the First Amendment right to engage in political boycotts.)
- *Multnomah County, et al. v. Mehrwein, et al.*, Oregon Supreme Court, October 1, 2019. (Multnomah County law limiting independent expenditures, limiting contributions to groups making independent expenditures, and requiring donor names be included on communications violates multiple aspects of the First Amendment.)
- *Barr v. American Association of Political Consultants*, United States Supreme Court, September 25, 2019. (Content-based ban on political speech using autodialed or prerecorded calls to cell phones violates the First Amendment, particularly since such calls for other purposes are permitted.)
- *Americans For Prosperity Foundation v. Becerra*, U.S. Supreme Court, September 25, 2019. (California Attorney General's demand for the personal information of major donors to all federally registered nonprofit organizations operating in the state violates freedom of association under the First Amendment.)
- *Jones v. Jegley*, United States Eighth Circuit Court of Appeals, September 4, 2019. (An Arkansas law prohibiting contributions more than two years before a candidate's next election infringes First Amendment rights.)
- *Thompson v. Hebdon*, U.S. Supreme Court, August 26, 2019. (Alaska's political contribution limits that are too low violate free speech under the First Amendment.)
- *The Washington Post, et al. v. David J. McManus, Jr., et al.*, U.S. Court of Appeals for the Fourth Circuit, June 7, 2019. (The Maryland law forces newspapers to publish information about their advertisers, which is inimical to a free press and harms those wishing to speak online.)
- *Evergreen Freedom Foundation v. Washington*, U.S. Supreme Court, in support of certiorari, May 13, 2019. (Does Washington's enforcement action under its campaign and election regulation violate the First Amendment when it is extended to cover legal fees for litigation concerning a local ballot initiative process where no campaign or election ever occurred?)
- *Arkansas Times LP v. Waldrip*, U.S. Court of Appeals for the Eighth Circuit, April 15, 2019. (Political boycotts are protected under the First Amendment.)
- *Crossroad GPS v. CREW, et al.*, U.S. Court of Appeals for the District of Columbia Circuit, March 18, 2019. (An FEC regulation limiting donor disclosure protected First Amendment privacy in association and should not have been struck down.)

- *Pulliam, et al. v. Austin, et al.*, District Court, Travis County, Tex., February 22, 2019. (Where meritorious public interest litigation seeks to restrain public-sector unions, use of an anti-SLAPP law to dismiss case violates the First Amendment right to petition the courts.)
- *Woodhull Freedom Foundation, et al. v. U.S., et al.*, U.S. Court of Appeals for the District of Columbia Circuit, February 20, 2019. (First Amendment standing doctrine provides standing for a pre-enforcement challenge to a statute of broad scope and uncertain meaning that allows numerous parties, including private litigants and state attorneys general, to bring lawsuits against alleged violators.)
- *State of Washington v. Grocery Manufacturers Association*, Washington State Supreme Court, in support of review, February 5, 2019. (A $6 million fine for a minor campaign finance filing error is unconstitutional under the First and Eighth Amendments and chills campaign speech.)
- *Tate v. United States*, U.S. Supreme Court, in support of certiorari, December 7, 2018. (The government should not import civil enforcement decisions of the Federal Election Commission as a means to impose criminal liability.)
- *Montanans for Community Development v. Mangan*, U.S. Supreme Court, in support of certiorari, October 24, 2018. (The Court should reaffirm precedent that groups can be regulated as political committees only if their major purpose is the election or defeat of a candidate.)
- *Nieves v. Bartlett*, U.S. Supreme Court, merits brief, October 9, 2018. (Does probable cause for arrest defeat a First Amendment retaliation claim?)
- *Libertarian National Committee, Inc. v. Federal Election Commission*, United States Court of Appeals for the District of Columbia Circuit, September 12, 2018. (Does imposing annual contribution limits against the bequest of a supporter violate the First Amendment rights of the Libertarian National Committee? And two related questions.)
- *Timbs v. Indiana*, U.S. Supreme Court, merits brief, September 10, 2018. (Does the Excessive Fines Clause of the Eighth Amendment apply to the states?)
- *Lair v. Mangan*, U.S. Supreme Court, in support of certiorari, September 4, 2018. (The Court should clarify that "exacting scrutiny" applies to contribution limits.)
- *Zimmerman v. Austin*, U.S. Supreme Court, in support of certiorari, August 16, 2018. (Does an "appearance of corruption" based solely on perceptions of public opinion justify limits on campaign contributions?)
- *Citizens Union of the City of New York, et al. v. Attorney General of the State of New York*, U.S. District Court for the Southern District of New York, July 2, 2018. (A broad disclosure law is unconstitutional.)
- *Utah Republican Party v. Cox*, U.S. Court of Appeals for the Tenth Circuit, in support of *en banc* reconsideration, April 25, 2018. (The court should reconsider its ruling harming associational rights.)

- *State of Washington v. Grocery Manufacturers Association*, Washington State Court of Appeals, Division II, July 20, 2017. (An $18 million fine for a minor campaign finance filing error is unconstitutional and chills campaign speech.)
- *Public Citizen v. Federal Election Commission*, U.S. District Court for the District of Columbia, September 17, 2014. (The court should defer to the findings of the three FEC Commissioners concerning a political committee status determination.)

New Staff

Tiffany Donnelly, Media Manager

Tiffany joined the Institute for Free Speech as Media Manager in November 2019. She is responsible for compiling and distributing the Institute for Free Speech's signature Daily Media Update, which contains topical news stories and commentary on a variety of issues on free expression. Tiffany also monitors news sources for relevant commentary and discussions on political speech stories that IFS can engage with and contribute to, and maintains our website and social media presence. She also authors op-eds and blogs on a variety of political speech subjects.

Tiffany holds a B.A. in History from Brown University and a J.D. from the University of Louisville. Prior to earning her J.D., Tiffany worked as a Paralegal at the ACLU's National Office, where she managed client outreach in education-related cases across the country. Most recently, she worked at organizations focused on artistic and cultural education.

New Washington, D.C. Office

The Institute for Free Speech said goodbye to its longtime home in Alexandria, Virginia last winter. IFS moved into new offices in Washington, D.C. at the beginning of 2020.

Thanks to your generous investment, the Institute for Free Speech has seen significant growth in recent years. Our new location features more offices, a larger conference room, and space for additional desks and offices. The more IFS grows, the more we can lead the fight against restrictions on First Amendment political speech rights.

Our new office is conveniently located between Dupont Circle and downtown D.C., bringing us closer to Congress, the Supreme Court, the Federal Election Commission, and the vibrant community of think tanks and advocacy groups in Washington. We invite you to stop by and tour our new office space the next time you're in town. After all, your investment in our work made it possible.

Research

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 prevent bad bills from becoming law and secure good court decisions over time.

To this end, our research efforts are aimed at improving public understanding of the impact of political speech regulations as well as reinforcing our litigation and external relations efforts, with solid arguments in support of (or opposition to) speech-related proposals in Congress and state legislatures.

Publication of First-Ever 50-State Survey of Campaign Finance and Lobbying Laws

The Institute for Free Speech published a comprehensive survey of campaign finance and lobbying statutes across the states as well as Washington, D.C., New York City, and Seattle that impact free political speech, to determine how much of a regulatory burden each jurisdiction imposes on this core First Amendment activity. The survey looks at twelve broad issue areas: (1) false statement laws; (2) definitions of "expenditure" and "express advocacy"; (3) electioneering communications; (4) donor reporting requirements for independent expenditures made by non-PACs; (5) disclaimer requirements; (6) statutory or regulatory authority for super PACs; (7) major/primary purpose for PAC status; (8) PAC status determination and thresholds; (9) regulation of "incidental committees"; (10) private enforcement actions; (11) coordination; and (12) lobbying. It was released in March 2019.

This first-of-its-kind compendium is informing members of the public and state policymakers about some of the complex and onerous laws burdening political speech. By revealing information not only on how the states compare with each other, but also on how a given state regulates various issues pertaining to speech about government, this document is providing a useful guide to public interest organizations and policymakers on the obstacles facing First Amendment-friendly policies.

What Would H.R. 1 Mean for My Group?

