INSTITUTE FOR FREE SPEECH

STATEMENT OF
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ON S.443, THE DISCLOSE ACT
BEFORE THE
COMMITTEE ON RULES AND ADMINISTRATION
UNITED STATES SENATE
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Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee:

On behalf of the Institute for Free Speech,[1] thank you for the opportunity to appear before the Committee today.

S. 443, the DISCLOSE Act, would harm the rights of Americans guaranteed by the First Amendment to freely speak, publish, organize into groups, and petition. These rights are vitally important to Americans who work to advocate for better government.

Significant portions of the bill would violate the privacy of advocacy groups and their supporters – including those groups who do nothing more than speak about policy issues before Congress or express views on federal judicial nominees. Other key provisions would compel speakers to recite lengthy government-mandated messages in their communications, instead of their own speech. The bill would also compel the publication of misleading or false information to the public.

S. 443 would impose onerous and unworkable standards on the ability of Americans and groups of Americans to discuss the policy issues of the day with elected officials and the public.

S. 443's substance would help incumbents and expensive campaign finance attorneys while harming the public. The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations and their supporters will be further deterred from speaking or be forced to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers.

Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means public officials will be able to act with less accountability to the public. Consequently, citizens who would have otherwise heard their speech or read publications will have less information about their government.

[1] Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, publish, assemble, and petition the government.

Much of my statement is drawn from portions of an analysis of H.R. 1 by Institute for Free Speech Senior Fellow Eric Wang. That bill contains subtitles labeled as the "DISCLOSE" Act and "Stand by Every Ad" and those portions of that legislation are nearly identical to S. 443.

Executive Summary

Numerous components of S. 443 would harm our democracy and our First Amendment rights. Specifically, these provisions in S. 443 would:

- Unconstitutionally regulate speech that mentions a federal candidate or elected official at any time under a vague, subjective, and dangerously broad standard that asks whether the speech "promotes," "attacks," "supports," or "opposes" ("PASO") the candidate or official. This standard is impossible to understand and would likely regulate any mention of an elected official who hasn't announced their retirement.

- Force groups to file burdensome and likely duplicative reports with the Federal Election Commission ("FEC") if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials to support or oppose policy issues, including legislation.

- Compel groups to declare on new, publicly filed "campaign-related disbursement" reports that their ads are either "in support of or in opposition" to the elected official mentioned, even if their ads are neither. This form of compulsory speech forces organizations to declare their allegiance or opposition to public officials, provides false information to the public, and is unconstitutional.

- Force groups to publicly identify certain donors on reports for issue ads and on the face of the ads themselves. In many instances, the donors being identified will have provided no funding for the ads. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) "campaign" ads in FEC reports and disclaimers, many donors will stop giving to nonprofits, or these groups will self-censor.

- Subject far more issue ads to lengthy disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.

- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications' message, exacerbating the politics of personal destruction and further coarsening political discourse.

- For the first time, subject groups that sponsor communications about judicial nominees to burdensome campaign finance reporting, donor exposure, and disclaimer requirements without any sound policy justification or recognized constitutional basis for doing so.

- Force organizations that make grants to file reports and publicly identify their own donors if an organization is deemed to have "reason to know" that a donee entity has made or will make so-called "campaign-related disbursements." This new, vague, and subjective standard will greatly increase the legal costs of vetting grants, and many groups will end grant-making programs.

- Impose inflexible disclaimer requirements on online ads from American speakers that may make many forms of small, popular, and cost-effective ads advocating government policy changes or the election or defeat of candidates effectively impossible.

I. S. 443 Would Impose Unconstitutionally Overbroad Regulations on Speech About Policy Issues and Judicial Nominees. It Would Subject Many Organizations' Donors to Excessive and Irrelevant Reporting Requirements, Thereby Inviting Retaliation and Harassment, Chilling Speech, and Deterring Financial Support.

A) Overbroad Definition of "Campaign-Related Disbursements"

S. 443 creates a new category of highly regulated speech it calls "campaign-related disbursements." But much, if not most, of the regulated speech would not be campaign-related at all. Specifically, the following four types of speech would be classified as "campaign-related disbursements":

(1) Generally, any public communications at any time that mention a federal candidate or elected official who is subject to re-election and that "promote[] or support[]" or "attack[] or oppose[]" the election of a candidate or official, "without regard to whether the communication expressly advocates a vote for or against" that candidate;

(2) Generally, any public communications that are "susceptible to no reasonable interpretation other than promoting, supporting, attacking, or opposing the nomination or Senate confirmation" of a federal judicial nominee.

(3) So-called "electioneering communications." This includes the current law definition – *i.e.*, television and radio ads that so much as mention a federal candidate or elected official who is subject to re-election, if the ads are disseminated within the jurisdiction the official or candidate represents or seeks to represent within certain pre-election time windows; and

(4) Independent expenditures that expressly advocate the election or defeat of a federal candidate or that are "the functional equivalent of express advocacy."[2]

Of these four categories, the U.S. Supreme Court has only determined that the last – express advocacy independent expenditures – sets forth a bright-line category for regulating speech that is "unambiguously" campaign-related.[3] While some "electioneering communications" may be intended to influence elections, the purpose of many (if not most) of these ads is to call public and

[2] S. 443 § 201 (to be codified at 52 U.S.C. § 30126(d)); *see also* 52 U.S.C. § 30104(f) (defining "electioneering communication").
[3] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *see also FEC v. Wis. Right to Life*, 551 U.S. 449, 469-470 (2007).

official attention to various policy issues and positions. As discussed more below, S. 443 would make an already bad law even worse by expanding the types of speech that can be regulated under the new terminology of "campaign-related disbursements."

B) A New and Dangerously Broad Standard That Threatens Free Speech and a Free Press

S. 443 would regulate a dangerously and unconstitutionally overbroad universe of speech about public officials and their policies under the "promote," "support," "attack," or "oppose" content standard. This standard, known to campaign finance attorneys as "PASO," is hopelessly subjective, vague, and overbroad. It cannot be applied with any consistency and would regulate speech that has nothing to do with elections.

Despite that, the bill characterizes such ads as "campaign-related disbursements," even though the election may be nearly two years away for representatives, four years away for the president, six years away for senators, or, in the case of judicial nominees, where there are no elections at all – *because the federal judiciary is not elected*.[4]

This analysis addresses the application of the PASO standard to judicial nomination communications in S. 443 separately below. For now, the focus is on how the PASO standard in S. 443 would apply to communications about elected officials. Suppose that President Biden (or another future president) files for and begins fundraising for re-election soon after winning election, as former President Trump did.[5] Under the campaign finance law that S. 443 would amend, Biden would be considered a "candidate."[6] As such, nearly all ads by advocacy groups that seek to prioritize issues with the administration or to oppose administration policies or positions would be subject to onerous reporting and donor exposure requirements.

For example:

- A left-leaning organization sponsors a social media campaign calling on President Biden to support the "Bernie Sanders single-payer healthcare plan" – a policy that Biden pointedly disavowed during the 2020 campaign.[7]

- An environmental advocacy organization sponsors a television ad campaign urging Biden to adopt "AOC's Green New Deal" climate policy – a program that Biden said during one of the presidential debates "is not my plan."[8]

- An abortion rights organization running digital ads calling on President Biden to take action to protect abortion access in the wake of the recent Supreme Court ruling in *Dobbs v. Jackson Women's Health Organization*.

