

WHITE PAPER NO. 27

LEGISLATIVE ELECTION 2015: BIG INDEPENDENT SPENDING, BIG ASSEMBLY SHAKEUP

*The New Jersey Election Law Enforcement Commission
P.O. Box 185, Trenton, NJ 08625*

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State of New Jersey

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“Legislative Election 2015- Big Independent Spending, Big Assembly Shakeup” is the 27th white paper released by the New Jersey Election Law Enforcement Commission (ELEC) since 1988.

This series has received widespread recognition. Its contents have been cited in media reports, the political science literatures, and in studies prepared by sister agencies and advocacy groups.

The documents serve as reference works and provide valuable background and guidance for the Governor’s Office, legislators and other policy makers. Some recommendations have helped spur legislative proposals and even new laws.

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All 27 white papers are available on ELEC’s website at www.elec.state.nj.us.

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INTRODUCTION AND SUMMARY

At the start of 2015, most pundits thought the fall legislative election would be a snoozer.

No change in the status quo was likely.

There was no gubernatorial election to help draw voter attention to the election. None of the 40 state Senate members were required to defend their seats.

Only the 80 Assembly seats were up for reelection. The previous time Assembly members ran alone on the ticket was way back in 1999.

Back then, Republicans controlled the governor's seat and both legislative houses. Even after losing three seats during the election, they retained a healthy 45-to-35 margin in the lower house.

Legislative candidates in 1999 spent about \$16 million in 2017 dollars (Table 1). It was the smallest amount spent in the five election years between 1995 and 2015 when the Assembly was in play without Senate members on the ballot.

It was somewhat shocking, then, that spending in 2015 turned out to be nearly triple the 1999 total.

What really set the 2015 election apart was that special interest groups acting independently of legislative candidates shelled out a whopping \$10.9 million in the general election. In 1999, there was zero independent spending. Independent spending in 2015 comprised 32.5 percent of total general election spending- a new high through that year (Table 19).

Table 1
Election Spending in Years When Assembly
Members Ran Without Senate Members on Ballot

YEAR	HOUSE	LEGISLATIVE	INDEPENDENT	TOTAL	TOTAL 2017 DOLLARS
1995	Assembly	\$10,671,042	0	\$10,671,042	\$17,144,725
1999	Assembly	\$10,873,095	0	\$10,873,095	\$15,975,879
2005	Assembly	\$23,713,193	\$ 3,476	\$23,716,669	\$29,950,382
2009	Assembly	\$18,584,098	\$ 15,999	\$18,600,097	\$21,222,649
2015	Assembly	\$22,632,814	\$10,908,983	\$33,541,797	\$34,907,713

The 2015 legislative election reaffirmed the biggest campaign finance trend in recent New Jersey elections- that independent special interest spending is becoming a major force.

Not that legislators themselves didn't spend a respectable sum. They collectively shelled out \$22.6 million, or the second highest candidate total except for 2005 (Table 1).

Total spending reached \$33.5 million. It was a new record for an Assembly-only election, even adjusting for inflation (Table 1).

Democrats were the main beneficiaries of the independent spending.

When spending by individual legislators and independent groups is combined, Democrats outspent Republicans by \$26.6 million to \$6.1 million- more than 4-to-1.

Democrats boosted their already formidable margin by four seats to 52-28, making it the largest Democratic Assembly margin since 1979. It was the biggest one-year pickup since 2003, when Democrats also grabbed four seats.

INTRODUCTION AND SUMMARY

They seized back one Assembly seat in the 1st legislative district, claimed both seats in the 11th legislative district for the first time since 1992, and picked up a seat in the 16th legislative district for the first time since Assemblyman James Bowers of Somerville represented the area in 1935¹.

About \$6.7 million, or 20 percent of total candidate and independent spending, went to just the three pickup districts (Table 15), including the heaviest dose of independent spending (about \$2.3 million).

Another \$5.2 million, including \$2.1 million from independent groups, poured into the notoriously volatile 2nd legislative district, where the two major parties each succeeded in reelecting an incumbent. Almost 35 percent of total spending (\$11.9 million) went to these four target zones.

ELEC analysis found that the 2nd legislative district has drawn the most spending since 2003 (Table 18). The 2015 total ranks as the eleventh most expensive race in state history using inflation-adjusted numbers (Table 16). This ranking includes mostly campaigns that also featured Senate candidates on the slate.

Looking at races with just Assembly members running since 1995, only a 2005 campaign that also involved the 2nd district ranked higher (\$5.6 million) on an inflation-adjusted basis (Table 17).

Assembly Minority Leader Jon Bramnick (R-21) said his party faced a major disadvantage. “There was an incredible amount of special interest money (going to Democrats)...It’s very difficult to run against that amount of money.”²

Changing demographics in some districts also helped Democrats gain an advantage.

Low turnout also didn’t help Republicans since more Democrats are registered in the state. Only 22 percent of registered voters show up at the polls, the lowest on record for a statewide race dating back to 1924³.

By comparison, 31 percent showed up for the 1999 election that featured only the Assembly. Other Assembly-only elections with no independent spending also enjoyed much higher turnout: 1995 (38 percent); 1979 (48 percent); and 1975 (57 percent).⁴

A Rutgers-Eagleton poll released October 27, 2015 found that 76 percent of the 935 voters polled were unaware of the legislative elections.⁵

“...This is an off-year election, and with the General Assembly at the top of the ticket and the only office appearing on every New Jersey ballot, legislative elections are definitely not on New Jerseyans’ radar this November.”⁶

As a percent of total contributions, PACs represented 33 percent in 2015- a new benchmark (Table 12). Legislative candidates in 2015 were more than twice as dependent on PAC contributions than they were in 2001 (33 percent versus 14 percent). Legislators in 2015 also were five times more dependent on union PAC money as they were in 2001 (20 percent versus 4 percent).

Heavy spending in just five districts helped Democrats seize control of both legislative houses in 2001 and expand those majorities ever since. Before the 2001 election, Republicans held a 13-to-2 advantage in the five districts. Democrats now hold 14 of the 15 seats (Table 18).

¹ Peter Mazzei, Manager, and Jordan Shedlock, Library Digital and Information Resources, Office of Legislative Services Library Services, on September 13, 2017.

² Brent Johnson, “Top Republican Says Money Played Big Role in Assembly Losses,” NJ Advance Media for nj.com, November 4, 2015.

³ New Jersey Division of Elections, “Total Number of Registered Voters, Ballots Cast, Ballots Rejected, Percentage of Ballots Cast and the Total Number of Election Districts in New Jersey- General Election November 3, 2015,” November 1, 2015.

⁴ New Jersey Division of Elections, “General Election Data 1924 to 2010.”

⁵ “What Election? Just as in 1971, Nearly All New Jerseyans Unaware of State Assembly Races This November,” Rutgers-Eagleton poll, October 27, 2015.

⁶ Ibid.

KEY FUNDRAISING TRENDS

Spending on the 2015 election was not as impressive when lumped together with totals from elections that also included Senate races. Among the eight legislative races since 2001, it ranks sixth highest in spending though it tops all previous Assembly-only races.

Table 2
Fundraising and Spending in Legislative
General Elections 2001-2015

YEAR	RAISED BY LEGISLATORS	SPENT BY LEGISLATORS	HOUSES RUNNING?	INDEPENDENT SPENDING	TOTAL SPENDING	TOTAL IN 2017 DOLLARS
2001	\$34,825,851	\$32,550,394	S, A	\$ 3,166,463	\$35,716,857	\$49,395,404
2003	\$47,911,008	\$44,990,255	S, A	\$ 4,857	\$44,995,112	\$59,859,639
2005	\$25,081,696	\$23,713,193	A	\$ 3,476	\$23,716,669	\$29,950,382
2007	\$50,797,317	\$47,231,847	S, A	\$ 165,000	\$47,396,847	\$55,956,268
2009	\$20,457,342	\$18,584,098	A	\$ 15,999	\$18,600,097	\$21,222,649
2011	\$45,656,674	\$44,024,272	S, A	\$ 1,835,500	\$45,859,772	\$49,906,109
2013	\$46,691,108	\$43,446,977	S, A	\$15,442,717	\$58,889,694	\$59,916,030
2015	\$22,883,719	\$22,632,814	A	\$10,908,983	\$33,541,797	\$34,907,713

Average spending per legislative seat in 2015 was \$436,346 while the average per district was \$872,693.

Table 3
Average Spent Per Legislative Seat
(Inflation Adjusted)

YEAR	TOTAL SPENDING IN 2017 DOLLARS	CONTESTED SEATS	AVERAGE PER SEAT	AVERAGE PER DISTRICT
2001	\$49,395,404	120	\$411,628	\$1,234,885
2003	\$59,859,639	120	\$498,830	\$1,496,491
2005	\$29,950,382	80	\$374,380	\$ 748,760
2007	\$55,956,268	120	\$466,302	\$1,398,907
2009	\$21,222,649	80	\$265,283	\$ 530,566
2011	\$49,906,109	120	\$415,884	\$1,247,653
2013	\$59,916,030	120	\$499,300	\$1,497,901
2015	\$34,907,713	80	\$436,346	\$ 872,693

Republicans have not outraised Democrats since 1999, the last year they controlled both legislative houses. Democrats in 2015 maintained the fundraising edge they secured in 2001.