H.R. 1, the number one legislative priority of House Democrats in 2019, threatened First Amendment rights on multiple fronts. It particularly endangered common advocacy and operating activities of nonprofit and civic advocacy groups. This massive bill had many provisions that were difficult for even campaign finance attorneys to understand.

The Institute for Free Speech published an explainer identifying and analyzing each of these provisions in order to educate the leaders of these groups as well as the public.

H.R. 1 would have made it harder for groups to speak about the federal government through more lawyers' fees and government regulations, compulsory declarations of allegiance to candidates, and mandating donor disclosure on disclaimers as well as increasing their length.

It would regulate and surveil groups' social media accounts and online communications. H.R. 1 would also redefine "coordinated" speech in order to ban it, intrude on groups' donor and associational privacy, and subject groups to politically motivated FEC investigations.

Our explainer made these extremely complex provisions understandable for a general audience who could be affected if they became law.

This resource supplemented our already extensive library of explainers on topics that affect political speech. Efforts in this area further IFS's goal of being the go-to source for information and expertise on issues implicating political speech and association, and provide lawmakers with easy-to-digest arguments both to support good laws and push back against speech-harming proposals.

External Relations

To stop or improve bad legislation and regulations, it is essential that lawmakers understand their constitutional responsibilities, that regulators are made aware of constitutional limits, and that the public be informed of such threats and opportunities.

Expert Commentary and Analysis

Institute for Free Speech experts were invited to testify on legislation, filed comments with federal and state regulators, and provided other analyses and resources more than 44 times in 2019.

When H.R. 1 was introduced in the 2019 session of Congress, our experts were the only ones invited to testify on the free speech implications of the "For the People Act." IFS Chairman Brad Smith testified before the House Oversight and Reform Committee. IFS President David Keating testified before the House Administration Committee eight days later.

Our staff wrote a three-part analysis of the bill that was distributed widely. We received many compliments about how helpful this analysis was to understanding the potential impact of the legislation. When Congress asked the Government Accountability Office to conduct a review of federal campaign finance law late last year, the GAO sent its top officials from around the country to meet with IFS staff.

IFS Chairman Brad Smith was also invited to testify before the U.S. House Committee on House Administration on oversight of the Federal Election Commission on September 25, 2019. Additionally, Staff Attorney Tyler Martinez was invited to testify before an Idaho Interim Committee considering a bill that would expand the state's "electioneering communication" statute. Martinez's testimony spurred the Idaho Committee to make significant changes to the bill.

Comments Supporting Free Speech Filed at the IRS, FEC and State Agencies

The Institute for Free Speech continually monitors federal and state agencies that may threaten First Amendment rights, including the Internal Revenue Service, Federal Election Commission, and others. When it comes to regulation of political advocacy, the devil is often in the details. Careful attention to detail is one reason the Institute for Free Speech has become the nation's most effective voice for free political speech.

The Institute for Free Speech filed comments in November and December 2019 with the IRS in support of a proposed rule to protect the privacy of nonprofit donors. IFS attorney Ryan Morrison also testified before the agency in support of the rule in February 2020. The IRS adopted the rule in May.

The rule ended a requirement that all nonprofits provide the IRS with a list of their major contributors' names and addresses. There is no authority under tax laws for the IRS to

mandate production of this information other than for political action groups and charities.

"Compelled disclosure of donors to civil society groups offends the First Amendment," IFS's comments warned. Ending collection of this information would both lift a "burden from the IRS [and] decreases the likelihood of donor exposure, which is significant in light of disclosures of sensitive contributor information in recent years."

IFS has long fought for the right to privately support social causes. Americans are more likely to join organizations and give if their support is private. This is particularly true for groups promoting new or controversial ideas.

The rule protects privacy by eliminating the risk of accidental disclosures. That will encourage Americans to get involved. As IFS President David Keating put it, "The IRS should not look over your shoulder every time you support a nonprofit."

One of the most concerning acts of foreign interference in U.S. elections is the hacking of campaign e-mails and data. While some see regulation as the answer to every problem, the Institute for Free Speech disagrees. We urged the Federal Election Commission to give candidates more freedom to use cybersecurity products. The FEC voted unanimously to do so. Area 1 Security sells an anti-phishing program developed by former NSA and United States Cyber Command experts. The company wished to provide the program to all candidates and party committees at a standard discount available to nonprofits and start-ups. Yet the FEC stood in the way of this patriotic gesture.

The law bans businesses from contributing to candidates. Would Area 1's discounted service count as an illegal corporate in-kind contribution? Citing the Supreme Court, federal regulations, and previous FEC actions, IFS asked the Commission to approve the company's request.

"Area 1 merely seeks to sell security software to political committees at a rate already available to other, non-political, entities," we noted. In the past, the FEC has allowed companies to offer reduced-cost services to campaigns "on the same terms and conditions available to all similarly situated persons."

In addition to improving election security, the FEC's vote helps establish an important principle. Campaigns should be able to use any commercially available product for the price offered in the marketplace. Regulations that impede access to commercial products raise the cost of campaigning. Candidates get less bang for their buck.

The Institute for Free Speech engages with regulatory agencies to encourage policies that benefit free speech and discourages efforts to restrict it. Nipping unconstitutional proposals in the bud can prevent years of costly litigation.

The Institute's other comments to the FEC also focused on First Amendment protections. Our comments on independent expenditure reporting by candidates urged the FEC to provide a simplified and clarified version of proposed rules that would prevent a future constitutional challenge. The Institute's comments on a rulemaking clarifying the

permissible use of campaign funds by former candidates and officeholders urged the FEC to enforce their existing rules, instead of adding new, unnecessary, and complex regulations.

In response to a decision in the U.S. District Court for the District of Columbia invalidating a Commission regulation on non-PAC entities making independent expenditures, IFS filed a Petition for Rulemaking with the FEC seeking clarity on the definition of "contribution" in order to limit groups' donor reporting obligations. The court's ruling said that those who donate to an advocacy group "for political purposes" must be disclosed. However, that phrase is vague and potentially overbroad, and thus the petition calls upon the FEC to remedy that defect by adopting a rule.

IFS has engaged in regulatory work at the state level as well. Working directly with regulatory agencies is often arduous and unglamorous work, but it is critically important. Our work often allows us to influence the implementation of speech-protecting rules or stop the enactment of speech-restricting rules. When this work is ignored, courts frequently uphold many harmful regulations. Even when courts strike down or limit the application of anti-speech rules, the process can take years. It is more effective to prevent bad regulations from being implemented in the first place.

Coalition Letters

The Institute for Free Speech helped to organize and sign several coalition letters on issues critical to protecting First Amendment rights.

In November 2019, IFS signed a coalition statement expressing concerns about social media monitoring by law enforcement. Social media has been a vital tool for activists to connect and organize online. Powerful platforms have allowed movements to flourish and influence the national dialogue on issues that affect all Americans. The statement discussed "six of the harmful impacts from social media surveillance that lawmakers and the public must take into account in any discussion about surveillance of social media users."

Often covert and conducted without oversight, social media surveillance gives law enforcement agencies the ability to monitor and archive information on millions of people's activities. This includes tracking people's political actions, a practice that endangers activists and undermines our First Amendment rights to speech and association.

In May 2019, the Institute for Free Speech signed a coalition letter to Kevin McAleenan, acting U.S. Department of Homeland Security secretary, along with 103 organizations across the political spectrum. The letter expressed concerns that the "Customs and Border Protection (CBP) created dossiers on activists, journalists, and lawyers, and targeted these individuals for heightened border screening" based on their policy views.

In April 2019, we signed a coalition letter to the U.S. House Committee on Natural Resources urging it to secure a commitment from Acting Director of the National Park Service (NPS) Dan Smith to withdraw proposed rules restricting protesting and

demonstration activities on the National Mall, on publicly accessible grounds surrounding the White House, and other NPS areas in Washington, D.C. The right to gather together and express viewpoints is vital to First Amendment rights of freedom of association. The proposed rule would also "open the doors to charging fees for demonstrations," which would raise "significant First Amendment concerns."