[4] *See* U.S. CONST., Art. III.
[5] *See* FEC Form 99, Donald J. Trump (filed Jan. 20, 2017), *at* https://docquery.fec.gov/pdf/569/201701209041436569/201701209041436569.pdf.
[6] *See* 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3.
[7] Jacob Knutson, *Biden: "I am the Democratic Party right now,"* AXIOS (Sept. 30, 2020), *at* https://www.axios.com/biden-democratic-party-trump-a8a71bfc-945d-4e27-9241-cc2accc1cf6a.html.
[8] David Roberts, *What Joe Biden was trying to say about the Green New Deal*, VOX (Oct. 7, 2020), *at* https://www.vox.com/energy-and-environment/21498236/joe-biden-green-new-deal-debate.

All these examples could be said to "oppose" President Biden under the vague standard in the bill. The first two examples could be said to implicitly oppose Biden because they advocate policies that he did not support during the 2020 campaign and presumably still does not support as president. They could also be said to oppose Biden by perpetuating rifts within the Democratic coalition and make it more difficult for Biden to govern. The last example could be alleged to show discontent with the actions President Biden has taken to date to protect abortion access. Moreover, the first example could be said to "support" Senator Bernie Sanders, while the second example could be said to "support" Representative Alexandria Ocasio-Cortez, both of whom are currently candidates for re-election.

S. 443 purports to tether the PASO standard to whether a communication "promotes or supports… or attacks or opposes *the election*" of a named candidate. But this attempt at narrowing the scope of regulation only to supposedly election-related communications is misleading. The bill otherwise says that speech may be regulated as PASO "without regard to whether the communication expressly advocates a vote for or against a candidate." In other words, the PASO regulatory standard in S. 443 seeks to determine what is *implied* by a communication and how others might perceive it. This will vary from person to person based on his or her subjective interpretation and perception. Moreover, as all of the examples above may sway public opinion against Biden's policies or make his job more difficult, they could all be said to undermine his chances at re-election in some way (*i.e.*, "oppose" his re-election). In short, PASO is an arbitrary "know it when I see it"[9] standard that is incapable of being applied consistently or fairly.

If these concerns seem speculative and alarmist, consider how courts have, in practice, upheld regulation of pure issue speech as election campaign activity. In *Independence Institute v. FEC*, a Section 501(c)(3) think tank (prohibited by federal tax law from political campaign intervention) wished to run the following ad that focused entirely on advocating for a criminal justice reform bill pending in Congress:

> Let the punishment fit the crime. But for many federal crimes, that's no longer true. Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt. And for what purpose? Studies show that these laws don't cut crime. In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons. Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619. It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes. Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it's time to let the punishment fit the crime.

Incredibly, a federal three-judge panel upheld the regulation of the ad as an "electioneering communication" under existing law. The judges reasoned that the ad could be interpreted as "tak[ing] a position [] against the identified Senate candidate" (*i.e.*, Senator Udall, who was up for re-election at the time), and "if the Senate candidate has already taken a position against the bill, the advertisement could very well be understood by [voters] as criticizing the Senate candidate's

[9] *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 752 (2013) (Sotomayor and Kennedy, JJ., dissenting) (repudiating a "know it when I see it" regulatory standard).

position."[10] (In fact, like most senators, Udall had not yet taken a position on the bill.) Under this reasoning, any issue ad that merely urges an elected official to change their position (*e.g.*, on single-payer healthcare or the "Green New Deal") – even without saying anything about the official's existing position – could certainly be said to "attack" or "oppose" the official's re-election under the PASO standard. Even if the official has yet to take a position, an ad could be interpreted to "oppose" the official's re-election.

Notably, the PASO standard comes from the provision in the 2002 Bipartisan Campaign Reform Act (a.k.a. "McCain-Feingold") that regulates the funds state and local party committees may use to pay for communications that PASO federal candidates.[11] The Supreme Court upheld the PASO standard against a challenge that it is unconstitutionally vague on the basis that it "clearly set[s] forth the confines within which potential *party speakers* must act" because "actions taken by *political parties* are presumed to be in connection with election campaigns."[12]

However, S. 443 would expand the PASO standard to *all* speakers. Everyone knows why a political party speaks about candidates – its purpose is to support its candidates. Unlike political parties, it is *not* reasonable to presume that all the policy advocacy activities of groups like those in the examples above are "in connection with election campaigns."

Moreover, while the Supreme Court initially suggested that speakers could seek advisory opinions from the FEC to clarify what the PASO standard means,[13] the Court has subsequently denounced vague campaign finance laws that effectively force speakers to seek FEC advisory opinions as "the equivalent of" an unconstitutional "prior restraint" on speech.[14] In short, S. 443's reliance on the PASO standard to regulate "campaign-related disbursements" not only is unwise, it is very likely unconstitutional.

It is important to keep in mind that "public communications" cover not just broadcast ads, but any form of paid communications, including mailings and Internet ads. Many groups raise money, identify supporters of a cause, and build their brand through such communications and are not attempting to elect or defeat a candidate.

C) Compulsory Declarations of Allegiance

S. 443 would impose a binary choice on sponsors of "campaign-related disbursements" that are public communications to declare on campaign finance reports "whether such communication[s] [are] in support of or in opposition to" the candidate referenced in the communication.[15] Under current law, only reports for independent expenditures that expressly advocate the election or defeat of candidates are required to state whether the communication supports or opposes the

[10] *Independence Institute v. FEC*, 216 F.Supp.3d 176, 188-89 (D.D.C. 2016), *aff'd per curiam*, 137 S. Ct. 1204 (2017).
[11] *See* 52 U.S.C. §§ 30101(20)(A)(iii), 30125(b)(1).
[12] *McConnell v. FEC*, 540 U.S. 93, 169-170 and 170 n.64 (emphasis added).
[13] *Id*. at 170 n.64.
[14] *Citizens United v. FEC*, 558 U.S. 310, 335 (2010).
[15] S. 443 § 201 (to be codified at 52 U.S.C. § 30126(a)(2)(C)).

candidate involved[16] since, as discussed above, only such communications are unambiguously campaign-related.[17]

Given S. 443's overbroad regulation of "campaign-related disbursements," using the examples from before, left-leaning organizations calling on President Biden to adopt a more left-leaning agenda could be required to affirmatively and publicly declare to the FEC that their ads "oppose" Biden, even if they are otherwise agnostic to or may even support his re-election. This type of compelled speech is obnoxious to its core and goes beyond "mere disclosure," thereby making it especially likely to be held unconstitutional.[18] There is no government interest in publishing false or misleading information.

D) Overbroad Reporting and Donor Identification Requirements

As an initial matter, S. 443's reporting requirements for "campaign-related disbursements" appear to be largely duplicative of the existing reporting requirements for independent expenditures and electioneering communications,[19] since the latter two categories of speech are encompassed within the former category. If the bill's intent is to create additional and duplicative reporting requirements, the added administrative burden for speakers is unconstitutional, as it serves no public interest, would clutter the FEC's website with redundant and confusing reports, and may mislead some into thinking the reports cover different activities and thus lead some to conclude groups spent more on reported communications than was actually the case.