KEY FUNDRAISING TRENDS

Table 4
Legislative Fundraising and Spending by Party

YEAR	DEMOCRATS RAISED	DEMOCRATS SPENT	REPUBLICANS RAISED	REPUBLICANS SPENT
2001	\$19,344,839	\$18,350,917	\$15,433,716	\$14,144,262
2003	\$29,159,958	\$28,528,080	\$18,649,276	\$16,366,548
2005	\$17,560,153	\$16,522,626	\$ 7,514,067	\$ 7,176,582
2007	\$35,617,962	\$33,394,029	\$14,844,892	\$13,532,754
2009	\$14,674,311	\$13,188,346	\$ 5,682,968	\$ 5,267,534
2011	\$31,838,968	\$31,055,091	\$13,740,008	\$12,909,239
2013	\$31,023,841	\$28,724,119	\$15,579,153	\$14,635,432
2015	\$16,343,437	\$15,918,780	\$ 6,538,259	\$ 6,712,224

Table 5
Spending Advantage of Incumbent Legislators Over Challengers

YEAR	INCUMBENTS SPENT	CHALLENGERS SPENT	INCUMBENT %	CHALLENGER %
2001	\$14,326,038	\$13,670,769	51%	49%
2003	\$25,376,630	\$15,069,233	63%	37%
2005	\$14,279,965	\$ 8,219,657	63%	37%
2007	\$22,242,726	\$21,160,907	51%	49%
2009	\$12,761,309	\$ 3,230,602	80%	20%
2011	\$32,174,797	\$11,849,475	73%	27%
2013	\$33,525,856	\$ 9,921,121	77%	23%
2015	\$17,331,766	\$ 5,301,048	77%	23%

Four Republican incumbents lost reelection in 2015, the largest number since 2003, when four other incumbents faced defeat. Even so, 95 percent of all Assembly incumbents won reelection.

Table 6
Number of Assembly Incumbents Who Won Reelection

YEAR	TOTAL	WON	LOST	% WON
2001	59	56	3	94.9%
2003	72	68	4	94.4%
2005	73	70	3	95.9%
2007	54	53	1	98.1%
2009	71	71	0	100%
2011	66	65	1	98%
2013	74	72	2	97.3%
2015	74	70	4	95%

KEY FUNDRAISING TRENDS

With just one house up for reelection, the average amount of contributions fell about 22 percent to \$2,093.

Table 7
Average Contributions to
Legislative Candidates

YEAR	AVERAGE CONTRIBUTION
2001	\$2,436
2003	\$2,803
2005	\$1,800*
2007	\$1,472*
2009	\$2,147
2011	\$2,501
2013	\$2,668
2015	\$2,093

*Clean Elections Program in effect, which drastically increased number of small contributions.

With fewer districts in serious play during an Assembly-only election year, the number of large checks dropped substantially from the previous election.

For instance, candidates received more than \$100,000 on 19 occasions in the 2013 campaign. In 2015, the number dropped to two. Likewise, the number of checks ranging from \$25,000 to \$100,000 fell from 168 four years ago to 49 in 2015.

Table 8
Range of Contributions
Received by Legislative Candidates

RANGE	COUNT	AMOUNT
> \$100,000	2	\$ 276,000
\$25,000 to \$100,000	49	\$ 1,933,149
\$5,001 to \$25,000	561	\$ 5,313,650
\$4,001 to \$5,000	190	\$ 923,692
\$3,001 to \$4,000	129	\$ 455,927
\$2,001 to \$3,000	637	\$ 1,626,745
\$1,001 to \$2,000	672	\$ 1,071,051
\$301 to \$1,000	4,093	\$ 2,683,652
\$300 or Less	525	\$ 66,609
Totals	6,858	\$14,350,476

KEY FUNDRAISING TRENDS

Table 9
Year-to-Year Comparison of Range of Contributions
Received by Legislative Candidates

RANGE	2001	%	2003	%	2005	%	2007	%
>\$100,000	13	0.001	45	0.4%	15	0.2%	44	0.2%
\$25,001-\$100,000	141	1%	132	1%	57	0.6%	122	0.5%
\$5,001-\$25,000	556	6%	672	6%	449	5%	793	3%
\$4,001-\$5000	341	3%	290	2%	152	2%	276	1%
\$3,001-\$4,000	112	1%	141	1%	66	1%	140	1%
\$2,001-\$3,000	754	7%	967	8%	647	7%	1,074	4%
\$1,001-\$2,000	985	10%	1,287	11%	647	7%	1,419	6%
\$301-\$1,000	6,353	63%	7,927	65%	4,153	42%	7,355	29%
\$300 or less	829	8%	691	6%	3,667	37%	14,228	56%
Total	10,084		12,152		9,853		25,451	

RANGE	2009	%	2011	%	2013	%	2015	%
>\$100,000	7	0.1%	15	0.1%	19	0.2%	2	0.03%
\$25,001-\$100,000	45	0.6%	110	1%	168	1%	49	0.71%
\$5,001-\$25,000	509	7%	872	7%	1,111	10%	561	8%
\$4,001-\$5000	162	2%	321	3%	119	1%	190	3%
\$3,001-\$4,000	115	2%	217	2%	247	2%	129	2%
\$2,001-\$3,000	721	10%	1,376	11%	1,559	14%	637	9%
\$1,001-\$2,000	702	10%	1,203	10%	715	6%	672	10%
\$301-\$1,000	4,118	58%	6,800	57%	6,510	57%	4,093	60%
\$300 or less	672	10%	1,060	9%	1,065	9%	525	8%
Total	7,051		11,974		11,513		6,858	100%

LEGISLATIVE SELF-FINANCING

Compared to most past legislative elections, legislative candidates in 2015 spent a meager amount of their personal funds- \$84,660.

Dating back to 1985, the only year when legislative self-funding was smaller was 1989, when the total was \$50,787 adjusting for inflation, according to analysis by ELEC.

The 2015 total was a fraction of the record \$2 million in personal spending by candidates in the 2007 legislative election.⁷

No individual candidate came close to matching the \$411,769 (inflation adjusted) spent by former Orange Mayor Joel Shain in 1983 on an unsuccessful state Senate campaign in the 27th District.⁸ His expenditure is believed to be the most any candidate has spent from their own pocket on a single legislative race.

Table 10
Top Five Self-Financing Candidates
In 2015 Legislative Elections

CANDIDATE	AMOUNT	DISTRICT	PARTY	W/L?	OFFICE
Jones, David	\$30,500	14	R	L	Assembly
Vaginos, Paul	\$13,040	40	D	L	Assembly
Ordway, Christine	\$13,000	40	D	L	Assembly
Mendoza, Peter	\$ 6,500	15	R	L	Assembly
Merwin, David	\$ 6,084	12	D	L	Assembly

⁷ Joseph Donohue, "White Paper No. 26- Legislative Elections 2013: Big Spending, Little Change Plus a History of Self-financing by Legislators and Others," table 16, page 11, September 2015. (Previous inflation adjustment updated)

⁸ Ibid., table 19, page 14, September 2015. (Previous inflation adjustment updated)

SOURCES OF CONTRIBUTIONS TO LEGISLATIVE CANDIDATES

A tradition in legislative campaigns is that incumbents in relatively safe districts share funds with incumbents facing tough reelection races or with challengers with good prospects of seizing a seat from the opposing party.

That trend continued in the 2015 campaign, when legislators got the lion's share of their funds- \$3 million (21 percent)- from other legislators.

A similar pattern prevailed in the four previous legislative elections dating back to 2007.

The biggest haul was in 2011, when lawmakers shared \$9.3 million with their colleagues- 31 percent of their total fundraising.

Earlier white papers have noted that legislative candidates can legally accept larger checks from public contractors- \$2,600 versus \$300- than either the two state parties or four legislative leadership committees. They can do so because they don't award contracts to such donors.

While union PACs gave more dollars to lawmakers in both the 2011 and 2013 campaigns, the \$2.8 million they provided in 2015 made up the largest percentage ever- 20 percent- for a legislative race.

Individuals have given about 12 percent of all legislative receipts in every legislative election going back to 2003.

Table 11
Contributions by Contributor Type
to Legislative Candidates in 2015

TYPE	TOTAL	%	TOP YEAR BY %	%
Campaign Fund (Mostly Legislative)	\$ 2,975,815	21%	2011	31%
Union PAC	\$ 2,814,260	20%	2015	20%
Political Party Committee	\$ 2,531,004	18%	2001	26%
Individual	\$ 1,711,710	12%	2011	13%
Legislative Leadership Committee	\$ 1,244,781	9%	2005	32%
Professional/Trade Association PAC	\$ 1,190,715	8%	2009	9%
Misc. Businesses- Direct	\$ 1,181,554	8%	2003 and 2013	10%
Ideological PAC	\$ 272,617	2%	2007	3%
Regulated Industries PAC	\$ 208,900	1%	NA	NA
Misc. Business PAC	\$ 185,270	1%	2009 and 2011	3%
Union- Direct	\$ 17,450	0.1%	2011	2%
Political Committee	\$ 16,400	0.1%	2001	1%
Total	\$14,350,476	100%		

Political action committees (PACs) have contributed more dollars in three previous elections- 2007, 2011, and 2013.

However, as a percent of total contributions, PACs represented 33 percent in 2015- a new benchmark. The previous high was 25 percent in 2009.

Legislative candidates in 2015 were more than twice as dependent on PAC contributions than they were in 2001 (33 percent versus 14 percent).

SOURCES OF CONTRIBUTIONS TO LEGISLATIVE CANDIDATES

Table 12
PAC Contributions as Percentage of all Contributions to Legislative Candidates

YEAR	TOTAL PAC DOLLARS	% OF TOTAL CONTRIBUTIONS
2001	\$3,558,171	14%
2003	\$4,603,534	14%
2005	\$3,212,830	18%
2007	\$6,123,214	16%
2009	\$3,675,039	25%
2011	\$6,485,603	22%
2013	\$7,141,747	23%
2015	\$4,671,762	33%

Since 2005, union PACs have been the largest source of PAC funds to legislative candidates. Union PACs donated more cash in 2011 and 2013. But the \$2.8 million in contributions in 2015 represented 60 percent of all PAC contributions- another new high-water mark. The previous high was 55 percent in 2013.