Reaching Lawmakers, Allies, and the Public through Speaking Engagements

We strive to educate the public, judges, lawmakers, and regulators about the importance of free speech. In 2019, IFS staff spoke at 39 conferences and forums. Notable speaking engagements featuring IFS representatives included:

- IFS President David Keating briefing Republican Study Committee members and staff on H.R. 1;
- Keating speaking with columnist David French about donor privacy before the 2019 *National Review* Ideas Summit;
- IFS Chairman Brad Smith speaking about modernizing campaign finance law at a meeting of the National Conference of State Legislatures;
- Brad Smith and David Keating speaking on "Defending Corporate Political and Advocacy Rights" at the U.S. Chamber of Commerce;
- IFS Legal Director Allen Dickerson speaking about online ad regulation at a Cato Institute conference;
- Dickerson speaking at *The Atlantic* Roundtable lunch on "Fighting Misinformation While Protecting Free Speech;" and
- IFS External Relations Director Matt Nese presenting on various topics relating to protecting donor privacy and the First Amendment at multiple American Legislative Exchange Council (ALEC) and State Policy Network (SPN) meetings.

IFS experts also spoke at the annual meeting of the Council on Government Ethics Laws, the winter meeting of the First Amendment Lawyers Association, the Heritage Foundation, Americans for Tax Reform, the Free Expression Network, the Association of Private Enterprise Educators, the Association of American Law Schools, Yale Law School, American University, Stanford University, the James Madison Program at Princeton University, the Osher Lifelong Learning Institute at Dartmouth College, and multiple Federalist Society chapters across the country.

Communications and Media Outreach

A crucial component of the Institute for Free Speech's overall mission is to educate the public about the danger to free speech from excessive regulations on political speech. In the long term, without an informed public that shares our skepticism of laws limiting free speech 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 complement our other work. For example, the lawsuits we file provide excellent opportunities for news coverage. This helps to influence public opinion about speech 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 every weekday morning by email to over 550 reporters, nonprofit attorneys, campaign finance experts, and other influencers of public policy on free speech.

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 regular 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 larger audience.

Recapping the Institute's 2019 Media Outreach

The Institute for Free Speech lived up to its reputation as the go-to source for journalists seeking to understand political speech issues in 2019. IFS experts appeared in more than 266 news articles and reports, including articles in *The Wall Street Journal*, *The New York Times*, *The Washington Post*, *USA Today*, the *New York Post*, *NPR*, *CNN.com*, *FoxNews.com*, and *The Atlantic.* IFS experts were also quoted in major regional or state newspapers, such as the *Detroit Free Press*, the *Las Vegas-Review Journal*, *The Salt Lake Tribune*, the *Deseret News*, the *Connecticut Post*, and *The Raleigh News and Observer*, among many others.

In addition, IFS experts were frequently asked to comment on political speech controversies on television and radio programs. IFS Chairman Bradley Smith appeared on two highly-rated Fox News primetime shows during 2019 – Sean Hannity's *Hannity* and Laura Ingraham's *The Ingraham Angle*, as well as One America News Network's *The Daily Ledger*. Smith was also filmed for an MSNBC documentary on *Citizens United*

that aired in July 2019, and his testimony before the House Oversight and Government Reform Committee on H.R. 1 was televised on C-SPAN. IFS President David Keating appeared on C-SPAN's long-running interview show, *Washington Journal.* IFS staff made numerous appearances on regional television and radio stations and participated in podcasts for organizations such as the Cato Institute, Foundation for Individual Rights in Education, Radio America, the Center for Individual Freedom, the Libertas Institute, and more.

Institute for Free Speech staff had 41 op-eds and letters to the editor published in 2019. These pieces have been featured in national and state-based newspapers across the country, including *The Wall Street Journal*, *USA Today*, *The Washington Post*, *New York Daily News*, *Washington Examiner*, *The Hill*, *The Federalist*, *National Review*, *City Journal*, *The Daily Caller*, and *Reason* as well as the *Minneapolis Star Tribune, Columbus Dispatch, The Oregonian, NJ.Com, Asbury Park Press,* and *The Republican (MassLive).* Several of these outlets have published multiple op-eds by IFS experts.

In addition to authoring op-eds, Institute for Free Speech staff contributed 37 posts to our blog. The Institute for Free Speech's blog offers IFS experts a platform to dig deep on policy issues, contribute to ongoing debates about political speech regulation, and comment on stories that failed to receive adequate attention in media coverage. Our blog also creates additional opportunities to promote and discuss IFS research, legislative analyses, and legal cases through the lens of current events.

Four Star Charity

Institute for Free Speech Awarded Charity Navigator's Top Ranking for the 6th Consecutive Year

For the sixth year in a row, the Institute for Free Speech was awarded a 4-star rating by Charity Navigator for "demonstrating strong financial health and commitment to accountability and transparency."

Charity Navigator first rated the Institute for Free Speech in 2015; we received a 4-star rating that year and every year since. Our 4-star status was reaffirmed on February 1, 2020.

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. The Institute for Free Speech also matched its highest point total from last year, receiving 97.23 out of a possible 100 points.

Appendix

Litigation Detail

The following are short descriptions of each case we were litigating as of December 31, 2019 (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. This claim was surprising because Calzone had never been paid or in any way compensated, nor had he given any gifts to lawmakers. Yet his alleged failure to register as a lobbyist with the state could subject 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 sought 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 and never made any gifts to legislators or their staffs. 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 General Assembly.

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.

We are also representing Mr. Calzone in state court, but those actions have been postponed until the federal litigation has been resolved.

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

Notable Case Actions: On June 26, 2017, a federal court judge ruled that the state law was constitutional. An appeal and briefs were filed with the United States Court of Appeals for the Eighth Circuit, and an oral argument was heard on April 10, 2018. On November 28, a divided Eighth Circuit upheld the district court. Judge Stras dissented, noting that neither the government nor the majority had explained "why compiling a list of people who are engaging in core political speech is 'important'" to the state.

IFS sought *en banc* review, which was granted on January 29, 2019. The *en banc* hearing was held on April 19, 2019.

On November 1, 2019, the full Eighth Circuit Court of Appeals ruled in favor of our client Ron Calzone's right to petition the government. The Court set a new precedent establishing that unpaid volunteers like Calzone who talk to state legislators without giving them gifts cannot be fined for failing to register as lobbyists.

The only issue left unresolved at the end of 2019 was on the issue of attorney's fees.

Howard Jarvis Taxpayers Association v. Governor of the State of California
(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, IFS joined 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 a voter initiative prohibiting them from doing so.

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 from being 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 Act 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 then-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.

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.

Notable Case Actions: The complaint was filed on December 12, 2016 with the Sacramento Superior Court. The Court struck down the law on August 24, 2017. The state appealed the decision on January 9, 2018 to the Court of Appeal of the State of California, Third Appellate District. Briefs were filed by both parties.

On August 27, 2019, the California Court of Appeal ruled that the California Legislature could not pass legislation authorizing taxpayer-funded campaigns. The court agreed with our arguments that such a law requires voter approval. The state decided against further appeals.

***Institute for Free Speech v. Becerra* (Mandated disclosure to the state of personal information of donors to charities.)**

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, except in very narrowly defined circumstances and only on a confidential basis.

Historically, the California attorney general did not require 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 were 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 would protect the First Amendment right to free association, and consequently the range of opinions available to the public. It would 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.

The Ninth Circuit's ruling prohibits nonprofits from engaging in protected First Amendment speech if they maintain the privacy of their supporters. The Institute for Free Speech is currently banned from speaking with potential donors in California unless it reports its donors to the state. The Institute has refused to accede to the state's demands for the last four years.

Notable Case 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. IFS appealed the case to the United States Court of Appeals for the Ninth Circuit.

On October 11, 2019, the Ninth Circuit granted the California attorney general's motion for summary affirmance, relying upon its May 1, 2015 decision denying a preliminary injunction in this case.

On December 18, 2019, IFS asked the U.S. Supreme Court to hear the case and reaffirm its longstanding precedents on freedom of association.

Joe Markley and Rob Sampson v. State Elections Enforcement Commission **(Limits on candidate speech.)**

At issue in this case is a state's effort to restrict voters from hearing important information about elections and candidates. Connecticut's State Elections Enforcement Commission (SEEC) fined two General Assembly members for campaign mailers that discussed the governor's policies. With the help of IFS, the two candidates are fighting back.

Joe Markley, then a state senator, and Rob Sampson, then a state representative (and now a state senator), were ensnared by the law after they decided to split the costs on a series of standard campaign mailers highlighting their achievements in office. The mailers promoted Markley and Sampson as opponents of Governor Dannel Malloy's policies on taxes and government spending. Malloy was also on the ballot that year.