Additionally, S. 443 departs from existing law by imposing additional donor identification requirements on campaign finance reports.[20] Organizations that make "campaign-related disbursements" totaling more than $10,000 during a two-year "election reporting cycle"[21] (or during a calendar year, for so-called "federal judicial nomination communications," which are discussed more below) would have to publicly report all of their donors (including their addresses) who have given $10,000 or more during that same period, unless such communications are paid for using a segregated account (the donors to which must be reported), or if donors affirmatively restrict their donations from being used for such purposes and those donations are deposited "in an account which is segregated from any account used to make campaign-related disbursements" (in which case the other donors still must be reported).[22] Both of these so-called options are impractical for many, if not most, groups. They would significantly impede fundraising (particularly for most donors who do not wish to be publicly reported) and would still result in many donors being included on campaign finance reports with the implication they are financing "campaign-related disbursements" that they knew nothing about and may not even agree with.

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[16] *See* 52 U.S.C. § 30104(c)(2)(A); *compare id. with id*. § 30104(f)(2)(D) (reporting requirement for electioneering communications).
[17] *See Buckley*, 424 U.S. at 80.
[18] *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[19] *See* 52 U.S.C. § 30104(c), (f); S. 443 § 201(a) ("Nothing in this section shall be construed to waive or otherwise affect any other requirement of this Act which relates to the reporting of campaign-related disbursements.").
[20] The bill could easily expand the existing independent expenditure ("IE") and electioneering communication ("EC") reporting requirements to include additional donor identification, thereby alleviating speakers from filing two separate sets of reports (*i.e.*, both IE/EC *and* "campaign-related disbursement" reports) for each communication. However, the bill does not take this more streamlined approach.
[21] An "election reporting cycle" is defined as being coterminous with the two-year congressional election cycle. S. 443 § 201 (to be codified at 52 U.S.C. § 30126(a)(4)(C)).
[22] *Id.* (to be codified at 52 U.S.C. § 30126(a)(1)-(3)).

Moreover, while sources of business revenues are exempt from reporting, dues-paying members are not.[23]

The right to associate oneself with a nonprofit group's mission and to support the group financially in private is a bedrock principle of the First Amendment that the government may not abridge casually.[24] This is particularly true when the cause is contentious – as with abortion, gun control, LGBTQ rights, or civil rights – and association with either side on such issues may subject a member or donor to retaliation, harassment, threats, and even physical attack, as recent events have tragically reminded us. The potential divisiveness of these issues does not diminish their social importance and the need to hash out these debates in public while preserving donors' privacy. Even when a group's cause is not controversial, there are many important and legitimate reasons why donors may wish to remain anonymous, such as altruism, religious obligations, a desire to avoid solicitations by others, and a wish to remain out of the public spotlight.[25]

It is wholly inappropriate, for example, for donors to an environmental organization, an ideological nonprofit action group, or social issues advocacy organization to be publicly identified on campaign finance reports as "supporting" or "opposing" the president, if the organization sponsors an ad urging the president to support their view on government policies. These reporting scenarios likely would result from the passage and enactment of S. 443. Faced with the prospect of these public reporting consequences, many potential donors will simply choose not to give. And many advocacy groups would choose silence or ads that are far less effective.[26] Either way, the public would lose the right to hear the strong voices needed for robust public debate.

Importantly, S. 443's gratuitous reporting requirements are not limited to organizations that sponsor public communications. An organization that makes payments or grants to other organizations also would be deemed to be making "campaign-related disbursements" and would have to file the same reports and publicize its own donors, if:

(1) the organization making the payments or grants has itself made "campaign-related disbursements" other than in the form of certain "covered transfers" totaling $50,000 or more during the prior two years;

(2) the organization making the payments or grants "knew or had reason to know" that the recipient has made "campaign-related disbursements" totaling $50,000 or more in the previous two years; or

[23] *Id*. (to be codified at 52 U.S.C. § 30126(a)(3)(A), (4)(D)).
[24] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).
[25] *See* Sean Parnell, *Protecting Donor Privacy: Philanthropic Freedom, Anonymity and the First Amendment*, Philanthropy Roundtable, *at* https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy_white_paper.pdf?sfvrsn=566a740_6.
[26] *Buckley*, 424 U.S. at 68 (noting that reporting "will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights…").

(3) the organization making the payments or grants "knew or had reason to know" that the recipient will make "campaign-related disbursements" totaling $50,000 or more in the two years from the date of the payment or grant.[27]

Grant-making institutions that wish to protect their donors' privacy would need to research a recipient group's past activities to determine if the group has engaged in any "campaign-related disbursements." It is unclear whether it would be sufficient under S. 443 to rely on any FEC reports that a recipient group has filed within the previous two years. For example, if a group made "campaign-related disbursements" but inadvertently did not report them, would the provider of a grant to that group still be on the hook for having to file its own "campaign-related disbursement" reports and publicly report its own donors? The types of investigations donor organizations would have to conduct on donees may go far beyond the standard due diligence that is currently performed in the grant-making community, especially among charities. While attorneys will certainly benefit from the thousands of dollars in additional fees that it will cost to vet any donation or grant to a nonprofit organization, there is little other apparent upside to this reporting burden.

The bill's vague and subjective "had reason to know" standard is even worse when applied prospectively. Grant-making organizations effectively will need to consult a crystal ball in order to know whether a group they are giving to will, within the next two years, make "campaign-related disbursements" that would require the donor organization to report its own donors.

Lastly, S. 443 purports to allow the FEC to exempt donors' names and addresses from reporting "if the inclusion of the information would subject the person to serious threats, harassment, or reprisals."[28] In practice, the FEC and similar agencies have been unable to agree on when such exemptions should apply or to grant exemptions consistently and objectively, and very few exemptions have ever been granted without a court order.[29]

E) Expansion of Disclaimer Requirements

Existing law already requires lengthy disclaimers for independent expenditures and electioneering communications.[30] These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.[31] The Supreme Court specifically has recognized that these disclaimer requirements "burden the ability to speak" and therefore are subject to "'exacting

[27] S. 443 § 201 (to be codified at 52 U.S.C. § 30126(a)(1)-(2), (d), (f)(1)(D) & (E)). Donor organizations must affirmatively restrict their payments or grants in writing from being used by donees for "campaign-related disbursements" in order to avoid having to file reports on the donor side. But note that, if the donee organization deposits that donation into an account later used to finance a "campaign-related disbursement," the exemption would no longer apply. *Id.* (to be codified at 52 U.S.C. § 30126(f)(2)(B)). Either scenario typically will function as a trap for the unwary for organizations that do not retain one of the select few campaign finance attorneys steeped in the nuances of this law. As the Supreme Court has noted, "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day," *Citizens United*, 558 U.S. at 324, and the same principle should hold true for groups providing grants to enable other groups to speak about political issues.

[28] S. 443 (to be codified at 52 U.S.C. § 30126(a)(3)(C)).