It is worth noting that PAC contributions to legislators roughly doubled after 2005 when tight new state limits drastically curtailed contributions from public contractors to party and leadership committees.

The new more stringent limits did not apply to individual legislators, who, incidentally, often send contributions to the state and county parties and leadership committees.

Table 13
Contributions by PAC Type to Legislative Candidates in 2015

PAC TYPE	AMOUNT	% OF PACS
Union PAC	\$2,814,260	60%
Professional/Trade Association PAC	\$1,190,715	25%
Ideological PAC	\$ 272,617	6%
Regulated Industries PAC	\$ 208,900	4%
Misc. Business PAC	\$ 185,270	4%
All PAC Total	\$4,671,762	100%
Percent of Total Contributions	33%	

Union PAC contributions have grown sharply since 2001 as a percent of total contributions received by legislators.

Legislators in 2015 were five times more dependent on union PAC money as they were in 2001 (20 percent versus 4 percent).

SOURCES OF CONTRIBUTIONS TO LEGISLATIVE CANDIDATES

Table 14
Union PAC Contributions as a Percentage of
Total Contributions to Legislative Candidates and Total Share of PAC Contributions

YEAR	UNION PAC CONTRIBUTIONS	% OF TOTAL CONTRIBUTIONS	% OF TOTAL PAC CONTRIBUTIONS
2001	\$1,055,100	4%	30%
2003	\$1,444,337	4%	31%
2005	\$1,305,840	7%	41%
2007	\$2,362,245	6%	39%
2009	\$1,505,830	10%	41%
2011	\$3,073,812	10%	47%
2013	\$3,935,864	13%	55%
2015	\$2,814,260	20%	60%

BATTLEGROUND DISTRICTS

A familiar pattern emerged during the 2015 legislative elections when a handful of districts drew the bulk of the spending. Five districts attracted more than 43 percent of total spending. The top ten districts captured 57 percent.

These districts are the focus of both parties because most other districts are drawn so incumbents enjoy an advantage in voter registration. Voting margins- and reelection odds- tend to be tightest in so-called “battleground” or “swing” districts.

Table 15
Top 10 Legislative Districts by General Election Spending in 2015

DISTRICT	CANDIDATES	INDEPENDENT	TOTALS
2	\$ 3,114,977	\$2,078,580	\$ 5,193,557
1	\$ 1,805,322	\$1,802,412	\$ 3,607,734
38	\$ 1,843,719	\$ 393,741	\$ 2,237,460
11	\$ 1,529,616	\$ 234,118	\$ 1,763,734
16	\$ 1,058,977	\$ 250,400	\$ 1,309,377
14	\$ 784,499	\$ 313,952	\$ 1,098,451
7	\$ 980,323	\$ 61,157	\$ 1,041,480
32	\$ 887,028	\$ 7,631	\$ 894,659
6	\$ 778,996	\$ 10,635	\$ 789,631
21	\$ 746,885	\$ 9,054	\$ 755,939
Totals	\$13,530,342	\$5,161,680	\$18,692,022
		Total Spending	\$32,740,102
		Top 5-% of Total Spending	43%
		Top 10- % of Total Spending	57%

Historically, the most expensive legislative races have occurred in years when both the Senate and Assembly are running together on the ticket. In 2015, Assembly members ran alone.

Even so, spending topped \$5 million in the 2nd legislative district, making it the eleventh costliest legislative election of all time ranked by inflation-adjusted numbers.

Table 16
All-Time Most Expensive Legislative Districts*

RANK	DISTRICT	YEAR	TOTAL SPENDING	DEMOCRATS	REPUBLICANS	INDEPENDENT GROUPS	TOTAL SPENDING (INFLATION ADJUSTED)	WINNERS
1	3	2017	\$18,743,940	\$4,125,878	\$ 196,269	\$14,421,793	\$18,743,940	Democrats
2	4	2003	\$ 6,142,441	\$4,570,686	\$1,571,755		\$ 8,169,881	Democrats
3	12	2007	\$ 5,963,939	\$5,057,798	\$ 906,141		\$ 7,039,445	Republicans
4	1	2007	\$ 4,975,772	\$3,605,195	\$1,370,577		\$ 6,618,128	Democrats
5	2**	2011	\$ 5,806,467	\$3,519,935	\$2,069,512	\$ 209,762	\$ 6,317,420	Split
6	38	2013	\$ 5,910,318	\$2,713,003	\$ 976,179	\$ 2,221,136	\$ 6,209,085	Democrats
7	3	2003	\$ 4,548,302	\$3,943,220	\$ 605,083		\$ 6,049,563	Democrats
8	38	2011	\$ 5,183,499	\$3,214,496	\$1,483,318	\$ 485,685	\$ 5,639,632	Democrats
9	2	2005	\$ 4,458,631	\$2,832,527	\$1,626,104		\$ 5,605,113	Split
10	3	2001	\$ 3,940,278	\$2,828,825	\$1,111,453		\$ 5,448,113	Democrats
11	2	2015	\$ 5,193,557	\$1,951,231	\$1,163,747	\$ 2,078,580	\$ 5,379,854	Split

*Ranked by inflation adjusted spending. ** Includes \$7,258 in spending by independent candidate.

BATTLEGROUND DISTRICTS

The second legislative district race also was the second most expensive Assembly-only race of all time. Two other races in the 1st and 38th districts also made the list of the top ten all-time Assembly-only races.

Table 17
Top 10 All-Time Most Expensive Assembly-Only Elections*

YEAR	DISTRICT	SPENDING	INFLATION ADJUSTED SPENDING
2005	2	\$4,458,631	\$5,605,113
2015	2	\$5,193,557	\$5,362,631
2015	1	\$3,607,734	\$3,737,146
2009	1	\$2,410,257	\$2,758,330
2015	38	\$2,237,460	\$2,317,720
2005	12	\$1,834,857	\$2,306,668
2005	14	\$1,827,804	\$2,297,801
2005	11	\$1,742,488	\$2,190,547
1995	7	\$1,235,269	\$1,990,039
2009	5	\$1,722,450	\$1,971,195

*Ranked by inflation-adjusted spending.

The 2nd legislative district has been the state's most active battleground since 2003. It has ranked number one in spending three times, and ranked five times in the top five.

More than \$27 million has poured into the district over eight elections since 2001- an average of \$3.4 million. As a comparison, this average is more than twice the average of \$1.4 million spent per district in all legislative elections during 2013.

One sign of the competitiveness in the 2nd district- neither party has controlled all three seats since 2005.

Table 18
Five Most Expensive Legislative Districts 2001-2015

DISTRICT	TOTAL SPENT*	TOP RACE	TOP FIVE
2	\$27,023,702	3	5
1	\$22,464,102	1	5
14	\$21,021,080	1	7
38	\$20,152,298	1	4
3	\$19,365,669	1	4

*Not inflation adjusted.

Along with legislative redistricting and demographic changes, heavy spending in the five districts listed above helped Democrats seize control of both legislative houses in 2001 and expand those majorities since then.

Before the 2001 election, Republicans held a 13-to-2 advantage in the five districts. Democrats now hold 14 of the 15 seats.

BATTLEGROUND DISTRICTS

INFLUENCE OF INDEPENDENT GROUPS GROWS IN LEGISLATIVE ELECTIONS

In 2015, spending by groups independent of candidates and parties totaled more than \$10.9 million, or 32.5 percent of all spending. That was the largest percentage ever for a statewide legislative election through 2015 (Preliminary numbers for 2017 indicate independent spending is 37.1 percent).

Table 19
Independent Spending in Legislative General Elections- 2001-2015

YEAR	SPENT BY LEGISLATORS	INDEPENDENT SPENDING	TOTAL SPENDING	%
2001	\$32,550,394	\$ 3,166,463	\$35,716,857	8.9%
2003	\$44,990,255	\$ 4,857	\$44,995,112	0.01%
2005	\$23,713,193	\$ 3,476	\$23,716,669	0.01%
2007	\$47,231,847	\$ 165,000	\$47,396,847	0.3%
2009	\$18,584,098	\$ 15,999	\$18,600,097	0.1%
2011	\$44,024,272	\$ 1,835,500	\$45,859,772	4.0%
2012*	\$ 758,612	\$ 299,049	\$ 1,057,661	28.3%
2013	\$43,446,977	\$15,442,717	\$58,889,694	26.2%
2015	\$22,632,814	\$10,908,983	\$33,541,797	32.5%

*Special election involving just three Assembly seats.

The numbers above fail to reflect the full influence of independent groups because independent spending on legislative primaries also is ramping up. In 2015, groups spent more than \$900,000 on the primary.

Table 20
Independent Spending in 2015 Legislative Elections

GROUP	PRIMARY	GENERAL	BOTH ELECTIONS
General Majority PAC	None	\$ 6,050,760	\$ 6,050,760
Garden State Forward	None	\$ 3,953,545	\$ 3,953,545
Carpenters Fund for Growth and Progress	\$768,796	\$ 492,527	\$ 1,261,323
National Association of Realtors Fund	\$116,765	\$ 268,295	\$ 385,060
NJ Coalition of Real Estate	\$ 42,000	\$ 80,717	\$ 122,717
NJ League of Conservation Voters for a Clean Environment	None	\$ 38,139	\$ 38,139
New Jerseyans for a Better Tomorrow	None	\$ 25,000	\$ 25,000
Totals	\$927,561	\$10,908,983	\$11,836,544

BATTLEGROUND DISTRICTS

The 2nd district, which was the most expensive race, drew the most independent spending, followed by the 1st district, which was the second most expensive race.