By criticizing the governor's record, the SEEC argued that Markley and Sampson made an illegal expenditure on behalf of the governor's opponent. The SEEC ordered Sampson to pay a $5,000 fine and ordered Markley to pay a $2,000 fine. In order for the ads to be legal, the SEEC believes the governor's opponent would have had to approve and share the costs of the ads. This is highly unrealistic and would result in legislative candidates being effectively prohibited from speaking about a governor's policies in campaign ads.

Markley and Sampson are represented by the Institute for Free Speech and Connecticut attorney Doug Dubitsky. We asked a Connecticut court to dismiss the fines and declare the law unconstitutional. After the state court ruled that it could not rule on the case because too much time had passed, our clients appealed.

The Connecticut Supreme Court agreed to hear the case before the lower appeals court had even ruled on it. Such a decision often indicates that the court sees a serious legal issue that needs to be resolved. The Institute for Free Speech's attorneys argued this case before the court in October 2019.

Success in this case would protect the First Amendment rights to speak and publish.

South Dakota Newspaper Association, et al. v. Barnett, et al. **(Constitutionality of ban on out-of-state contributions.)**

Americans have the right to support or oppose state ballot measures, even if they are not residents of the state. This is the issue at the heart of this case.

On behalf of our clients, the Institute for Free Speech filed a federal lawsuit to defend this important First Amendment right.

This case began when South Dakota voters approved Initiated Measure 24 in 2018. The law bans "any contribution to a statewide ballot question committee by a person who is not a resident of the state at the time of the contribution, a political committee that is organized outside South Dakota, or an entity that is not filed as an entity with the secretary of state for the four years preceding such contribution."

Such a ban on out-of-state contributions is detrimental to the First Amendment. Courts have long recognized that contributions to ballot measure campaigns promote robust debate about public issues. They therefore receive significant First Amendment protections. This is no less true for contributions from residents of other states.

The plaintiffs in this case are four trade associations that wish to spend funds to speak about ballot measures in South Dakota, and one national nonprofit and one former South Dakota resident who wish to donate funds to groups that speak about South Dakota ballot issues. All six would be prevented from exercising their First Amendment rights because of the ban.

The South Dakota Newspaper Association is a nonprofit founded in 1882 that represents South Dakota's 114 weekly and 11 daily newspapers. The South Dakota Retailers Association is a nonprofit founded in 1897 that represents nearly 4,000 South Dakota retailers across the state. The South Dakota Broadcasters Association is a nonprofit that represents 26 TV and 118 radio stations in the state. And the South Dakota Chamber Ballot Action Committee is an evergreen committee affiliated with the South Dakota Chamber of Commerce, an organization created by business leaders to promote public policy in the state.

These four groups all advocate for the policies they think are best for South Dakota. To do so, they advocate for and against ballot measures. But all four of these groups also want to receive out-of-state contributions to help fund their advocacy. By banning such funds, South Dakota is limiting the First Amendment rights of these groups.

Americans for Prosperity is a national advocacy organization that seeks to promote its political beliefs across the country. The group, however, is headquartered in Virginia. Thomas Barnett, Jr. is a former South Dakota resident who has long been active in ballot measure campaigns. He recently retired to Florida.

Both AFP and Barnett want to contribute to ballot committees to help advocate for and against South Dakota ballot measures. But both AFP and Barnett are completely prohibited from donating, effectively silencing their efforts to speak in the state.

This ban thus presents serious harm both to in-state groups looking to accept out-of-state funds and out-of-state groups and citizens looking to speak in the state. It is a clear instance of viewpoint discrimination and should be prohibited as an unjust restriction on the First Amendment.

The government has no legitimate interest in enforcing this ban. Far from benefiting the people of South Dakota, this ban would harm them by removing valuable voices in debates about ballot measures. Many state issues have national or regional implications, and voters may wish to hear from non-state residents or businesses who will be affected by state policy. Voters may also wish to hear from national organizations with expertise in specific policy areas.

The lawsuit also argued that the ban was unconstitutional under the Commerce Clause because it discriminates against and burdens the interstate flow of financial contributions from out-of-state individuals.

Notable Case Actions: On May 9, 2019, a federal judge agreed with the Institute for Free Speech's argument that this ban was unconstitutional under both the First Amendment and the Commerce Clause. The state chose not to appeal, and as of December 31, 2019 the Institute for Free Speech was awaiting a decision on attorneys' fees in the case.

Thomas v. Bright **(Constitutionality of Tennessee 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.

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 a 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 in October of 2017. The Institute for Free Speech is representing Thomas during the appeal but was not involved in the case previously.

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.

On September 11, 2019, the United States Sixth Circuit Court of Appeals ruled that the Tennessee Billboard Act is unconstitutional. This ruling set a new precedent in the Sixth Circuit and will be influential in other federal courts. The Court barred Tennessee from tearing down a sign praising Team USA that belonged to our client.

The key principle at stake in this case goes far beyond a patriot prohibited from saluting the Olympic team. As the court noted in its opinion, "The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech." As such, the state's law enabled outrageous discrimination against political and public policy speech.

Tennessee has petitioned the U.S. Supreme Court to hear the case.

Success in this case would protect the First Amendment rights to speak and publish.

Cases Closed in 2019

Institute for Free Speech v. Ravnsborg, et al. (Compelled speech, including top five donor disclosure on face of communication.)

When you're the Institute for Free Speech, educating citizens about threats to the First Amendment is an important part of your work. But if you do just that on a ballot measure in South Dakota, you could wind up in jail.

Why? Because South Dakota campaign laws regulate speech beyond political ads. A recently adopted law regulates any expenditure for any communication "concerning" a ballot measure. In order to publish our educational analysis of a pending 2018 ballot measure, the Institute filed a lawsuit in federal court challenging the law's constitutionality.

The law imposes absurd disclaimer requirements on groups that speak about ballot measures. These include, but are not limited to, a mandate that the publication lists the organization's top individual contributors, even where those donors had no knowledge of

the publication. This rule violates the privacy of donors who would otherwise remain private.

Failure to follow the law can result in prosecution and fines. Worse, South Dakota provides no way to get advice from the state about the reach of the law. As a result, the Institute for Free Speech turned to the courts to get its answer.

The Institute asked a federal court to allow us to publish our analysis of two ballot measures without prosecution by South Dakota.

On October 16, 2018 Judge Roberto A. Lange, appointed by President Barack Obama, ruled in our favor. His order barred the state from prosecuting us for publishing our analysis. The next day, we published the analysis online and then announced it in a press release.

The court's order allowing us to publish our analysis was a significant victory for IFS, but problems in the law remain. The court approved a permanent injunction in October 2019.

Our success in this case helped protect the First Amendment right to a free press, increasing information available to the public. It helped protect donor and associational privacy.

Massachusetts Fiscal Alliance v. Sullivan **(Compelled speech, including top five donor disclosure and CEO disclaimer on face of communication.)**

Can the government hijack over 20 percent of an issue ad to promote the state's message? Can it force a speaker to name five people on the face of a print, Internet, or television ad, even if those people had nothing to do with the communication's production? Those are the questions posed in *Massachusetts Fiscal Alliance v. Sullivan*.

Massachusetts, like many states, heavily burdens political speech by forcing groups to take a more formal organizational status, by limiting contributions to groups and candidates, and by administering an intrusive donor disclosure regime.

But the Commonwealth goes even further than other jurisdictions, co-opting private political entities to recite government-drafted scripts on camera and forcing groups to forfeit the privacy of their donors as a condition of talking about policy.

The Massachusetts Fiscal Alliance wants to run print, radio, television, and Internet communications that focus on two legislative issues: a tax increase proposal and a legislative pay raise. Because those ads will, by the nature of their content, reference an officeholder, the Commonwealth demands that the Alliance's chairman appear on televised communications for nearly 20 percent of the length of an ad and, for both radio and TV ads, personally read a script written for him by the State.

Why Massachusetts feels the need to force third party advertisers to show the race, gender, sex, speech pattern, and other irrelevant personal characteristics of a group's

principal officer is unclear. Disclosure, at least in theory, is about giving relevant information to the voters shortly before an election – and this information is inherently unhelpful to the electorate.