[29] *See, e.g.*, FEC Adv. Op. No. 2016-23 (Socialist Workers Party); Casey Seiler, *JCOPE rejects three source-of-funding disclosure exemptions*, TIMES UNION (Aug. 4, 2015), *at* https://blog.timesunion.com/capitol/archives/239408/jcope-rejects-three-source-of-funding-disclosure-exemptions/.

[30] 52 U.S.C. § 30120.

[31] *See* FEC Adv. Op. No. 2007-33 (Club for Growth PAC) (although this advisory opinion specifically addressed disclaimers for express advocacy independent expenditures, the disclaimer requirements for electioneering communications are the same; *see* 52 U.S.C. § 30120).

scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[32] Additionally, the U.S. Supreme Court's 2021 ruling in *Americans for Prosperity Foundation v. Bonta* held that exacting scrutiny also required "narrow tailoring." Narrow tailoring requires that a statute or policy must not infringe on First Amendment rights in a large number of situations, where doing so does not serve the "important" government interest at stake. In short, "exacting scrutiny" is now much closer to "strict scrutiny."

S. 443 would expand the existing disclaimer requirements to apply to all "campaign-related disbursements" in the form of a public communication.[33] As discussed above, many of these communications would merely mention elected officials in the context of discussing policies and treating them as campaign ads subject to the campaign finance disclaimer requirements is likely unconstitutional.

In addition to expanding the scope of speech covered by the disclaimer requirements, S. 443 also would expand the information that must be included in the disclaimers, specifically the "stand by your ad" portion of the disclaimer. Organizations – other than candidates, certain PACs, and political party committees – that sponsor such ads would have to include in the ads' disclaimers certain donor information.[34] Ads containing video content or that are in the form of "an internet or digital communication which is transmitted in a text or graphic format" would have to identify the organization's top five donors of $10,000 or more during the prior 12 months.[35] Ads containing only audio content (including telephone calls) would have to identify the organization's top two donors at or exceeding the same threshold.[36]

The bill purports to shield certain donors from being identified in the disclaimers,[37] but the exemption in the disclaimer provision is illogical. It also fails to track the donor identification requirement in the reporting provisions. This mismatch will cause enormous confusion for organizations seeking to comply with the law and those trying to understand who supposedly paid for the regulated communications.

Part of the confusion stems from S. 443's use of the term "*segregated* bank account" to describe two different concepts. For "campaign-related disbursement" reports, an organization may choose to pay for such disbursements using one type of "*segregated* bank account." Donors to this account *would* be publicly reported. Donors whose funds are not deposited in this account would not be reported.[38] However, S. 443 also provides that donors may be shielded from public identification on reports if they give to another form of a segregated account. This would be "an account which is *segregated* from any account used to make campaign-related disbursements."[39]

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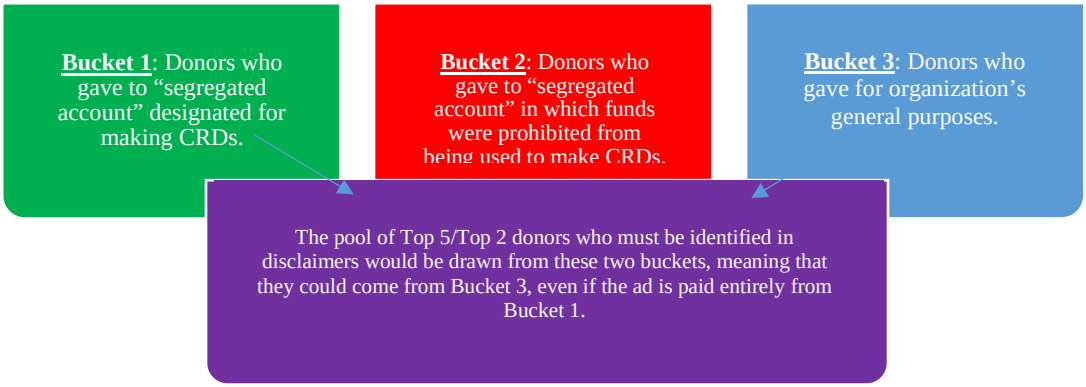
[32] *Citizens United*, 558 U.S. at 366.
[33] S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)).
[34] S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)). The bill exempts "certain political committees" from the donor identification disclaimer requirement, but it is unclear which "certain political committees" are being referenced. *See id.* (To be codified at 52 U.S.C. § 30120(e)(6)). It is possible that super PACs would be subject to the disclaimer requirement, while conventional PACs that accept contributions subject to amount limitations and source prohibitions would be exempt. *See* S. 443 § 201 (to be codified at 52 U.S.C. § 30126(e)(6)).
[35] *Id.* § 302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (5)(A) & (C)).
[36] *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(C), (5)(B) & (C)); *id.* § 303.
[37] *Id.* § 302 (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).
[38] *Id.* § 201 (to be codified at 52 U.S.C. § 30126(a)(2)(E)) (emphasis added).
[39] *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(B)) (emphasis added).

As if that were not confusing enough, S. 443 only shields donors from being identified in disclaimers for campaign-related disbursements as the top five or top two donors if they give to the "segregated" account that cannot be used for campaign-related disbursements.[40] Incredibly, communications *paid for only from* the segregated account used to pay for regulated communications must list the organization's top donors, even if their funds were *never* deposited in the account used to fund the communication.

That means a communication paid for by one set of donors (and only those donors) will often list donors in a disclaimer who *did not give any funds* to distribute the communication. In other words, the law would often require advertising disclaimers with false information. That will, in turn, lead to news stories that have false information about who paid for the communications.

The following diagram illustrates this donor identification paradox in S. 443's disclaimer requirement:



In addition, the disclaimers would have to include a statement by an organization's CEO or highest-ranking officer identifying himself or herself and his or her title and stating that he or she "approves this message."[41] (Current law allows announcers to read disclaimers for organizations.) Ads containing video content would have to include "an unobscured, full-screen view" of the CEO or highest-ranking officer reading the disclaimer or a photo of the individual.[42] "Campaign-related disbursements" sponsored by individuals would have to include disclaimers featuring the individual.[43]

These disclaimer requirements, especially the requirement to include an image or picture of a sponsoring individual or a sponsoring organization's CEO or highest-ranking officer, do not appear to have any relation – let alone a "substantial relation" – to any important governmental interest, or any governmental interest other than deterring speech.[44] Rather, the bill compels speakers to call attention to certain individuals associated with the sponsoring organizations, thereby detracting from the substance of the groups' message. One can easily imagine circumstances where the required individual might not want to or be physically able to deliver

[40] *Id.* § 302 (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).
[41] *Id.* (to be codified at 52 U.S.C. § 30120(e)(2)(B), (4)(B)).
[42] *Id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(ii)).
[43] *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(A), (2)(A) & (4)(a)).
[44] *See Citizens United*, 558 U.S. at 366.

such a message, such as those who are mute, battling a serious illness, or recuperating from surgery or an injury from an accident or attack. Ironically, while the original (and dubious) purpose of the "stand by your ad" disclaimer was to improve the quality of political ads, S. 443 would personalize political discourse and may further contribute to the politics of personal destruction.[45]

Moreover, S. 443 would expand the "stand by your ad" disclaimer requirement beyond the television and radio ads it currently covers to also apply to Internet ads.[46] Internet advertisers already struggle often to fit the FEC disclaimers in their ads. Internet video "pre-roll" ads, for example, "are usually short, often 10 seconds or 15 seconds long so as not to unduly annoy viewers who don't wish to wait long for the clip."[47] Podcast ads are often short as well. Expanding the "stand by your ad" disclaimer requirement to Internet ads would require substantial portions of ads to be devoted to the disclaimer and would threaten the very viability of the Internet as a medium for advocacy or political communication.[48] One of the requirements for video ads mandates display of a disclaimer for "at least 6 seconds,"[49] making it illegal to use 5 second video ads.