Table 21
Legislative District Breakdown of 2015 Independent Spending
Primary and General (Where Available)

LEGISLATIVE DISTRICT	GENERAL MAJORITY PAC	NATIONAL ASSOCIATION OF REALTORS FUND	GARDEN STATE FORWARD	NJ COALITION OF REAL ESTATE	CARPENTERS FUND FOR GROWTH AND PROGRESS	NJ LEAGUE OF CONSERVATION VOTERS FOR A CLEAN ENVIRONMENT	NEW JERSEYANS FOR A BETTER TOMORROW	AMOUNT
2	\$2,034,388				\$ 22,955	\$21,237		\$ 2,078,580
1	\$1,779,457				\$ 22,955			\$ 1,802,412
38	\$ 393,741							\$ 393,741
14			\$ 313,952					\$ 313,952
16		\$250,400						\$ 250,400
11	\$ 234,118							\$ 234,118
20		\$116,765*		\$ 31,999*				\$ 148,764
7				\$ 61,157				\$ 61,157
6				\$ 10,635				\$ 10,635
21		\$9,054						\$ 9,054
30		\$8,841						\$ 8,841
32				\$ 7,631				\$ 7,631
General- (District Unspecified)	\$1,609,056		\$3,639,593	\$ 1,294	\$ 446,617	\$16,902	\$25,000	\$ 5,738,462
Primary- (District Unspecified)				\$ 10,001	\$ 768,796			\$ 778,797
Totals	\$6,050,760	\$385,060	\$3,953,545	\$122,717	\$1,261,323	\$38,139	\$25,000	\$11,836,544

*Primary campaign.

MASS MEDIA SPENDING

Mass media spending by candidates and independent groups totaled \$12.5 million. As a percentage of total spending, mass media at 37 percent topped only 2009 and 2011 as the lowest share since 2001. The highest year on a percentage basis was 56 percent in 2001.

Table 22
Mass Media Spending as a Percent of Total Campaign Spending

YEAR	MASS MEDIA SPENDING	% OF ALL SPENDING
2001	\$15,894,343	56%
2003	\$22,763,046	54%
2005	\$11,641,252	55%
2007	\$22,284,576	53%
2009	\$ 6,054,152	35%
2011	\$14,426,075	33%
2013	\$21,607,970	41%
2015	\$12,500,784	37%

As in previous years, mass media spending was the largest item of spending.

Table 23
Total Spending by Category in 2015 Legislative General Election

CATEGORY	AMOUNT	%
Mass Media	\$12,500,784	37%
Contributions-Political	\$11,109,040	33%
Transfer to Next Election	\$ 3,045,204	9%
Research and Polling	\$ 1,493,303	4%
Get-Out-The-Vote (GOTV)	\$ 1,395,232	4%
Administration	\$ 1,223,938	4%
Fundraising/Entertainment	\$ 935,539	3%
Consulting	\$ 913,026	3%
Contributions-Charitable	\$ 378,020	1%
Compliance	\$ 276,825	1%
Miscellaneous (Expense Not Identified)	\$ 201,184	1%
Multiple Purposes	\$ 144,043	0.4%
Loan Reimbursement	\$ 15,346	0.05%
Refund	\$ (89,687)	-0.3%
Total	\$33,541,797	100%

MASS MEDIA SPENDING

Just as they did in 2013, independent groups spent a greater percentage of their spending on mass media than candidates (46 percent versus 33 percent). The percentage spent by independents was down from 67 percent in 2013 while outlays by candidates dropped only from 35 to 33 percent.

As in 2013, independent groups spent more than candidates on research and polling. They spent less on get-out-the-vote (GOTV) than candidates, a switch from 2013. They transferred slightly more of their money to other groups than candidates (37 percent versus 31 percent) while spending far less than candidates on administration, consulting and fundraising.

Candidates transferred a large portion of their funds (13 percent) to their next election while independent groups reported no leftover money.

Table 24
Major Spending Categories-
Legislative Candidates and Independent Groups

CATEGORY	CANDIDATES-AMOUNT	% OF CANDIDATE SPENDING	INDEPENDENTS-AMOUNT	% OF INDEPENDENT SPENDING
Mass Media	\$ 7,533,027	33%	\$ 4,967,757	46%
Contributions-Political	\$ 7,066,040	31%	\$ 4,043,000	37%
Transfer to Next Election	\$ 3,045,204	13%		
Administration	\$ 1,096,095	5%	\$ 127,843	1%
Fundraising/Entertainment	\$ 918,697	4%	\$ 16,842	0.2%
Consulting	\$ 848,467	4%	\$ 64,559	1%
Get-Out-The-Vote (GOTV)	\$ 820,414	4%	\$ 574,818	5%
Research and Polling	\$ 626,524	3%	\$ 866,780	8%
Contributions-Charitable	\$ 378,020	2%		
Miscellaneous (Expense Not Identified)	\$ 161,003	1%	\$ 40,181	0.4%
Multiple Purposes	\$ 130,676	1%	\$ 13,367	0.1%
Compliance	\$ 78,742	0.3%	\$ 198,082	2%
Loan Reimbursement	\$ 15,346	0.1%		
Refunds	\$ (85,441)	-0.4%	\$ (4,246)	-0.04%
Total	\$22,632,814	100%	\$10,908,983	100%

Media-TV was the largest category among independent groups- \$3.2 million and 66 percent of all spending by independents. Direct mail was the largest category of spending for candidates- \$2.7 million and 36 percent of all spending by candidates.

MASS MEDIA SPENDING

Table 25
Mass Media Spending by
Legislative Candidates and Independent Groups

EXPENSE	CANDIDATE SPENDING	% OF CANDIDATE SPENDING	INDEPENDENT SPENDING	% OF INDEPENDENT SPENDING	COMBINED SPENDING	% OF COMBINED SPENDING
Media- TV	\$ 896,794	12%	\$ 3,289,324	66%	\$ 4,186,117	33%
Mail	\$2,710,764	36%	\$ 658,179	13%	\$ 3,368,943	27%
Media- Unspecified	\$2,241,218	30%	\$ 308,991	6%	\$ 2,550,209	20%
Media- Radio	\$ 488,230	6%	\$ 101,432	2%	\$ 589,662	5%
Media- Production	\$ 413,960	5%	\$ 50,000	1%	\$ 463,960	4%
Media-Mixed			\$ 461,081	9%	\$ 461,081	4%
Media- Cable TV	\$ 305,842	4%			\$ 305,842	2%
Media- Billboards	\$ 146,976	2%			\$ 146,976	1%
Printing	\$ 127,834	2%			\$ 127,834	1%
Media- Newspapers and Other Print	\$ 102,709	1%			\$ 102,709	1%
Media- Internet	\$ 56,163	1%	\$ 88,539	2%	\$ 144,702	1%
Media- Robocalls	\$ 40,505	1%	\$ 10,211	0%	\$ 50,716	0.4%
Signs	\$ 2,035	0%			\$ 2,035	0.02%
Total	\$7,533,030	100%	\$4,967,757		\$12,500,786	100%

Perhaps for strategic purposes, candidates tend to be vague in describing their media buys. Although some independent groups are totally anonymous in their spending, some of those active in recent New Jersey elections have voluntarily disclosed their spending. Ironically, those that do disclose tend to be more specific than candidates in describing their expenditures.

Political consultants say the bulk of media spending tends to be for television.⁹

In its previous white paper on the 2013 legislative campaign, ELEC assumed that 75 percent of unspecified media spending is for television. No candidates or consultants challenged that rationale after the release of the analysis.

Using this assumption, it is estimated that television spending accounted for about 38 percent of candidate media spending and 78 percent of independent media spending. In 2013, candidate spending was 44 percent in television while independents spent 63 percent of all independent media spending. With both candidate and independent television spending combined, the percentage was 54 percent- slightly higher than 51 percent in 2013.

⁹ Page 27, "White Paper No. 26, Legislative Elections 2013: Big Spending, Little Change Plus A History of Self- Financing by Legislators and Others," September 2015.

MASS MEDIA SPENDING

Table 26
Estimated Television Spending by Legislative Candidates and Independent Groups

CATEGORY	CANDIDATES	INDEPENDENT GROUPS	COMBINED
75% of Unspecified Media Spending Assumed to be TV	\$1,680,913	\$ 231,743	\$1,912,657
Media- TV	\$ 896,794	\$3,289,324	\$4,186,117
Media- Cable TV	\$ 305,842	None	\$ 305,842
75% of Media Mixed	None	\$ 345,811	\$ 345,811
Totals	\$2,883,548	\$3,866,878	\$6,750,426
% of Total Media Spending	38%	78%	54%

Combined mass media spending in 2015 was \$12.5 million- a drop from \$21.6 million in 2013, when both legislative houses were contested.

Table 27
Mass Media Spending-Legislative Candidates and Independent Groups Combined

EXPENSE	TOTAL	%
Media- TV	\$ 4,186,117	33%
Mail	\$ 3,368,943	27%
Media- Unspecified	\$ 2,550,209	20%
Media- Radio	\$ 589,662	5%
Media- Production	\$ 463,960	4%
Media-Mixed	\$ 461,081	4%
Media- Cable TV	\$ 305,842	2%
Media- Billboards	\$ 146,976	1%
Printing	\$ 127,834	1%
Media- Newspapers and Other Print	\$ 102,709	1%
Media- Internet	\$ 144,702	1%
Media- Robocalls	\$ 50,716	0.4%
Signs	\$ 2,035	0.02%
Total	\$12,500,786	100%

Because independent groups tended to be more specific in their media descriptions, the amount of unspecified media was the lowest on a percentage basis (20 percent) since 2001.