The Commonwealth compounds this constitutional injury by compelling even more speech. Even groups that do not fall into its robust donor disclosure regime, like the Alliance, are forced to publicize their top five funders on the face of their communications. Once again, this information will be useless to the voters – none of the listed persons will have necessarily given to fund the ad, and they may not even agree with it. Nevertheless, Massachusetts has decided that donor privacy must be done away with — even if there is no articulable basis to argue the people losing that privacy truly authored or funded the ad.

On Election Day, Judge Rya W. Zobel denied the Alliance's request for a preliminary injunction. The group subsequently ran the issue communications it had intended – without the disclaimers, which are only required *before* the election.

After the court denied the plaintiff's motion for a preliminary injunction, the lawsuit was voluntarily dismissed on October 18, 2019.

Amicus Briefs Detail

The following are short descriptions of each case in which the Institute for Free Speech filed an amicus brief in 2019, or those cases that remained active at the end of the year. The list appears in reverse chronological order.

***Amawi v. Pflugerville,* United States Court of Appeals for the Fifth Circuit. (Texas law violates the First Amendment right to engage in political boycotts.)**

A Texas law violates the First Amendment right to engage in political boycotts. The First Amendment does not allow government to restrict political boycotts it disagrees with. This principle is critical to free speech.

The Texas law prohibits state entities from contracting with companies that boycott goods and services from Israel. It was passed as a response to the 'BDS movement,' an effort to pressure the Israeli government through boycotts, divestment, and sanctions of Israeli businesses.

IFS filed this brief on December 6, 2019 along with FIRE (Foundation for Individual Rights in Education).

The plaintiffs in the case include five individuals who have lost employment opportunities or potential employment opportunities as a result of the law. A district court struck down the law on First Amendment grounds on April 25. The state then appealed the ruling to the Fifth Circuit Court of Appeals.

Supreme Court precedent instructs lower courts to analyze a boycott's source, context, and nature as a whole to determine if it is protected expressive activity. A political boycott of a foreign government clearly passes that test, IFS and FIRE wrote.

"A boycott is more than the sum of its parts, and its nature and context as a whole must be examined to determine if it is a protected political boycott. The nature and context of the boycotts prohibited by Texas's H.B. 89 squarely place them among the political boycotts protected by the First Amendment and the district court correctly found the provision facially invalid," the brief explains.

The Fifth Circuit ruled the case as moot on April 27, 2020 because "Texas enacted final legislation that exempts sole proprietors from the" no boycott certification requirement.

***Multnomah County, et al. v. Mehrwein, et al.*, Oregon Supreme Court. (Multnomah County law limiting independent expenditures, limiting contributions to groups making independent expenditures, and requiring donor names be included on communications violates multiple aspects of the First Amendment.)**

Since 1976, the U.S. Supreme Court and lower federal courts have repeatedly held, across circumstances and regardless of the speaker, that government cannot prohibit, or even limit, expenditures for communications supporting or criticizing candidates, as long as those communications are made independently of a candidate. The government cannot even limit contributions that groups receive to fund such expenditures.

Nevertheless, Measure 26-184, which became law, did just that. It appeared to limit each individual and group to making no more than $5,000 and $10,000, respectively, in independent contributions or expenditures, no matter how many candidates they wish to support or oppose. It prohibited groups other than political committees from making expenditures at all. And political committees are strictly limited in the donations they may use to make expenditures.

The measure facilitates efforts to silence ideas by requiring the names of donors to be identified on the face of a communication, discouraging donors from giving. And, by serving donors' names up on the face of the communication, the measure not only discourages donors from giving in the first place, it alters the speaker's message or swallows it entirely. While the Supreme Court has upheld laws requiring reporting to the government, it has held that compelled speech like that at issue here must meet the highest levels of constitutional scrutiny, and that it fails that scrutiny when alternatives are available—such as the government publishing the messages themselves, instead of forcing the content out of others' mouths.

The Institute for Free Speech on October 1, 2019 filed an amicus brief to the Oregon Supreme Court in support of the Taxpayers Association of Oregon challenging this law.

On April 23, 2020, the Oregon Supreme Court issued its ruling. It interpreted the law so that the contribution limits would apply only to candidate committees or political committees that made contributions to candidates. It affirmed the lower court's decision that the expenditure limits were unconstitutional. By the time the Court ruled on the disclaimer provisions, the county had amended the law and thus the Court ruled that portion of the challenge was moot.

***Americans For Prosperity Foundation v. Becerra*, U.S. Supreme Court. (California attorney general's demand for the personal information of major donors to all federally registered nonprofit organizations operating in the state violates freedom of association under the First Amendment.)**

The Institute for Free Speech filed an amicus brief with the U.S. Supreme Court September 25, 2019 urging the Court to review California's demand that all charities soliciting in the state provide a list of their major donors' names and addresses to the

attorney general. The brief explains that the Ninth Circuit Court of Appeals erred in applying campaign finance precedent to groups that do not engage in electoral advocacy.

"The Supreme Court has consistently struck down donor disclosure mandates for groups that do not tell people how to vote. Americans have the right to privacy, both as individuals and when they join together in support of a cause," said Institute for Free Speech Legal Director Allen Dickerson in a press release about the filing.

The case began when then-Attorney General Kamala Harris issued a flurry of demands to nonprofit organizations soliciting funds from Californians to report the names and addresses of donors who give $5,000 or more in a year. Americans for Prosperity Foundation (AFPF), a 501(c)(3) nonprofit, filed a lawsuit to defend the privacy of its supporters. The Institute for Free Speech also filed a separate lawsuit against Harris in 2014, which remains ongoing.

On March 29, the Ninth Circuit Court of Appeals upheld the state's demand for AFPF's donor information. The majority decision, however, applied campaign finance precedent in a case brought by a charity, which federal law bans from electioneering. The Institute's brief explains that the Supreme Court has purposefully limited the scope of donor disclosure requirements to avoid infringing on the rights of non-electoral groups.

The brief notes that the "general doctrine protecting Americans' right 'to pursue their lawful private interests privately and to associate freely with others in so doing,' is longstanding" and that the "Court accepted limited donor disclosure in the campaign context only after it was presented with a substantial record that suggested that such disclosure was essential to preventing official corruption and providing the electorate with information about the financial constituencies of candidates for office."

"[A]s this case demonstrates, the narrow exception to the First Amendment fashioned in the campaign finance cases has begun to leak into other First Amendment matters. The Court ought to grant certiorari so that it may hold that outside of that limited context, the pre-Buckley presumption that donor disclosure regimes are unconstitutional still reigns," the brief explains.

The same brief was filed in a similar case also pending before the U.S. Supreme Court, *Thomas More Law Center v. Becerra*.

***Jones v. Jegley,* United States Eighth Circuit Court of Appeals. (State blackout period prohibiting contributions more than two years before a candidate's next election infringes First Amendment rights.)**

The Institute for Free Speech filed an amicus brief September 4, 2019 asking a federal appeals court to allow an Arkansas citizen to make campaign contributions, within legal limits, at a time of her choosing. Arkansas resident Peggy Jones is challenging an unusual blackout period in state law that prohibits contributions more than two years before a candidate's next election. But the state seeks to have her case dismissed because she has not been threatened with prosecution for violating the law.

Ms. Jones wishes to contribute to the campaign of State Senator Mark Johnson, who faces re-election in 2022. Under state law, this donation would be illegal until late next year. But the state also says Jones cannot challenge the law unless she is prosecuted for violating it.

If Arkansas is correct, states could chill the exercise of First Amendment rights by anyone who lacks the resources or willingness to fight back in court. Indeed, Jones has refrained from making such a contribution to avoid liability for herself and Senator Johnson. The Institute's brief explains that courts have relaxed requirements for First Amendment challenges to prevent precisely this sort of outcome.

"The State is incorrect in asserting that the only way to show a reasonable fear of prosecution is to have an actual prosecution," reads the Institute's brief. "[O]ne need not await prosecution to challenge a statute imposing liability… Ms. Jones need not allege that she is in fact harmed; she must allege harm in the form of curtailed expressive activity due to the statute's existence. Here she has plainly done so."