II. For the First Time, S. 443 Would Subject Groups That Sponsor Communications About Judicial Nominees to Burdensome Campaign Finance Reporting, Donor Exposure, and Disclaimer Requirements, Despite Lacking Any Acceptable Policy Rationale or Legitimate Constitutional Justification.

As noted above, ads that PASO a federal judicial nominee would fall under S. 443's "campaign-related disbursement" reporting and donor exposure requirements. These new burdens suffer from the same unconstitutional vagueness problems with the PASO standard already discussed. Furthermore, the regulation of communications discussing judicial nominees under the campaign finance laws is extraordinary, unprecedented, and without any recognized constitutional basis.

A) U.S. Supreme Court Precedents on Campaign Finance Regulation in Judicial Elections

The U.S. Supreme Court has upheld campaign finance regulation over the judicial selection process only in the context of state judicial elections.

In *Williams-Yulee v. The Florida Bar*, the Court upheld a state canon of judicial conduct prohibiting judicial candidates and incumbent judges running for re-election from personally

[45] In any event, the "stand by your ad" disclaimer requirement has not reduced the amount of negative ads, as it was intended. *See* Bradley A. Smith, THE MYTH OF CAMPAIGN FINANCE REFORM, NATIONAL AFFAIRS (Winter 2010), *at* https://nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform.
[46] S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)(1)).
[47] FEC Adv. Op. No. 2007-33 (Club for Growth PAC), Comments of Sierra Club *at* 3.
[48] While the bill purports to allow the FEC to adopt regulations to exempt certain ads from the top five or top two funders portion of the disclaimer when the disclaimer would take up a "disproportionate amount" of the ad, the bill also increases the amount of time that the disclaimer must be displayed in video ads to at least six seconds (up from four seconds under the current requirements for television ads). *Compare* S. 433 § 302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (C)) *with id.* (To be codified at 52 U.S.C. § 30120(e)(3)(C)(i)); *see also* 52 U.S.C. § 30120(d)(1)(B)(ii). The bill's contrary directives raise serious questions about how much discretion the FEC would have to exempt ads from the expanded disclaimer requirement. The FEC already has struggled for a decade over when disclaimer exemptions should apply to digital ads, and S. 443 fails to give the agency any more legislative clarity on this issue. *See, e.g.*, FEC Adv. Op. Nos. 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging LLC), and 2017-12 (Take Back Action Fund).
[49] *See* note 54, *supra*.

soliciting campaign contributions (while still allowing them to establish campaign committees to solicit contributions on their behalf).[50] The Court reasoned that "[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity."[51]

In *Caperton v. A.T. Massey Coal Co.*, the Court held that a justice of the West Virginia Supreme Court of Appeals was required to recuse from a case where the CEO of the appellant in the case had: (1) contributed $2.5 million to a Section 527 political organization to intervene in the justice's race; and (2) spent another $500,000 on independent expenditures of his own in connection with the race.[52] The Court "conclude[d] that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[53] The Court noted that *Caperton* was "an exceptional case" where the "temporal relationship between the campaign [spending], the justice's election, and the pendency of the [appellant's] case" before the West Virginia state court were "critical" to the Court's ruling.[54]

B) U.S. Supreme Court Precedents on Campaign Finance Reporting Requirements

The U.S. Supreme Court has recognized that campaign finance reporting requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and therefore may not be imposed indiscriminately or without sufficient justification.[55] Rather, laws requiring organizations to publicly report their donors, such as S. 443, are subject to "exacting scrutiny."[56] This means the law must further "governmental interests sufficiently important to outweigh the possibility of infringement," and there must be a "substantial relation between the governmental interest and the information required to be disclosed."[57] Last year the Court noted that, "[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes."[58]

The Court has articulated three "sufficiently important" governmental interests for campaign finance reporting laws:

First, the Court has reasoned that identifying a candidate's sources of financial support "allows voters to place each candidate in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office."[59]

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[50] 575 U.S. 433, 437, 439 (2015).
[51] *Id*. at 445.
[52] 556 U.S. 868, 872, 873 (2009) (Technically, *Caperton* was not strictly a case about campaign finance regulation *per se*, but rather about the standards for judicial recusal. However, the case centered on campaign finance activity and therefore is directly relevant to questions about the constitutionality of S. 443's regulation of ads about judicial nominees.).
[53] *Id*. at 884.
[54] *Id*. at 883, 886.
[55] *Buckley*, 424 U.S. at 64.
[56] *Id*.
[57] *Id*. (internal quotation marks and citations omitted) at 66.
[58] *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021).
[59] *Id*. at 66-67; *see also Citizens United*, 558 U.S. at 367 (noting that the Court upheld the Bipartisan Campaign Reform Act amendments to the FECA in *McConnell v. FEC*, 540 U.S. 93 (2003), "on the ground that they would help citizens 'make informed choices in the political marketplace.'") (quoting *McConnell*, 540 U.S. at 197).

Second, campaign finance reporting requirements "deter actual corruption and avoid the appearance of corruption" by allowing the public "to detect any post-election special favors that may be given in return" for campaign contributions.[60]

Third, campaign finance reporting requirements aid in "detect[ing] violations of the contribution limitations" that apply to contributions to candidates.[61]

Taking these three justifications in reverse order: The third rationale – detecting violations of the contribution limits – clearly does not apply. Federal judicial nominees do not raise campaign funds and are not subject to contribution limits.

The second rationale – deterring corruption and the appearance of corruption – also is weak or nonexistent for federal judicial nominations. Since federal judicial nominees do not receive campaign contributions, the only potential source of corruption is the independent spending of groups advocating for or against the nominees.

As a matter of law, the U.S. Supreme Court has held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[62] There do not appear to be any allegations that the organizations advocating on federal judicial nominations targeted by S. 443 or their donors are coordinating with the nominees or that the nominees are raising funds for such communications. While S. 443 itself contains no legislative findings regarding this provision, the provision is based on the "Judicial Ads Act,"[63] which, in turn, appears to have been an outgrowth of the "Captured Courts" report issued by the Senate Democratic Policy and Communications Committee.[64] That report also does not allege any coordination between independent groups and federal judicial nominees.

Even if, as the Court found in *Caperton*, it is asserted that *elected* judges may feel beholden to supporters for their independent campaign spending on judges' behalf, there is still a fundamental difference between state elected judges with fixed terms of office and federal appointed judges with lifetime tenure.