Table 28
Amount of Unspecified Media Spending
As a Percent of Total Media Spending

	2001	2003	2005	2007	AVERAGE
Unspecified Media	\$2,447,178	\$11,181,893	\$5,309,891	\$12,920,770	
Percent	15%	49%	46%	58%	
	2009	2011	2013	2015	
Unspecified Media	\$1,932,212	\$6,814,855	\$7,443,315	\$2,550,209	
Percent	32%	47%	34%	20%	38%

MASS MEDIA SPENDING

Among other media categories, direct mail stayed relatively steady at 27 percent in 2015. Radio as a percentage of overall media spending actually rose to its highest share- 5 percent- since 2001. Newspapers and outdoor advertising drew relatively little spending.

Reported spending on internet advertising is sparse and likely underestimated because it is often lumped together with other media spending.

One analysis of federal spending found that congressional candidates in 2014 devoted 5.5 percent of their total spending to online media.¹⁰ Applying that figure, internet spending may have reached as much as \$1.2 million in 2015 versus the \$144,702 found in disclosure reports.

Table 29
Other Media Categories
2001-2015

	2001	2003	2005	2007	2009	2011	2013	2015
Direct Mail	\$5,994,869	\$5,962,443	\$3,507,614	\$5,893,596	\$2,905,523	\$3,986,659	\$6,158,651	\$3,368,943
Percent	38%	26%	30%	26%	48%	28%	28%	27%
Radio	\$ 792,621	\$ 671,060	\$ 277,106	\$ 658,997	\$ 179,586	\$ 224,409	\$ 715,511	\$ 589,662
Percent	5%	3%	2%	3%	3%	2%	3%	5%
Newspapers	\$ 449,253	\$ 648,988	\$ 309,548	\$ 143,298	\$ 89,417	\$ 132,487	\$ 105,955	\$ 102,709
Percent	3%	3%	3%	1%	1%	1%	0.50%	1%
Outdoor Advertising	\$ 393,899	\$ 491,143	\$ 639,779	\$ 235,307	\$ 174,194	\$ 324,226	\$ 243,133	\$ 146,976
Percent	2%	2%	5%	1%	3%	2%	1%	1%
Internet	\$ 40,090	NA	NA	\$ 75,655	\$ 150,417	NA	\$ 269,382	\$ 144,702
Percent	NA	NA	NA	0.30%	2%	NA	1%	1%

¹⁰ Russ Chroma, "You're Going to See an Explosion of Online Political Ads in 2016," Mother Jones, June 25, 2015.

NON-MEDIA SPENDING

Most incumbent state legislators avoid serious reelection challenges because most districts are drawn in a way that gives them an edge among voters.

As a result, many legislators don't hesitate to share their campaign funds with other legislators, particularly those in the handful districts of districts that are more competitive.

Even with those transfers, incumbents often have enough leftover funds that they can transfer significant amounts to their next campaigns.

In 2015, \$11.1 million either was contributed by candidates to other candidates (\$7.1 million) or by independent committees to other independent committees (\$4 million). Candidates also earmarked \$3 million for future campaigns.

A total of \$14.1 million was transferred between committees or reserved for future elections. The 42 percent share ties the share in the 2009 election for third highest behind 46 percent in 2011 and 43 percent in 2013.

Table 30
Contributions to Other Candidates and
Committees and Transfers to Future Campaign

	2001	2003	2005	2007	AVERAGE
Political Contributions	\$5,219,286	\$7,392,713	\$5,001,171	\$ 9,485,909	
Transfers to Next Campaign	\$ 478,328	\$1,175,233	NA	\$ 2,105,018	
Total	\$5,697,614	\$8,567,946	\$5,001,171	\$11,590,927	
Percent	20%	20%	24%	28%	
	2009	2011	2013	2015	
Political Contributions	\$4,958,467	\$13,906,135	\$20,243,491	\$11,109,040	
Transfers to Next Campaign	\$2,272,267	\$ 6,431,152	\$ 4,933,748	\$ 3,045,204	
Total	\$7,230,734	\$20,337,287	\$25,177,239	\$14,154,244	
Percent	42%	46%	43%	42%	32%

With just one house running in 2015, it wasn't a surprise that other non-media expenses were down compared to 2013. Even so, as a percentage of total spending, most did not differ much from recent elections.

For instance, fundraising was 3 percent, the same share as in four of the past seven elections.

Table 31
Non-Media Spending- 2001-2015

CATEGORY	2001	2003	2005	2007	2009	2011	2013	2015	AVERAGE
Fundraising	\$811,233	\$767,468	\$541,807	\$1,119,352	\$1,106,917	\$1,738,756	\$1,575,244	\$935,539	
Percent	3%	2%	3%	3%	6%	4%	3%	3%	3.4%
Consulting	\$1,080,974	\$3,309,063	\$1,732,673	\$1,388,125	\$871,210	\$2,370,730	\$1,967,233	\$913,026	
Percent	4%	8%	8%	3%	5%	5%	4%	3%	5%
Polling	\$570,535	\$882,162	\$541,359	\$854,971	\$295,951	\$1,041,827	\$2,243,067	\$1,493,303	
Percent	2%	2%	3%	2%	2%	2%	4%	4%	2.6%
Election Day	\$492,990	\$622,507	\$201,101	\$658,715	\$245,885	\$564,394	\$2,229,452	\$1,395,232	
Percent	2%	1%	1%	2%	1%	1%	4%	4%	2%
Charitable Donations	\$350,328	\$433,778	\$324,368	\$267,030	\$166,184	\$427,461	\$509,670	\$378,020	
Percent	1%	1%	2%	1%	1%	1%	1%	1%	1.1%
Administrative Expenses	\$856,679	\$2,910,023	\$819,081	\$2,633,627	\$843,671	\$2,410,481	\$2,352,280	\$1,500,763	
Percent	3%	7%	4%	6%	5%	5%	4%	5%	4.9%
Refunds	\$680,096	\$637,288	NA	\$859,046	\$178,803	\$164,356	\$251,556	\$89,687	
Percent	2%	2%	NA	2%	1%	0.40%	0.50%	0.30%	1.2%

RECOMMENDATIONS

CURRENT STATE LAW ALLOWS INDEPENDENT GROUPS TO TAKE PART IN STATE AND LOCAL ELECTIONS WITHOUT TELLING THE PUBLIC WHO FUNDS THEM

Nearly \$15 million of the independent spending related to the 2013 governor’s race was done without anyone knowing where a single dollar came from. It was nearly 40 percent of the independent spending that year, and the amount is more than all candidates spent in the 1985 gubernatorial election.

Table 32
Amount of Disclosure by Independent
Groups in 2013 New Jersey State Campaigns

EXTENT OF DONOR DISCLOSURE	TOTAL	%
Contributions/Expenses	\$ 24,088,504	62%
None- Expenses Only	\$ 3,740,234	10%
None- Total Spending Only	\$ 11,000,000	28%
Grand Total	\$ 38,828,738	100%

Candidates, parties and political action committees must disclose all their campaign finances, including contributions.

Yet groups that often have a major stake in the outcome of elections can sidestep the same rules.

New Jersey’s present law fails to reflect more than 40 years of U.S. Supreme Court and lower court rulings that uphold broad disclosure laws.

The U.S. Supreme Court has consistently upheld strong disclosure laws even as it has recently rolled back other restrictions on political spending.

In the landmark case, *Buckley v. Valeo* (1976), the majority agreed transparency in election financing helps stop abuses before they occur:

[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return....In enacting these requirements it (Congress) may have been mindful of Mr. Justice Brandeis’ advice: ‘Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.’¹¹

Watergate lead prosecutor Richard Ben-Veniste said disclosure is a critical tool for discouraging corruption. “How can you tell if there is a quid pro quo for a contribution unless you can tell who it was who gave the money?”¹²

¹¹ *Buckley v. Valeo*, 424 U.S. (1976) at 67.

¹² “Watergate Prosecutor Assesses Campaign Finance Controversy,” Ryan Faughnder, www.neontommy.com, October 28, 2010.

RECOMMENDATIONS

Buckley v. Valeo's disclosure requirement applied only to political communications that are "express advocacy." This means they bluntly urge voters to elect or defeat candidates. These advertisements use the so-called "magic words" such as "vote for" or "vote against."

By 2003, however, the U.S. Supreme Court in *McConnell v. FEC* (2003) recognized that untold millions of dollars of campaign ads escape disclosure rules by applying such a narrow definition. It conceded reality when it admitted that many ads without the "magic words" are election-related.

The majority noted that it was not persuaded:

[T]hat the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad . . . Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley*'s magic-word requirement is functionally meaningless.¹³

The majority further stated:

Not only can advertisers easily evade the (*Buckley* bright) line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.¹⁴

The case contained an intriguing footnote that mentioned testimony by political consultant Douglas Bailey. He said the most powerful political ads often are those that DON'T contain magic words.

Bailey said it is "rarely advisable to use such clumsy words as 'vote for' or 'vote against.' . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat."¹⁵

In a second footnote, the judges cited an example of how issue ads containing none of the "magic words" clearly can have an impact on campaigns. The group sponsoring the ad did so anonymously.

One striking example is an ad that a group called Citizens for Reform sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated: 'Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But her nose was not broken. He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values'. . . The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.¹⁶

¹³ *McConnell v. FEC*, 540 U.S. (2003) at 193.

¹⁴ *Ibid.* at 193 and 194.

¹⁵ *Ibid.* at 194, footnote 77.

¹⁶ *Ibid.* at 194, footnote 78.

RECOMMENDATIONS

Since *Citizens United*, nearly all judges considering the issue have declared that election-related issue-oriented ads are fair game if disclosure rules follow the court’s guidelines for identifying such ads.