***Thompson v. Hebdon*, U.S. Supreme Court. (State political contribution limits that are too low violate free speech under the First Amendment.)**

Sometimes the Supreme Court doesn't need oral arguments to rule on a case. That was the case in a recent challenge to Alaska's contribution limits. On August 26, 2019, the Institute for Free Speech filed an amicus brief in the case arguing the limits were unconstitutionally low.

On November 25, 2019 the Court vacated a Ninth Circuit ruling upholding the state's limits—a ruling that ignored Supreme Court precedent. Now the Ninth Circuit will have to go back and apply the Court's First Amendment jurisprudence. That means Alaskans may soon see their right to support candidates grow.

The First Amendment protects the right to contribute to campaigns. In the 2006 case *Randall v. Sorrell*, the Supreme Court struck down Vermont's contribution limits for being too low. Justice Breyer wrote that "contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."

Alaska's contribution limits are among the nation's worst. The state is the country's largest, yet limits statewide candidates to receiving just $500 per election cycle from each individual donor. That limit was set in 1996, and since then inflation has cut the value of the limit by nearly 40%.

The *Randall* ruling, however, created a complicated test that lower courts have failed to apply. The Institute for Free Speech urged the Supreme Court to resolve this issue. We filed a brief asking the Court make clear the standard by which all contribution limit cases should be evaluated.

"The standard of review applied to laws such as Alaska's should be consistent nationwide. [Review] ought to be granted to resolve this confusion and bind the lower courts to a single judicial standard," read the Institute's brief.

The Court chose a narrower ruling—requiring the Ninth Circuit to apply *Randall*—but gave reason to believe that the limits are unconstitutional.

"In *Randall*, we identified several 'danger signs' about Vermont's law that warranted closer review. Alaska's limit on campaign contributions shares some of those characteristics," the Court wrote.

The Justices singled out five other states with individual-to-candidate limits of $500 or less: Colorado, Connecticut, Kansas, Maine, and Montana.

The case returned to the Ninth Circuit for further consideration.

***The Washington Post, et al. v. David J. McManus, Jr., et al.,* U.S. Court of Appeals for the Fourth Circuit. (The Maryland law forces newspapers to publish information about their advertisers, which is inimical to a free press and harms those wishing to speak online.)**

The Internet has long been a bastion of free political speech. Yet a spate of bills being proposed in states across the country would restrict the ability to speak and associate online.

One of them became law in 2018 in Maryland. As the bill was being considered, the Institute for Free Speech warned that it was likely unconstitutional. The law regulates speech that merely "relates to" a candidate or ballot question. It even regulates speech relating to *prospective* candidates and ballot questions.

The law's vague language could stifle Maryland citizens who try to mobilize on social media. But that's not all. *The Washington Post*, *The Baltimore Sun*, and other local media faced another problem: the law forces them to collect and publish information about their advertisers. This form of compelled speech, in addition to the law's vague standards, is now the subject of an important First Amendment lawsuit.

The newspapers won the first round in court. A federal judge issued an injunction in January preventing the state from enforcing the law against the plaintiffs. Judge Paul Grimm wrote that states "must not encroach on First Amendment freedoms that are the hallmark of our nation. Maryland's statute appears to overstep these bounds."

The state appealed, and the case is now before the U.S. Court of Appeals for the Fourth Circuit. It presents an opportunity to affirm the First Amendment's bedrock protections of a free press and free speech online. Because of the case's implications for free speech on the Internet, the Institute for Free Speech filed an amicus brief in support of the media outlets.

The law was passed as a purported response to foreign interference in U.S. election campaigns. But, as our brief states, it "will do little to advance that cause while chilling political speech and association at the core of the First Amendment's protections."

"Indeed, Maryland's law requires press entities and Internet advertisers to amass vast amounts of information – every buyer of advertisements and their underlying donors – in order to possibly find a Russian spy posing as an American," the brief notes.

Our brief calls Maryland's regulation of online speech "a massive overreaction." It asks the court to affirm the lower court's ruling barring Maryland from enforcing its misguided law against online publishers.

On December 6, 2019, the United States Court of Appeals for the Fourth Circuit affirmed a district court ruling striking down the law (as mentioned on page 3).

***Evergreen Freedom Foundation v. Washington*, U.S. Supreme Court, in support of certiorari. (Does Washington's enforcement action under its campaign and election regulation violate the First Amendment when it is extended to cover legal fees for litigation concerning a ballot initiative process where no campaign or election ever occurred?)**

A law firm's pro bono representation of a citizen activist facilitates political speech and is thus protected by the First Amendment. Additionally, a lawyer representing a citizen pro bono is not the same as a politician receiving a campaign contribution. The act of giving legal advice to citizens attempting – and failing – to put a measure on the local ballot is not part of an electoral campaign by any definition other than the one Washington invented here.

Washington's effort to redefine campaigns and contributions in this way is absurd and dangerous to First Amendment freedoms. Washington's law, which applies restrictions to non-electoral activism, is an overreaching restriction on political speech.

Unfortunately, on May 28, 2019 the U.S. Supreme Court declined to review the case.

***Arkansas Times LP v. Waldrip*, U.S. Court of Appeals for the Eighth Circuit. (Political boycotts are protected under the First Amendment.)**

Justice Louis D. Brandeis said, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." So it is with Arkansas's law requiring that government contractors certify that they will not boycott Israel for the duration of their contracts or pay a penalty. Although it does not engage in such boycotts, in 2018 the *Arkansas Times* refused to continue making the pledge as a condition of publishing ads for a local college, and the state refused to renew its contract with the paper.

Represented by the ACLU, the *Arkansas Times* filed a lawsuit challenging the law as violating the First and Fourteenth Amendments. Unlike district courts in other states, the

district court here upheld the law, holding that the First Amendment does not protect purchasing decisions.

The Institute for Free Speech and the Foundation for Individual Rights in Education filed an amicus brief on April 15, 2019 before the Eighth Circuit Court of Appeals, emphasizing the holistic nature and context test established by the Supreme Court as critical to protecting the associational interests involved in political boycotts. Political boycotts combine associational and expressive activities that are each protected by the First Amendment. And, just as the political boycott is more than the sum of its parts, so is the First Amendment protection it receives. Accordingly, the Supreme Court has determined that the government may restrict boycotts only in narrowly defined instances.

The government may not craftily cripple a boycott by targeting some component of the law that is not speech or "expressive," as the district court allowed the state to do here. Such a test would be ineffective, because every effective boycott has an expressive component, and because it would allow the government to sidestep the First Amendment. Rather, a court must examine the nature and context of the boycott to determine if it is political, and thus constitutionally protected, or if it is organized to further the organizer's economic advantage. The district court here failed to uphold the First Amendment because it dissected the law to see if the spending decision was expressive, ignoring the First Amendment protections given to the political activities as a whole under the nature and context test.

***Crossroads GPS v. CREW, et al.*, U.S. Court of Appeals for the District of Columbia Circuit. (An FEC regulation limiting donor disclosure protected First Amendment privacy in association and should not have been struck down.)**

In August 2018, the U.S. District Court for the District of Columbia struck down a 37-year-old Federal Election Commission regulation that limited donor disclosure triggered by groups that make independent expenditures. In doing so, the district court claimed it was fulfilling Congressional intent, but the court did not consider that Congress had an unconstitutional intent. In such circumstances, the rote application of administrative law is insufficient.

IFS's brief argues that the district court should be reversed, both in order to vindicate the privacy in association that the regulation was designed to protect and to prevent additional, inadvertent constitutional issues that would inevitably follow from the district court's opinion.

The Institute for Free Speech filed the amicus brief on March 18, 2019.

***Pulliam, et al. v. Austin, et al.*, District Court, Travis County, Tex. (Where meritorious public interest litigation seeks to restrain public-sector unions, use of an anti-SLAPP law to dismiss case violates the First Amendment right to petition the courts.)**

Anti-SLAPP (Strategic Lawsuit Against Public Participation) laws are intended to keep frivolous lawsuits from chilling protected speech. But what happens when the better First

Amendment claim is on the side bringing the lawsuit? Ambiguous language in the Texas Citizen Participation Act ("TCPA") presents that problem, burdening meritorious public interest litigation – and violating the First Amendment right to petition the courts.