IFS takes no position on the long-running debate over having elected or appointed judges. However, the entire rationale for an independent federal judiciary with lifetime tenure is that the judges are independent.[65] By design, federal judges are independent of the presidents that nominate them, the Senators who vote to confirm them, and any groups that may support their nominations. Indeed, from Justice David Souter's liberal rulings to Justice Neil Gorsuch's recent majority opinion on Title VII's protection of employees' sexual orientation, members of the federal

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[60] *Buckley*, 424 U.S. at 67.
[61] *Id*. at 67-68.
[62] *Citizens United*, 558 U.S. at 357.
[63] S. 4183 (116th Cong.). *See* Eric Wang, *Analysis of the "Judicial Ads Act" (S. 4183): Bill Appears to Be Aimed Solely at Exposing Independent Groups' Donors to Public Disfavor and Serves No Apparent Legitimate "Disclosure" Interest*, Institute for Free Speech (July 2020), *at* https://www.ifs.org/wp-content/uploads/2020/07/2020-07-29_IFS-Analysis_S-4183_Judicial-Ads-Act.pdf.
[64] *See Captured Courts*, Democratic Policy & Communications Committee (May 2020), *at* https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf, at 47. ("Over the coming months, Democrats in the Senate . . . will propose legislative reforms" to address the issues raised in the report.).
[65] *See* U.S. CONST., Art. III, § 1.

judiciary have often and famously bucked the expectations of the presidents that nominated them and their supporters.[66]

In short, the independent federal judiciary is already a "prophylactic measure"[67] against judicial bias that is fundamental to and baked into our constitutional structure. Therefore, any pretense S. 443 may have of further protecting federal judges from feeling beholden to groups supporting their nominations (and those groups' donors) is the type of "prophylaxis-upon-prophylaxis approach" that is strongly disfavored for campaign finance laws.[68]

Indeed, reporting laws like S. 443 may actually enhance the risk of corruption and bias rather than alleviate such concerns. There are no apparent indications or allegations that federal judicial nominees are even aware of who is donating to groups supporting their nominations. This is in contrast to the situation in *Caperton*, where the West Virginia judge would know or could easily find out that a litigant appearing before him had spent millions supporting the judge's election, because that information was required to be publicly reported.[69]

This illustrates the double-edged sword of "disclosure." Where donors to groups supporting or opposing government decisionmakers would otherwise remain anonymous, the donor exposure laws essentially create lists of "friends" and "enemies" that aid government officials in rewarding and retaliating against those who ponied up and those who didn't.[70] Indeed, while congressional Democrats[71] are proposing S. 443 now, some prominent Democrats have made this very point in the past in opposing such disclosure requirements.[72]

This leaves us with the first and only remaining rationale the U.S. Supreme Court has recognized for campaign finance reporting requirements – helping voters identify candidates' place "in the political spectrum" and identify the interests to which they are likely to be responsive. Again,

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[66] *See*, *e.g.*, David Von Drehle, *George Herbert Walker Bush, the 41st President of the United States and the Father of the 43rd, Dies at 94*, TIME (Dec. 1, 2018), *at* https://time.com/longform/president-george-hw-bush-dead/ ("Believing that he was getting a pragmatic conservative, [President George H.W.] Bush was disappointed to see Souter move steadily to the left during his 20 terms on the high court."); Howard Kurtz, *Gorsuch draws personal attacks for breaking ranks on gay rights*, FOXNEWS.COM (Jun. 17, 2020), *at* https://www.foxnews.com/media/gorsuch-draws-personal-attacks-for-breaking-ranks-on-gay-rights ("Carrie Severino, president of the Judicial Crisis Network, which spent millions to help confirm Gorsuch and Brett Kavanaugh, said Gorsuch had acted 'for the sake of appealing to college campuses and editorial boards. This was not judging, this was legislating – a brute force attack on our constitutional system.'"); Brett Samuels, *Trump says 'we live' with SCOTUS decision on LGBTQ worker rights*, THE HILL (Jun. 15, 2020), *at* https://thehill.com/homenews/administration/502812-trump-says-we-live-with-scotus-decision-on-lgbtq-worker-rights ("'I've read the decision, and some people were surprised,' [President] Trump said.").

[67] *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014).

[68] *Id*.

[69] *Caperton*, 556 U.S. at 884; *see also* 26 U.S.C. § 527(j)(3)(B) (requiring Section 527 political organizations, such as the one the litigant in *Caperton* had contributed to, to report their donors); *Caperton*, 556 U.S. at 873 (noting that the litigant also was required to file "state campaign finance disclosure filings" for his own independent expenditures in support of the judge).

[70] *See*, *e.g.*, *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*) (noting that campaign finance reporting requirements "make[] it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped."); *Akins v. FEC*, 66 F.3d 348, 356 (D.C. Cir. 1995) (noting that when a contribution made to a candidate is reported, "the recipient's competitor will notice, and if the competitor should win the spender will not be among his favorite constituents.").

[71] The Institute for Free Speech is a nonpartisan organization. By identifying the political affiliation of S. 443's sponsors, IFS does not mean to impugn their political affiliation in any way, but merely notes that members of their party previously have taken the opposite (and what IFS believes to be the correct) position on the pitfalls of such "disclosure."

[72] Alexander Bolton and Mike Lillis, *Opposition to contractors disclosure rule grows among Dems*, THE HILL (May 13, 2011), *at* https://thehill.com/homenews/senate/161007-opposition-to-disclosure-rule-grows-among-dems (reporting that former Senators Joe Lieberman and Claire McCaskill wrote at the time, "The requirement that businesses disclose political expenditures as part of the offer process creates the appearance that this type of information could become a factor in the award of federal contracts.").

federal judges are not elected. Therefore, this rationale would have to be applied by analogy to informing the Senators voting to confirm nominees about the sources of the nominees' support.

However, this is decidedly not the rationale that appears to be underlying S. 443's regulation of judicial ads. Rather, to the extent the aforementioned Senate Democratic Policy and Communications Committee report appears to articulate the provision's rationale, the goal is to expose the donors to groups: (1) supporting "judges [who] were chosen not for their qualifications or experience – which are often lacking – but for their demonstrated allegiance to Republican Party political goals"; and (2) "work[ing] to ensure that corporate America, the ultra-rich, and the Republican Party would succeed in the courts."[73]

Putting aside the partisan attacks, at a macro level, the rationale is simply to expose what is already plainly obvious: that nominees put forward by each administration will have a certain judicial philosophy and will be inclined to rule a certain way. Indeed, former President Trump made his intention to nominate certain types of federal judges a mainstay of his campaign, including a list of potential Supreme Court nominees, and it was no secret what type of judicial philosophy those nominees would have.[74]

Therefore, to the extent that: (1) federal judicial nominees' approach to the law is already generally well-known; and (2) the congressional Democrats supporting S. 443 and Senators voting on nominees appear to have already made up their minds on the nominees' (a) judicial philosophies, (b) ideological leanings, and (c) affinity toward certain interests,[75] there does not appear to be any serious argument that exposing the finances of the groups supporting those nominees would add any value to the nomination process.