“Recounting the series of Supreme Court cases that had upheld disclosure requirements while simultaneously striking down other regulations on campaign speech, the Court (in *Citizens United*) affirmed and reiterated the importance of disclosure requirements- even requirements that apply to issue advocacy- to the government’s interest in informing the electorate.”¹⁷

“Given the Court’s analysis . . . and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.”¹⁸

Prior to *Citizens United*, a majority in *Wisconsin Right to Life v. FEC* (2007) sought to clarify the distinction between advertisements meant only to influence government policy and “sham issue ads” that clearly are aimed at unseating or electing candidates.

“A court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁹

Real issue ads, the justices said, focus on a legislative issue, take a position, urge the public to support that position and urge them to contact public officials. They do not mention elections, candidates, political parties or challengers. Legitimate issue ads, they continued, also take no position on a candidate’s character, qualifications or fitness for office.²⁰

While *Citizens United v. FEC* was most notable for allowing corporations and unions to spend unlimited sums independently, it also was one of the strongest pro-disclosure pronouncements by the high court.

The majority went so far as to declare that even its earlier definition of “functional equivalent of express advocacy” may be too narrow in deciding what types of advertising warrant election-related disclosure.²¹

“...we reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.”²²

In the words of the majority, “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²³

The justice also pointed to prior precedent:²⁴ “Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ ...²⁵ and do not ‘prevent anyone from speaking.’”²⁶

Subsequent rulings by the Supreme Court and lower courts have upheld these principles.

¹⁷ *Human Life of Washington Inc. v. Brumsickle*, 624 F. 3rd U.S. (2010) at 1013.

¹⁸ *Ibid.* at 1016.

¹⁹ *Wisconsin Right to Life v. FEC*, 551 U.S. (2007) at 469-470.

²⁰ *Ibid.*

²¹ *Citizens United v. FEC*, 558 U.S. (2010) at 368.

²² *Ibid.*

²³ *Citizens United v. FEC*, 558 U.S. (2010) at 371.

²⁴ *Citizens United v. FEC*, 558 U.S. (2010) at 366.

²⁵ *Buckley v. Valeo*, 424 U.S. (1976) at 64.

²⁶ *McConnell v. FEC*, 540 U.S. 93 (2002) at 201 (internal quotation marks and brackets omitted).

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In fact, the high court on June 28, 2016 agreed that even 501c3 charitable organizations, which are not supposed to engage in electioneering, would be subject to disclosure rules if they did cross that line.

The court let stand a ruling by the Third Circuit Court of Appeals, which upheld Delaware's disclosure related to "third party advertisements" in *Delaware Strong Families v. Matthew Denn, Attorney General of Delaware*²⁷.

This case is even more relevant now because President Donald Trump has called for repeal of the so-called Johnson Amendment, which was approved by President Dwight Eisenhower in 1954 and forbids 501c3 charities from taking part in elections.

Facing opposition even from many charities and others, Congress dropped a repeal amendment from the federal tax reform bill in December 2017 and again from a federal budget bill in March 2018. But it conceivably could surface in future legislation.

"The spending power of such groups would explode exponentially if any entity that calls itself a 'church' could scoop up tax-deductible dollars and spend it on politics."²⁸

Some are concerned that even without legislative action, charities, which also do not disclose their contributors, are less likely to face sanctions by the IRS even if they become more politically active.

INDEPENDENT SPENDING, MUCH OF IT UNDISCLOSED, IS GROWING RAPIDLY BOTH NATIONALLY AND IN NEW JERSEY

Information from the Center for Responsive Politics, which tracks federal campaign spending, shows independent spending has risen drastically since 2000. Most striking is the growth in undisclosed independent spending.

In the four election years between 2000 and 2006, independent spending totaled \$342 million. About \$26.3 million or 8 percent, was undisclosed.

Between 2008 and 2016, independent spending totaled \$3.6 billion. The amount of secret money was \$914 million- 25 percent of all independent spending, or 36 times the amount during the previous period.

²⁷ *Delaware Strong Families v. Denn*, 136 S. Ct. 2376 (2016)

²⁸ Eliza Newlin Carney, "The Move to Politicize Churches is Back, and Conservatives Should Be Outraged," *American Prospect*, March 8, 2018.

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Table 33
Independent Spending in Federal Elections
Total and Undisclosed

PERIOD	ALL	NO DONOR DISCLOSURE	% UNDISCLOSED
2000	\$ 51,638,411	\$ 11,210,000	22%
2002	\$ 27,686,417	\$ 4,070,000	15%
2004	\$ 193,129,472	\$ 5,880,000	3%
2006	\$ 69,565,098	\$ 5,170,000	7%
2008	\$ 338,441,092	\$102,430,000	30%
2010	\$ 309,834,190	\$138,700,000	45%
2012	\$1,038,747,447	\$311,310,000	30%
2014	\$ 566,210,599	\$177,750,000	31%
2016	\$1,397,465,613	\$183,480,000	13%
2000-2007	\$ 342,019,398	\$ 26,330,000	8%
2008-2016	\$3,650,698,941	\$913,670,000	25%
2000-2016	\$3,992,718,339	\$940,000,000	24%

Source: Center for Responsive Politics accessed 8/11/2017

The explosion of independent spending occurred primarily due to three developments. The so-called McCain-Feingold bill of 2002 prohibited national parties from accepting unlimited contributions (so-called soft money), prompting donors to spend more money independently of parties and candidates. U.S. Supreme Court decisions in 2007 and 2010 led to increased independent spending by political non-profit groups, corporations and unions.

As a result, large blocks of secret money now influence elections each year. For instance, in the 2016 election:

- 45Committee, a 501c4 non-profit group that discloses its donors only to the IRS, spent \$21.3 million on the 2016 election.²⁹ It supported President Donald Trump.
- Conservative Solutions Project, a similar group, spent \$22 million promoting Sen. Marco Rubio in the GOP primary.³⁰ One unknown source alone wrote a \$13.5 million check.³¹
- Non-profit groups that mainly supported Democrats also spent considerable sums without disclosing their donors, including the Environmental Defense Fund (\$4.3 million) and League of Conservation Voters (\$4.2 million).

It is encouraging that the annual total of anonymous spending in the 2016 presidential election year was lower than in 2012 (\$183 million versus \$311 million) and the lowest on a percentage basis since 2006 (13 percent in 2016 versus 7 percent in 2006).

But these totals understate the extent of undisclosed fundraising in American elections.

²⁹ “Two (at most) Secret Donors Funded 93% of Pro-Rubio Nonprofit,” Robert Maguire, Center for Responsive Politics, May 3, 2017.

³⁰ Ibid.

³¹ “Rubio Says Identity of Person Who Gave \$13.5 Million to Group Supporting Him is ‘Irrelevant’” Alex Leary, Tampa Bay Times, June 1, 2016.

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It does not include millions paid to Super PACs, which do disclose, by 501(c) non-profit groups, which do not. It does not include millions more contributed by limited liability corporations, which also do not reveal names of contributors.

It also omits hundreds of millions of dollars more in undisclosed spending in state and local elections.

For instance, a record \$75.8 million was spent by 65 outside special interest groups in state recall races held in Wisconsin in 2011 and 2012. Of that amount, \$49 million- or 64 percent- was undisclosed. Only \$1.1 million was fully disclosed.³²

INDEPENDENT SPENDING BY SPECIAL INTEREST GROUPS HAS GROWN RAPIDLY IN NEW JERSEY DURING THE PAST DECADE. YET, STATE LAW DOES NOT REQUIRE THEM TO DISCLOSE THEIR CONTRIBUTIONS.

Spending by independent special interest committees has exploded in New Jersey during the last decade. Including the 2017 primary and general elections, independent groups have spent \$112 million on gubernatorial and/or legislative elections since 2007. That represents 93 percent of all independent spending since 1977.

How much has the influence of these groups swollen? In the six statewide elections between 1997 and 2007, independent groups spent \$7.5 million while the so-call “Big Six” committees- the two state parties and four leadership committees- spent \$152 million.

In the five elections since 2007, independent groups have spent \$112 million while the Big Six spent \$65 million. Independent spending has increased more than ten-fold while Big Six spending decreased by two-thirds.

Table 34
Independent Committee Spending Versus
Big Six Spending in Gubernatorial and/or Legislative Elections

PERIOD	INDEPENDENT SPENDING	CHANGE	BIG SIX* SPENDING	CHANGE
1997-2008 (6 Elections)	\$ 7,477,455		\$152,092,332	
2009-2017 (5 Elections)	\$111,752,606	1,395%	\$ 65,204,435	-57%

*Two state parties and four legislative leadership committees.

Campaign attacks financed by cloaked contributions have not been as prevalent in New Jersey as in they have been elsewhere because some groups have voluntarily disclosed their contributions. But there is a real risk for future elections because there is no guarantee this trend will continue.

Under current state law, most³³ of the \$120 million in independent spending since 1977 could have been done anonymously.

³² “Smear Groups Raised \$49 Million from Secret Sources,” Wisconsin Democracy Project, September 17, 2012.

³³ Pre-election fundraising committees formed by prospective gubernatorial candidates, which technically are independent of their candidate committees, are required under a 2001 law to disclose their contributions if the candidates actually run. About \$10.3 million has been disclosed as a result.

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Groups that now independently spend millions of dollars in New Jersey races and currently disclose their donors could stop at any time. With a flick of the switch, they could turn out the lights on their contributions.

SECRET POLITICAL MONEY ENCOURAGES BAD BEHAVIOR

Some might wonder- what's wrong with secret money in politics?

"Secrecy in campaign finance is a precursor to scandal," said Meredith McGehee of the Campaign Legal Center.³⁴

In a healthy democracy, one way elected, and appointed government officials are held accountable is for citizens to know who is "pulling their strings," particularly through use of financial inducements like campaign contributions, gifts or even "independent" spending on their behalf. "...information is a predicate of wise self-government."³⁵

Few citizens today realize federal and state campaign finance disclosure laws exist primarily because of the Watergate scandal of the 1970s, which was largely about secret money in politics. It had an enormous impact because it led to the resignation of President Richard Nixon.