In *Pulliam v. Texas*, a public-sector union attempted to close the courthouse door on a case challenging its use of public funds to conduct union activities. It didn't argue that the case would interfere with its protected right to political speech or petition. Instead, it claimed that its right to associate was implicated – even though the "association" in question was purely economic. In an amicus brief, IFS argued that anti-SLAPP laws should be applied only in cases seeking to burden First Amendment protected rights, and not wherever a corporation or union happens to have members. Otherwise, another important First Amendment right – the plaintiff's right to petition the government – will inadvertently be harmed.

The Institute for Free Speech filed an amicus brief in the case on February 22, 2019.

***Woodhull Freedom Foundation, et al. v. U.S., et al.,* U.S. Court of Appeals for the District of Columbia Circuit. (First Amendment standing doctrine provides standing for a pre-enforcement challenge to a statute of broad scope and uncertain meaning that allows numerous parties, including private litigants and state attorneys general, to bring lawsuits against alleged violators.)**

The Woodhull Freedom Foundation is challenging the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) because it "chills sexual speech and harms sex workers." After a federal district court judge ruled the group didn't have standing to challenge the law in court, the Foundation appealed the ruling. The IFS brief supports the Foundation's appeal.

Courts have long recognized "the danger that citizens will not risk speaking in the face of ambiguous or merely possible governmental action," the brief explains. As a result, they have historically relaxed the traditional rules of standing in order to allow Americans to challenge such laws in court.

"This is precisely the kind of case for which First Amendment standing doctrine was developed," the Institute's brief states. "It is a pre-enforcement challenge to a statute of startling scope and uncertain meaning, directly regulating a major frontier of First Amendment-protected activity. And Congress chose to decentralize its enforcement, permitting numerous parties – including private litigants and state attorneys general – to bring lawsuits against alleged violators."

The Institute for Free Speech filed an amicus brief in support of the Woodhull Freedom Foundation's standing to bring the case on February 20, 2019. On January 24, 2020, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Woodhull Freedom Foundation had standing to bring the case and sent it back to the district court for further consideration.

***State of Washington v. Grocery Manufacturers Association*, Washington State Supreme Court and Washington State Court of Appeals, Division II. (A $6 million fine for a minor campaign finance filing error is unconstitutional under the First and Eighth Amendments and chills campaign speech.)**

Can a group be fined $6 million for not properly filing campaign finance reports? The Institute for Free Speech's brief warns that such a massive penalty is unconstitutional under the Eighth Amendment to the Constitution that bars "excessive fines." Such large fines 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.

The Institute for Free Speech filed two briefs in this case. Our first brief was filed July 20, 2017 with a state appeals court. That court reduced the fine to $6 million.

We filed two more briefs with the Washington State Supreme Court. The first brief, filed February 5, 2019, urged the state's highest court to review the lower court's ruling. After the Court agreed to review it, we filed a second brief September 6, 2019 on the merits of the case.

Such fines have incalculable First Amendment harms. As the Institute for Free Speech's brief noted, the 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.'"

Our brief urged the Court to rule the fine unconstitutional under the Eighth Amendment's bar against the imposition of excessive fines.

On April 16, 2020, the Washington Supreme Court interpreted the state's campaign finance law as requiring the $18 million fine, but remanded the case to the state's court of appeals to consider whether the fine "violates the excessive fines clauses of the federal and state constitutions."

***Tate v. United States*, U.S. Supreme Court, in support of certiorari. (The government should not import civil enforcement decisions of the Federal Election Commission as a means to impose criminal liability.)**

At issue in this case is the conviction of several actors involved in a presidential campaign, who the government prosecuted under Sarbanes-Oxley's false submission prohibition and the federal False Statement statute. This had the effect of exposing the defendants to higher criminal liability without the "knowing and willful" state of mind standard required by the Federal Election Campaign Act (FECA). Our brief, filed December 7, 2018, argued that such prosecutions are counter to Congress's intent in FECA that political speech be carefully regulated and that increasing criminal exposure on uncertain standards chills political speech.

The lower court's ruling raises due process and vagueness problems because Mr. Tate cannot have been on notice that criminal liability would flow from FEC enforcement principles never used to impose criminal liability previously, as they are not included in or discernable from the plain language of FECA, or the other primary statutes of his conviction. Because no notice through customary channels could have informed Mr. Tate of the possible criminal liability of his acts, his conviction threatens to chill the speech of others working in the political arena. Finally, the Supreme Court has recognized in the arena of political speech and campaign finance regulation that vague rules are anathema to clarity and threaten to chill speech. Consequently, this case calls for application of the rule of lenity.

Unfortunately, on March 18, 2019 the U.S. Supreme Court declined to review the case.

***Montanans for Community Development v. Mangan*, U.S. Supreme Court, in support of certiorari. (The Court should reaffirm precedent that groups can be regulated as political committees only if their major purpose is the election or defeat of a candidate.)**

In the landmark 1976 case, *Buckley v. Valeo*, the Supreme Court narrowly construed a federal campaign finance law in order to shield civil society from overregulation. It did so, as the Court ruled in *N.Y. Times v.* Sullivan, to preserve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Unfortunately, the Court has failed to police one of its core holdings: the requirement that registering and reporting regulations may only be imposed upon groups "under the control of a candidate or [that have] the major purpose of… the nomination or election of a candidate." This case provides an opportunity for the Court to reassert that standard. We filed a brief on October 24, 2018 urging the Court to hear the case.

Several states, including Montana, have chosen to enforce their campaign finance laws via a single, often politically involved, individual. Such arrangements raise the specter of

partisan enforcement of the laws, or at the very least, the appearance of corrupt enforcement. Because the major purpose requirement is clear and objective, it greatly reduces such risks compared to the vague political committee laws at issue in this case. Mandating its application can alleviate the appearance of partisan enforcement not only in Montana, but nationwide.

Unfortunately, on February 19, 2019, the U.S. Supreme Court declined to review the case.

***Nieves v. Bartlett,* U.S. Supreme Court, merits brief. (Does probable cause for arrest defeat a First Amendment retaliation claim?)**

In some federal courts, your First Amendment claim for retaliatory arrest can't win if there's probable cause for your arrest. In other federal appeals courts, it is one factor used to decide the case. Only the latter rule provides any real protection for free speech.

This issue is similar to one heard by the Supreme Court in June 2018, when the Supreme Court ruled in favor of Fane Lozman, who was arrested while speaking during public comment time at a city council meeting. A lower court had found probable cause, which barred his claim for retaliation. During arguments on the case, Chief Justice John Roberts said, "I found the video pretty chilling…. [He] is up there for about 15 seconds, and [then] he's being led off in handcuffs." While Lozman won, the Supreme Court limited its ruling to "facts like these," where it appeared the council members had a grudge against Lozman. That's not the case here.

Giving this sort of unchecked power to the police still raises grave free speech concerns, which is why we filed a brief in support of Bartlett. It is far easier to cease one's controversial speech than it is to design one's life so that no police officer could ever suspect one of having committed a violation of any one of the innumerable laws imposed by our society. If probable cause can be used to defeat a free speech claim, the risks of attending or participating in controversial protests would multiply. If, for example, a clash between pro-choice and pro-life activists sparked a riot, under the rule proposed by government's side in this case, the police would be free to arrest only the pro-life activists when there was probable cause to do so. In fact, even if an officer acknowledged that she rounded up only pro-life protesters, an arrest would not be actionable so long as probable cause for a violation of law existed.

Unfortunately, the U.S. Supreme Court ruled on May 28, 2019 that Russell Bartlett's retaliatory arrest claim failed as a matter of law because police officers had probable cause to arrest him.

***Libertarian National Committee, Inc., v. Federal Election Commission*, United States Supreme Court/United States Court of Appeals for the District of Columbia Circuit. (Does imposing annual contribution limits against the bequest of a supporter violate the First Amendment rights of the Libertarian National Committee? And two related questions.)**

We filed two amicus briefs in this case. The Libertarian Party wanted to accept bequeathed funds in excess of the federal contribution limits. The deceased, Joseph Shabir, left the party a bequest of over $235,000. The party had no prior knowledge of the bequest, which was far in excess of the $33,500 contribution limit to parties. However, the year before he died, the contribution limits were modified so that parties could accept up to an additional $100,200 into each of three different accounts – for conventions, headquarters buildings, and recounts and "other legal proceedings." But the party wished to spend the bequest on party communications and other party activities.