Instead, the sole goal of S. 443's judicial ads provision appears to be exposing the donors of groups supporting federal judicial nominees that the bill's sponsors oppose for the purpose of suppressing speech about the nominees and ginning up public disfavor. This is decidedly not a legitimate justification for campaign finance reporting requirements. Indeed, it is precisely why the Supreme Court and lower courts (all of the tribunals with future nominations that this bill would impact) have recognized that such laws infringe on core First Amendment rights.[76]

C) U.S. Supreme Court Precedent on Lobbying Reporting Requirements

While S. 443 proposes to amend federal campaign finance law, the judicial ads provision nonetheless might be defended as a measure to regulate so-called "grassroots lobbying," insofar

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[73] *Captured Courts*, *supra* note 70 at 3-4.

[74] *See*, *e.g.*, Nick Gass, *Trump unveils 11 potential Supreme Court nominees*, POLITICO (May 18, 2016), *at* https://www.politico.com/story/2016/05/trumps-supreme-court-nominees-223331.

[75] *Captured Courts*, *supra* note 70 at 3-4.

[76] *See Buckley*, 424 U.S. at 64; *see also*, *e.g.*, *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) ("'public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute' and 'expose contributors to harassment or retaliation.' [] Ironically, these two values the *Buckley* Court acknowledged would be harmed by the disclosure requirements were the very same values the *McIntyre* Court later believed 'exemplified the purpose behind the Bill of Rights and of the First Amendment in particular' – namely, 'protecting unpopular ideas from suppression' and 'individuals from retaliation.'") (quoting *Buckley*, 424 U.S. at 68 and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)) (brackets and ellipses in the original omitted).

as it would regulate activity directed at the U.S. Senate's role in confirming judicial nominees. Even when analyzed under the rubric of the federal lobbying laws, however, the bill fares no better.

In *U.S. v. Harriss*, the U.S. Supreme Court upheld the federal lobbying reporting laws on the grounds that members of Congress have the prerogative to evaluate "the myriad pressures to which they are regularly subjected" in the form of lobbying.[77] The Court explained that Congress may require "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose" so as "to know who is being hired, who is putting up the money, and how much."[78]

The lobbying law that *Harriss* upheld was quite "narrow," as the Court emphasized multiple times.[79] Specifically, under the law the Court upheld:

(1) the person must have solicited, collected, or received contributions; (2) *one of the main purposes of such person, or one of the main purposes of such contributions*, must have been to influence the passage or defeat of legislation by Congress; [and] (3) the intended method of accomplishing this purpose must have been through *direct communication* with members of Congress.[80]

The Judicial Ads Act provision in S. 443 is materially different from the lobbying law upheld in *Harriss*. The bill would indiscriminately apply to all groups speaking about judicial nominations, regardless of whether their advocacy on such nominations is "one of the[ir] main purposes." The bill also would require such groups to indiscriminately report their donors, regardless of whether "one of the main purposes of such contributions" was to advocate on judicial nominations.

These differences are significant. With respect to the bill's failure to target only those groups whose "main purpose" is to advocate on judicial nominations, the Court has cautioned that "the relation of the information sought to the purposes of the [law] may be too remote" in such circumstances.[81] Similarly, "[t]o insure that the reach of [the law] is not impermissibly broad," the Court has required contributor reporting mandates to apply only to "contributions earmarked" for the purposes the law purports to regulate.[82]

This type of narrowing not only is good law, but it is also sound policy and common sense. As we have explained many times before, to indiscriminately require groups to report donors who had nothing to do with the communications being regulated would result in "junk disclosure" that spreads misinformation and thus serves no public interest.[83]

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[77] 347 U.S. 612, 625 (1954).
[78] *Id*.
[79] *Id*. at 623.
[80] *Id*. (internal quotation marks omitted, emphasis added).
[81] *Buckley*, 424 U.S. at 80.
[82] *Id*.
[83] *See, e.g.*, Matt Nese, *House Floor Amendment 1 to Kentucky Senate Bill 75: A Threat to Nonprofit Groups' Speech and Kentuckians' Privacy*, Institute for Free Speech (Mar. 7, 2017), *at* https://www.ifs.org/wp-content/uploads/2017/04/2017-03-07_House-Talking-Points_KY_HFA-1-To-SB-75_EC-Disclosure.pdf; Matt Nese, *Constitutional Issues with California Assembly Bill 45*, Institute for Free Speech (Apr. 23, 2013), *at* https://www.ifs.org/wp-content/uploads/2013/04/2013-04-23_Assembly-ER-Comments_CA_AB-45_Multipurpose-Organization-Donor-Disclosure.pdf.

Equally fatal to S. 443's Judicial Ads provision is its singling out of judicial nomination communications for regulation of so-called "grassroots lobbying" – *i.e.*, ads disseminated openly and widely to influence public opinion, as opposed to one-on-one direct communications with members of Congress and their staff. For the 75 years that federal lobbying has been regulated,[84] only direct lobbying has been regulated. Proposals to regulate federal grassroots lobbying have been proposed numerous times in Congress throughout the years and rejected.[85]

While the Senate's role in confirming federal judges is an important, constitutionally prescribed function, it is only one of the innumerable issues that Congress votes on. The Judicial Ads Act's singular and unprecedented focus on grassroots lobbying on judicial nominations is therefore peculiarly underinclusive. When a law that regulates First Amendment activity is underinclusive in this manner, it "raises a red flag" and creates "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[86] As discussed previously, that appears to be precisely the case here: congressional Democrats have minced no words in expressing their disapproval of the groups advocating on federal judicial nominations that this bill would regulate.[87]

III. S. 443 Would Impose Inflexible and Impractical Disclaimer Mandates on Speakers.

In addition to the disclaimer requirements discussed above that S. 443 would impose on Internet ads containing video and audio content, the bill would impose other general and inflexible disclaimer burdens on all Internet ads. Many of these rules are written for broadcast ads and are impractical for many online ad formats – not just small-sized display ads.

The existing FEC disclaimer requirements that S. 443 would extend to online ads are already unwieldy, especially for space-limited ads. For independent expenditures and electioneering communications, the disclaimer must provide the sponsor's name; street address, telephone number, or website URL; and state that the ad is not authorized by any candidate or candidate's committee.[88] In addition, TV and radio ads must include an audio disclaimer declaring that "[Sponsor's name] is responsible for the content of this advertising," and video ads must also contain a similar text disclaimer. As discussed above, S. 443 also would require additional donor information to be included in this existing disclaimer language for video and audio ads.