Chris Dolan, a political science professor at Lebanon Valley College in Pennsylvania, said: "Watergate was basically a campaign finance scandal."³⁶

The most memorable event was the June 17, 1972 break-in of the Democratic National Committee by five men, three of whom were associated with Nixon and his reelection campaign. Among the items on them were 53 new \$100 bills. The money was laundered through several sources, including a Mexican bank account, but came from people associated with Nixon's fundraising committee.³⁷ Another \$25,000 in contributions made their way into the bank account of another one of the so-called "plumbers."³⁸

It turned out the break-in was just the side-show.

After Watergate, 20 corporations were criminally convicted for illegal campaign-finance activities. The hotel break-in itself was financed with secret campaign contributions. Consider, ITT pledged \$400,000 to help finance the 1972 Republican convention, and the Justice Department quickly settled an antitrust case in ITT's favor. Nixon himself intervened in the case. The dairy industry gave \$2 million to the Nixon campaign and soon got the increase in dairy price supports they were seeking. Nixon overrode his Agriculture Department's objection to put these supports in place. Ambassadorships were sold at six-figure prices. Herbert Kalmbach, Nixon's attorney and a major campaign fundraiser, ultimately went to jail for selling an ambassadorship.³⁹

³⁴ July 17, 2012.

³⁵ David Von Drehle, "Could We Be Wrong?," Washington Post, December 26, 2017.

³⁶ John Blake, "Forgetting a Key Lesson from Watergate?," CNN, February 2, 2012.

³⁷ P. 110 and 111, "Who Shakes the Money Tree: American Campaign Financing Practices from 1789 to the Present," George Thayer.

³⁸ "Remembering CREEP, and the High Price of Easy Money," Robert Maguire, Center for Responsive Politics, March 11, 2013.

³⁹ "Citizens United: Watergate Redux," Fred Wertheimer, president of Democracy 21, June 14, 2012.

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Under court order, the administration eventually disclosed that about \$11 million in contributions should have been reported under a new federal law enacted in 1971.

“If these revelations, and the public reaction to them, proved anything, it was that good, enforceable disclosure laws, such as those passed in 1971, would work,” said Bradley Smith, a former Republican Federal Election Commission member who is a critic of many campaign finance restrictions due to concerns about infringement on free speech rights. “Once Nixon’s campaign finances and expenditures were revealed, public reaction was harsh, and undoubtedly contributed to the electoral pasting the Republicans suffered in the 1974 congressional elections.”⁴⁰

In *Citizens United*, the majority declared that independent spending, unlike direct contributions to candidates, does not have the potential to corrupt. While some critics have criticized this view as naïve, it is the current law of the land.

Even if the 5-4 majority in *Citizens United* refused to use avoidance of corruption as a rationale for disclosure in the case of independent spending, it cited (in *Citizens United* and *McCutcheon v. FEC*) other strong reasons in defending the right of voters to know where independent committees get their funds.

These include enabling voters to judge the credibility of political messages and minimizing the potential for abuse of the campaign finance system without imposing an undue burden on free speech rights.

Disclosure is important because “listeners are entitled to know by whom they are being persuaded.”⁴¹

“It is important for voters to know who is paying for the ads bombarding them because voters will find some sources more ‘trustworthy’ than others. Viewers have different views about the reliability of an ad depending on who paid for it. Ads about cigarette taxes are likely to be seen as more or less reliable if one knows tobacco companies or anti-smoking groups paid for them.”⁴²

Even an erudite skeptic of campaign finance regulation such as Bradley Smith has grudgingly acknowledged:

a simple and legitimate, though hardly flattering, reason for favoring disclosure. It is that we, as voters, are lazy. Keeping up on the activities of particular legislators- particularly in the modern era when government has its hands into so many activities- is hard, time-consuming work. Knowing the sources of a candidate’s campaign funds provides us with a shorthand method for estimating a candidate’s probable stand on a variety of issues....Contributions, in short, are a bit like endorsements.⁴³

While Smith was talking only about disclosure of contributions, not the source of independent spending, the same logic seems to apply.

Unfortunately, federal and state laws have lagged far behind pro-disclosure federal court rulings.

For instance, *Buckley v. Valeo* made it clear that independent committees that directly try to elect or defeat candidates can be made to disclose their contributions. Yet, in the more than four decades since the ruling, New Jersey lawmakers have yet to mandate such disclosure.

⁴⁰ Bradley Smith, “Unfree Speech- The Folly of Campaign Finance Reform,” Page 32, 2001.

⁴¹ Meredith McGehee, “Listeners Are Entitled to Know by Whom They Are Being Persuaded,” Campaign Legal Center, January 14, 2014.

⁴² Ibid.

⁴³ Bradley Smith, “Unfree Speech- The Folly of Campaign Finance Reform,” Page 224, 2001.

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More recently, Congress, in 2002 legislation repeatedly upheld by the Supreme Court, also allowed states to require disclosure of contributions that finance issue-oriented ads called electioneering ads that do not explicitly urge voters to elect or defeat candidates. Again, New Jersey has yet to adopt a law that allows such disclosure though both parties have introduced legislation enabling it.

Citizens are entitled to know the origin of election money because it might influence their votes. They shouldn't be victims of "false advertising."

In the words of former Texas State Ethics Commissioner Chase Untermeyer: "Disclosure...is truly the only protection that voters have when it comes to weighing candidates. They may be inclined to support somebody or disinclined to support somebody based upon what contribution they accept. Or it may make no difference. But the key is that the information be available to the voter."⁴⁴

Disclosure by independent groups is especially critical because they historically tend to run nastier, more personal attacks on candidates.

Candidates are at least somewhat inclined to avoid the extremes, and may pay a price if their ads are overly harsh and negative. Special interest groups and Super PACs are less likely to feel these constraints...candidates are 'grateful' when independent groups take on the burden of running the negative ads, because it enables them to appear to be 'above the fray.'⁴⁵

Some are especially concerned that about the growing potential for abuse of 501(c) non-profit groups, which confidentially disclose contributions larger than \$5,000 only to the Internal Revenue Service.

Four years before allegations arose that Russian operatives might be trying to influence the 2016 presidential election, Fred Wertheimer, president of Democracy 21, made the following point in testimony before Congress:

Contributions to 501(c) groups can come from corporations, labor unions, individuals and other entities. They also can come from foreign entities. Absent effective disclosure requirements, it is exceedingly difficult to monitor and determine if foreign money is being illegally used by any of these groups to pay for expenditures to influence federal elections.⁴⁶

More recently, concerns arose over Wanhua Chemical, a \$10 billion enterprise controlled by the Chinese government, joining the American Chemical Council, a 501c6 non-profit that does not disclose the source of its contributions.⁴⁷

"I'm sure ACC will claim that any foreign funds it receives will be segregated from money used for elections, but how will we know?" asks Brendan Fischer, a campaign finance counsel with the Campaign Legal

⁴⁴ Jay Root and Ryan Murphy, "Does Business Group's Use of "Dark Money" for Its Political Action Committee Follow State Ethics Rule?", Texas Tribune, January 29, 2018.

⁴⁵ Michael W. McConnell, "In Defense of *Citizens United*," Yale Law Journal, Vol. 123, No. 2013, March 29, 2013, 31.

⁴⁶ Fred Wertheimer, President of Democracy 21, in testimony before Senate Rules Committee on the DISCLOSE Act of 2012, March 29, 2012.

⁴⁷ Lee Fang, "Chinese State-Owned Chemical Firm Joins Dark Money Group Pouring Cash into US Elections," The Intercept, February 15, 2018.

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Center, which advocates for stricter enforcement of campaign finance law. “And in any case, money is fungible, so the influx of Wanhua funds could free up other ACC resources for political activity.”⁴⁸

The Federal Election Commission (FEC) recently disclosed that it has launched a preliminary investigation into whether Russian entities gave illegal contributions to the National Rifle Association to influence the 2016 campaign.⁴⁹

Congress has asked the FEC to prepare a report on illegal foreign political contributions in elections and how it can prevent such abuses.⁵⁰

Another reason for full disclosure by independent groups is that they tend to have special leverage since they usually concentrate their efforts on key congressional and legislative elections.

Dark money, like Super PAC and other ‘outside’ spending by groups other than candidates and parties, tends to cluster in a handful of the most competitive races....in those races where dark money is spent, it can be a big factor. For example, ‘undisclosed donors provided nearly half of the more than \$20 million in outside campaign spending,’ in the three hotly contested 2017 special elections for U. S. House seats in Georgia, Montana and South Carolina, according to an analysis by Bloomberg BNA.⁵¹

⁴⁸ Ibid.

⁴⁹ Josh Meyer, “FEC Probes Whether NRA Got Illegal Russian Donations,” Politico, March 16, 2018.

⁵⁰ Megan Wilson, “Congress to Require FEC Report on Foreign Money in Elections,” The Hill, March 22, 2018.

⁵¹ Brendan Fischer, “Dark Money Matters,” Campaign Legal Center, June 12, 2017.

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ELEC RECOMMENDATIONS

ELEC has put forth recommendations that would shut the loophole that allows independent campaign spenders to withhold contributor lists from voters.

With the adoption of the 2010 Annual Report in April 2010, the Election Law Enforcement Commission, in a unanimous, bipartisan action, agreed to urge the Legislature to expand disclosure requirements for independent groups.

At the time, Super PACs didn't even exist.

In 2012, Executive Director Jeff Brindle outlined key elements of reform legislation and presented it to members of both political parties. He also has written several columns to try to build support for the legislative changes.