Our first brief sought to educate the appeals court on the scope of the Federal Election Commission's capacity to respond if a ruling from the court found that contribution limits on bequests were unconstitutional. We took this approach as the legal issues were well briefed in the case, but we were concerned the court might have concern about whether the FEC could administer a ruling.

The brief urged the court to fashion a broad, bright-line rule that cleanly clarifies the circumstances where contribution limits will not apply to bequests. Such a remedy is easily articulated, the brief explained. The court should find that contribution limits are inappropriate where a bequest is made without any prior coordination with the recipient committee, and where that committee seeks to receive it only after the contributor's death. Such a ruling would be easily interpreted by the FEC and would eliminate any need for future litigation on the subject. The FEC should have little difficulty applying this standard via regulation or advisory opinion, but if it finds itself unable to, the harm to the regulated community will be minimal, because that community will know its rights.

Unfortunately, the appeals court upheld the law on May 21, 2019. It also upheld the recently enacted "two tier" limits scheme, which allows substantially higher contributions for conventions and other limited purposes.

Two partial dissents were filed in the case. Judge Thomas B. Griffith wrote that "the government has not carried its burden of showing that the two-tiered scheme is closely drawn to serve anticorruption interests."

Judge Gregory G. Katsas and Judge Karen L. Henderson wrote that the FEC's analysis was "flawed at every turn" and that its request for a low standard of scrutiny was "radical."

"The facts surrounding this bequest are undisputed," they wrote. "Shaber neither coordinated with the LNC regarding his decision to include the party in his will nor even informed the party of that decision… the challenged contribution limits are unconstitutional as applied to any of three nested categories: bequests, uncoordinated bequests, and Shaber's bequest."

The Libertarian National Committee petitioned the U.S. Supreme Court for review of the case. On September 23, 2019, the Institute for Free Speech filed an amicus brief supporting the petition. Unfortunately, on November 25, 2019 the Court declined to review the case.

***Timbs v. Indiana,* U.S. Supreme Court, merits brief. (Does the Excessive Fines Clause of the Eighth Amendment apply to the states?)**

In a case related to civil forfeiture, the Indiana Supreme Court ruled that the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution did not apply to the states. Incredibly, the U.S. Supreme Court had never before been faced with this question.

Our brief, filed September 10, 2018, discussed a disturbing trend that we have seen in many states – regulators have threatened outrageous fines for even minor, technical violations of campaign finance provisions. As a result, the threat of excessive fines itself works to chill speech.

Here, applying the Excessive Fines Clause to the states will bolster the rights protected by the First Amendment.

The Supreme Court ruled on February 20, 2019 that the clause does apply to the states.

***Lair v. Mangan*, U.S. Supreme Court, in support of certiorari. (The Court should clarify that "exacting scrutiny" applies to contribution limits.)**

In the landmark 1976 Supreme Court decision, *Buckley v. Valeo*, the Court said that contribution limits could only "be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."

In 2006, the Court issued a new ruling in the case, *Randall v. Sorrell*, which found that Vermont's contribution limits were unconstitutionally low. Unfortunately, the *Randall* ruling's standards for judging whether a contribution limit is too low provides little useful guidance to the lower courts that are obliged to apply it.

Our amicus brief, filed September 4, 2018, urged the Supreme Court to take this case and formally supersede the *Randall* plurality's opinion. The brief also urged the Court to clarify that *Buckley* mandates the application of "exacting scrutiny" to contribution limits.

The *Randall* ruling has created many opportunities for error and confusion. Governments should be required to justify their contribution limits before courts apply "exacting scrutiny" to determine whether they are constitutional. And those limits should rise or fall based upon the government's showing of need and proper tailoring. A contribution limit, as permitted in *Buckley,* is permissible only when narrowly and substantially related to the government's interest in combatting the "coercive influence of large financial contributions on candidates' positions and on their actions if elected."

Unfortunately, on January 14, 2019 the U.S. Supreme Court declined to review the case.

***Citizens Union of the City of New York, et al. v. Attorney General of the State of New York*, U.S. District Court for the Southern District of New York. *(*Argues that a broad disclosure law is unconstitutional.)**

This amicus brief was filed on behalf of a wide coalition of groups in support of a challenge to New York state's extremely burdensome donor disclosure laws. These laws would eliminate donor privacy for almost all nonprofits seeking to speak about public policy. David French of *National Review* wrote that this case is "one of the more important First Amendment challenges that you've likely never heard of," and we are committed to defeating this assault on free speech. Protection for anonymous speech on political issues is critical to preserving the First Amendment. This case may well reach the Supreme Court.

The Institute for Free Speech was the only group to file an amicus in support of this challenge. We are pleased to report that the Alliance for Justice, a national association of 130 organizations committed to progressive values, and The Philanthropy Roundtable joined our brief.

As mentioned on page 4, on September 30, 2019, U.S. District Judge Denise Cote struck down a New York state donor disclosure law violating the right to private association. The state agreed to settle the case and not appeal the ruling, and the case was formally closed on January 20, 2020.

***Public Citizen v. Federal Election Commission*, U.S. District Court for the District of Columbia. (Argues the court should defer to the findings of the three FEC commissioners concerning a political committee status determination.)**

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."

Our brief, filed September 17, 2014, 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.

External Relations Detail

Coalition Letters

- Statement on Civil Rights Concerns about Social Media Monitoring by Law Enforcement
- Center for Democracy & Technology Letter to Department of Homeland Security (Surveillance and targeting of immigration activists, journalists, and lawyers.)
- Letter to U.S. House Committee on Natural Resources (National Park Service proposed rule regarding demonstrations and special events in the National Capital Region.)

Select Legislative Testimony and Analysis

- Presentation to North Dakota Interim Judiciary Committee on Constitutional Implications of 2018 Measure 1
- Analysis of Connecticut H.B. 7329: "Dark Money and Disclosure" Bill is Extremely Opaque
- Memo on Iowa Legislature's Denial of Press Credentials to Laura Belin
- Letter Concerning the Texas Citizen Participation Act
- Analysis of Arkansas H.B. 1705: Silencing Speech Under the Guise of "Protecting Public Confidence"
- Free Speech Concerns with and Suggested Fixes to Indiana S.B. 471 (Critical infrastructure protection.)
- Constitutional and Practical Issues with New Jersey A. 1524 (Reporting requirements for advocacy nonprofits.)
- Constitutional and Practical Issues with Nebraska Legislative Bill 210 ("Electioneering Communication" reporting.)
- Constitutional and Practical Concerns with Idaho S. 1183 (Revised "Electioneering Communication" expansion bill.)
- Letter to U.S. House of Representatives Concerning H.R. 1: The Anti-First Amendment "For the Politicians Act"
- What Would H.R. 1 Mean for My Group? (Fact sheet/analysis.)
- Invited Testimony of David Keating Before the U.S. House Committee on House Administration on H.R. 1 (Omnibus anti-speech legislation.)
- Invited Testimony of Bradley A. Smith Before the U.S. House Oversight and Reform Committee on H.R. 1 (Omnibus anti-speech legislation.)
- Constitutional and Practical Issues with New Jersey S. 1500 (Nonprofit donor disclosure.)
- Invited Testimony on Draft Legislation Before the Idaho Campaign Finance Reform Interim Committee (Nonprofit donor disclosure.)
- Analysis of Maryland "Online Electioneering Transparency and Accountability Act" (Internet speech regulation.)

Select Regulatory Testimony and Comments

- Supplemental Comments to IRS on REG-102508-16: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations
- Comments to IRS on REG-102508-16: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations
- Comments to FEC on REG 2019-01: Rulemaking Petition to Amend the Definition of Contribution to Include "Valuable Information"
- Letter to Arizona Department of Child Safety Concerning Ban on Parental Criticism of Agency Actions
- Comments to FEC in Support of AOR 2019-12 (Area I Security, Inc. II)
- Comments to FEC on Notice 2018–05 – Rulemaking Petition: Size of Letters in Television Disclaimers
- Comments to FEC on Notice 2018-16 – Rulemaking Petition: Definition of Contribution (Independent expenditure donor reporting.)
- First Amendment Concerns Regarding Amendment 2019-02, Oklahoma Ethics Commission