For candidate-sponsored ads, the disclaimer must state, "Paid for by [name of candidate's campaign committee]."[89] In addition, TV and radio ads must include an audio disclaimer spoken by the candidate stating his or her name, and that he or she has approved the message, and TV ads also must contain a full-screen view of the candidate making the statement or a photo of the

[84] *See* Federal Regulation of Lobbying Act of 1946, 2 U.S.C. § 261 *et seq.*; Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq*.
[85] *See, e.g.*, R. Eric Petersen, *Lobbying Disclosure and Ethics Proposals Related to Lobbying Introduced in the 109th Congress: A Comparative Analysis*, Congressional Research Service (Mar. 23, 2006), *at* https://fas.org/sgp/crs/misc/RL33234.pdf, at 9-11.
[86] *Williams-Yulee*, 575 U.S. at 448-49 (internal quotation marks and citation omitted).
[87] *See Captured Courts*, *supra* note 70 at 3-4.
[88] 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).
[89] 11 C.F.R. § 110.11(b)(1).

candidate that appears during the voice-over statement.[90] TV ads also must contain an on-screen text disclaimer containing "a similar statement" of candidate approval.[91]

The current radio ad disclaimers – which S. 443 would make even lengthier – often run for as long as 10 to 15 seconds, depending on the name of the group and contact information provided, but many online radio or podcast ad formats are limited to only 10 to 15 seconds.[92] Online video ads also are commonly much shorter than broadcast TV ads.[93]

The FEC's existing disclaimer requirements exempt "small items" and communications where it is "impracticable" to include a disclaimer.[94] Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.[95]

S. 443 appears to make small internet ads ineligible for these exemptions from the disclaimer requirements. At a minimum, a digital ad would have to contain on its face the name of the ad's sponsor.[96] This information could not be displayed by alternative means, such as "clicking through" the ad. The ad also would have to provide some means for recipients to obtain the complete required disclaimer, thus barring the use of formats where this is technically impossible or impractical or if the vendor does not allow for it. Notably, it also appears that the complete disclaimer also could not be provided by linking to the advertiser's website where all of the remaining information would be available. Thus, S. 443 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

IV. S. 443's Court Picking Provision Would Shut Courthouse Doors Nationwide.

Tucked at the end of the bill is a provision that would force Americans who want to challenge the constitutionality of any part of S. 443 or the Federal Election Campaign Act to file a lawsuit in the District of Columbia.

This is a horrible idea that will drive up the costs of litigation for those seeking to vindicate their First Amendment rights. Many people and organizations would not be able to afford their day in court as it would necessitate a trip from potentially thousands of miles away. Likewise, attorney billing rates in the nation's capital are among the highest in the country.

Attached to my written statement is an article written by Alan Gura, the Vice President for Litigation at the Institute for Free Speech, critiquing this provision in more detail.

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[90] *Id*. § 110.11(c)(3).
[91] *Id*.
[92] *See Personalization of Audio: Shorter Audio Ads*, PANDORAFORBRANDS.COM (Aug. 24, 2017), *at* http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/ and Martin Luenendonk, *Everything You Need to Know about Podcast Advertising*, CLEVERISM.COM (Oct. 10, 2020), *at* https://www.cleverism.com/everything-about-podcast-advertising/.
[93] *See, e.g.*, Garett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE (Jul. 26, 2017), *at* http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/.
[94] 11 C.F.R. § 110.11(f)(1)(i), (ii).
[95] *See* FEC Adv. Op. No. 2010-19 (Google).
[96] *See* S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)); *but see id.* § 304 ("Nothing in this title or the amendments made by this title may be construed to require any person who is not required under section 318 of the Federal Election Campaign Act of 1971 to include a disclaimer on communications made by the person through the internet to include any disclaimer on any such communications.").

Conclusion

S. 443's provisions are so complex and open to so many possible interpretations that our analysis of the provisions may well understate the chill this legislation might place on the exercise of our First Amendment rights.

The best way to give the people a voice and to protect democracy is to protect and enhance the rights to free speech, a free press, assembly, and petition guaranteed by the First Amendment.

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Congressional Democrats' Court-Picking (Not Packing) Scheme

By Alan Gura

Congress probably won't pack the Supreme Court. But court picking poses a real threat to Americans' rights.

Court picking is when Congress uses its authority over federal-court jurisdiction to stuff politically sensitive cases from throughout the country into one court that leans its way, to be buried there for as long as possible. Court-picking's evil genius is its stealth. Americans would notice four new justices, but not changes to technocratic statutes that excite only civil-procedure professors. Despite featuring in Congress's most radioactive bill—the so-called For the People Act, or H.R.1, which would transform elections and limit Americans' rights to speak about them—court-picking has escaped notice.

It shouldn't. H.R.1's court-picking provision would shut courthouse doors throughout the country, attempt to game the outcome in critical cases, deny the Supreme Court the benefit of the federal judiciary's broad and diverse perspectives, and repeal measures that expedite important lawsuits questioning government power.

In one neat court-picking trick, the bill would strip 93 of 94 local federal district courts, and 11 of the 12 regional appellate courts that review their decisions, of their power to hear First Amendment challenges to Congress's regulation of political speech. All such claims—by Alaskans, Floridians or anyone in between—would be confined to the District of Columbia. Appeals would be heard only in the D.C. Circuit—the court over which Senate Democrats exercised the "nuclear option" in 2013, ramming through three judges who shifted its ideological balance. Imagine if Republicans had passed a voting-rights bill that forced Californians wishing to challenge it to sue in Louisiana, and appeal to some of the country's most conservative judges.

Some complex and discrete legal fields are best assigned to specialized courts. The D.C. Circuit has some unique authority to review administrative cases involving federal agencies, and Congress created the Federal Circuit in 1982 to hear appeals in patent cases nationwide. But all federal judges should be conversant in the Constitution, and Washington-based judges are no better than those elsewhere at interpreting the First Amendment.

While historical quirks once made Washington the only place where Americans could sue to stop federal violations of their rights, Congress ended that restriction in 1962. The Senate Judiciary Committee called the limit "an unfair imposition upon citizens who seek no more than lawful treatment from their Government" and noted that it caused substantial delays as cases from far and wide clogged the D.C. District Court. Court-picking Washington for all federal political-speech claims is a remarkable step backward.

Ensuring Americans' right to access local courts isn't good only for litigants. It's also good for the law. The Supreme Court prefers to let the law "percolate" among the various courts before deciding who's right. Stuffing all the most important cases into the D.C. courts deprives the justices of the benefit of the diverse perspectives held by federal judges from all 50 states.

The Supreme Court would eventually have a chance to review the cases that lawmakers direct to Washington. But the court-pickers try to stretch out "eventually" in the hope of running as many elections as possible under their new, constitutionally dubious rules.

Understanding that election speech cases are time-sensitive, Congress designed a system in 1974 to speed them along. Ordinary federal cases can drag on for years, decided up to three times (by a district judge, a three-judge appellate panel and an en banc hearing by a larger appellate panel or the full court) before reaching the justices. But when voters file election speech cases, the district judge only gathers facts and, if the issues are significant, certifies the matter for an en banc decision by the appellate court. That means the case is decided only once before going to the Supreme Court. Plaintiffs challenging the 2002 McCain-Feingold campaign finance law have another one-stop option on their way to the Supreme Court: a panel of three D.C. judges.

The speech-control bill would repeal these fast-track rules, leaving only a note advising courts that they have a "duty" to "advance" and "expedite" campaign speech cases "to the greatest possible extent." But federal law already instructs judges that good cause exists to expedite urgent constitutional claims. And time often appears differently to judges and litigants. In 2013 the D.C. Circuit refused to expedite an important Second Amendment case that had languished undecided for more than four years because the delay wasn't "so egregious or unreasonable" to merit relief. (The challengers, whom I represented, won seven months later.)

Congress knew what it was doing when it streamlined election speech cases. And the court-pickers know what they're doing by proposing to repeal these measures. The only value of the court-picking gambit is that it exposes the cynicism of would-be speech regulators, who fear exposing their schemes to rapid constitutional scrutiny by the nation's federal courts.

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