Both parties have introduced bills incorporating most of ELEC's recommendations. Assembly Minority Leader Jon Bramnick (R-21) introduced legislation (now entitled A-1957) in April 2016 while then-Assemblyman Troy Singleton (D-7)- now a state Senator- introduced two bills (now entitled S-1479 and S-1500) in June 2016. Assemblyman Andrew Zwicker (D-16) has introduced a companion bill (A-1524) in the Assembly.

Currently, groups or individuals that independently spend more than \$1,600 in New Jersey to explicitly urge voters to elect or defeat candidates must report only expenses to ELEC.

Under ELEC's proposal, independent expenditure-only committees similar to federal Super PACs or New Jersey political committees that support or oppose ballot questions would file reports detailing expenses and contributions 29 days and 11 days before elections, and 20 days afterward- just like candidates and political committees.

Independent expenditures would be defined as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate, or the functional equivalent thereof, because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party or a challenger to a candidate, or takes a position on a candidate's character, qualifications or fitness for office.

ELEC has further suggested that the Legislature expand the definition of independent expenditures to include electioneering-type ads in addition to express advocacy advertising.

Electioneering communications would be defined as all communications made beginning January 1 of a calendar year of a primary, general, May municipal, run-off, school board, or fire district election.

Electioneering disclosure requirements would apply to any communication that:
has at least a value of \$10,000 and refers to a clearly identified candidate for office and that promotes or supports a candidate for that office or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate, including communications published in any newspaper or periodical or broadcast on radio or television or over the Internet or any public address system; placed on any billboards, outdoor facilities, buttons, or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers or other circulars; or contained in any direct mailing, robotic phone calls or mass-emails.

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The intent would be to require all 527 or 501(c) non-profit groups that report to the IRS, and all Super PACs that now report only to the Federal Election Commission to disclose to voters their spending related to state, county or local campaigns in New Jersey, and how they raised those funds.

An ELEC survey has found, along with the federal government, at least 23 states, including neighbors like Delaware, Pennsylvania, New York, Maryland and Rhode Island, have laws requiring disclosure by funders of electioneering ads.

There would be no contribution or spending limits on the committees spending independently. They would have to divulge all contributions larger than \$5,000.

The contribution disclosure threshold would be set considerably higher than the \$300 threshold for candidates and committees to try to minimize the reporting burden on membership groups such as the Sierra Club or the Chamber of Commerce. The disclosure rules would not apply to advertising done within such groups to their members.

**Table 35
Current Disclosure Requirements for
Independent Spending Groups Versus Proposed Requirements**

CURRENT	PROPOSED
Independent Spenders that Spend More than \$1,600 Must Disclose <u>Expenditures</u> Before the Election If They Explicitly Urge a Candidate’s Election or Defeat.	Independent Spenders that Spend More than \$1,600 Must Disclose <u>Contributions</u> and <u>Expenditures</u> Before the Election If They Explicitly Urge a Candidate’s Election or Defeat or The Functional Equivalency Thereof.
Most Independent Spenders Who Run Issue-Style Communications, also called Electioneering Ads, About Candidates Do Not Have to Disclose Before the Election.*	Independent Spenders Who Run Issue-Style Communications costing \$10,000 or More About Candidates Would Have to Disclose Before the Election their <u>Contributions</u> and <u>Expenditures</u> for Ads Run After January 1. Applies to Communications by Network or Cable Television, Radio, Internet, Direct Mail, Other Printed Literature, Telephone and Billboards.
No Contribution Disclosure by Independent Spenders Unless They Voluntarily Register as a Political Committee or Continuing Political Committee.	Contributions of \$5,000 or More Must be Disclosed by Independent Spenders.

*Some disclosure has been done through grassroots lobbying reports filed in February after the election. Gubernatorial candidates who have promoted themselves using political non-profit groups prior to a primary election also are required to disclose donors and expenses.

THE ARGUMENT AGAINST DISCLOSURE- AND A RESPONSE

For those who want to finance campaigns in secret, a wise guy might say: “so move to North Korea.”

But objections to disclosure rules cannot be so easily dismissed. For one thing, even though the U.S. Supreme Court has strongly endorsed disclosure of campaign contributions and spending for more than 40

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years, well-financed legal challenges persist that are trying to overturn transparency laws or block their expansion.⁵²

While the courts generally have rejected such challenges, opponents of disclosure have found legislative and even judicial support recently in states like Arizona and Wisconsin. Both have passed laws making it easier to hide sources of money in campaigns.

Opponents of disclosure cannot be lightly dismissed because they raise serious issues that warrant reflection.

A chief argument is that disclosure can lead to harassment and retaliation, either from government officials or the general public. Such intimidation, opponents contend, stifles speech about elections. Plus, the frequency and intensity of such backlash has grown sharply in the social media era. Critics also insist that the ease with which people can access electronically filed disclosure reports also has made a difference.

Democratic election lawyer Bob Bauer said the only way to achieve a “bipartisan accord about strengthened, modernized transparency” is by “taking serious steps to answer the growing concerns of donors about their exposure to invasion of privacy, public Internet shaming, or more directly reprisal. These are real concerns in this day and age, and cannot simply be dismissed as sham explanations given to fend off legitimate public disclosure. Practitioners in the field of political law are now regularly asked about the availability of protections against disclosure.”⁵³

Disturbing examples were provided during court proceedings in *Americans for Prosperity Foundation v. Kamala Harris*. The foundation’s chairman is David Koch, a billionaire industrialist who, along with brother Charles Koch, has been vilified by critics for their political activism.

The foundation is a 501(c3) charity that is not permitted to participate in elections. Foundation officials went to court after the California attorney general in 2013 demanded to see the donor list it files with the IRS.

During a trial in February 2016, Arthur Pope, a contributor to the foundation whose support became public, explained why such contributions should be made anonymously.

“It’s caused my family great concern for their safety, my safety. It’s led to a threat of assassination about me. It’s led to boycotts of my business,” he testified.⁵⁴

In the same case, a lawyer for Koch Industries provided a tweet stating: “I say we kill the Koch brothers and their entire family line.”⁵⁵

U. S. Supreme Court Justice Clarence Thomas pointed to similar examples when he was the lone judge to speak out against the strong pro-disclosure provisions in *Citizens United v. FEC* (2010).

“The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens’ exercise of their First Amendment rights,” Thomas said.⁵⁶

⁵² Latesha Beachem, “Kochs Key Among Small Group Quietly Funded Legal Assault on Campaign Finance Regulations,” Center for Public Integrity, November 15, 2017.

⁵³ Bob Bauer, “The Transparency-Privacy Trade-Off (or Bargain)” www.moresoftmoneyhardlaw.com, September 13, 2016.

⁵⁴ Bonnie Eslinger, “Koch Brothers Group Donor Testifies He Got Death Threats,” Law360, February 25, 2016.

⁵⁵ John Dunbar, “Koch Brothers Plight Likened to that of Civil Rights Workers in the 1950s,” Center for Public Integrity, July 5, 2016.

⁵⁶ *Citizens United v. FEC* (2010).

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He cited a New York Times story that a group was planning to send “warning” letters to about 10,000 large Republican donors. “...the newly formed nonprofit group, Accountable America, is planning to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions.”⁵⁷

“These examples of retaliation sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements,” said Thomas.⁵⁸

Another case often cited by disclosure opponents was a boycott faced by retailing giant Target in 2010 after it contributed \$150,000 to a political action committee supporting Tom Emmer. He was a conservative gubernatorial candidate in Minnesota who opposed same sex marriages and abortion. Target officials insisted they made the contribution because they supported Emmer’s economic policy positions.⁵⁹ Author Eric Wang notes that MoveOn.org, “an organization comprised in large part of a 501c4 ‘dark money’ arm that is not required to disclose its own donors ... hypocritically led the boycott.”⁶⁰

Legal briefs filed by anti-disclosure groups typically cite cases where the U.S. Supreme Court allowed persecuted groups, including the NAACP and the Socialist Workers Party, to conceal their lists of supporters.

These arguments were enough for U.S. District Court Judge Manuel Real in *Americans for Prosperity Foundation v. Kamala Harris* to declare April 21, 2016 that the foundation did not have to submit its donor list to California’s attorney general.

“Although the Attorney General correctly points out that such abuses are not as violent or pervasive as those encountered in *NAACP v. Alabama (1958)* or other cases in that era, this Court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members,” he said.

The harassment examples cited above are reprehensible. Some might even warrant a call to law enforcement officials. In a civil society, political contributors on either side of the spectrum should not be viciously persecuted for their beliefs.

Fortunately, most aren’t.

Professor Richard Hasen contends anti-regulation groups are exaggerating the extent of serious harassment in an attempt to abandon long-standing disclosure laws and to block new ones.

“...even in the Internet age...there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak,” he said.⁶¹

While the courts should always be ready to grant exemptions where persecution is extreme, “major players in the electoral process generally should not be able to shield their identities under a pre-textual appeal to the prevention of ‘harassment’ because of the important government interests in preventing corruption and providing valuable information to voters which are furthered by mandated disclosure.”⁶²

⁵⁷ Michael Luo, “Group Plans Campaign Against GOP Donors,” New York Times, August 7, 2008.

⁵⁸ *Citizens United v. FEC* (2010).

⁵⁹ Eric Wang, “Staring at the Sun: An Inquiry into Compulsory Campaign Finance Donor Disclosure Laws,” Cato Institute, December 14, 2017.

⁶⁰ Ibid.

⁶¹ Richard Hasen, “Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age,” University of California, Irvine School of Law, October 24, 2011.

⁶² Ibid.

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A study of state contribution data released in 2015 found that “the speech-chilling effects of disclosure are negligible...In short, the argument that disclosure aggressively chills free speech is not supported by our data.”⁶³

Lawrence Noble, general counsel for the Campaign Legal Center and former general counsel of the Federal Election Commission, said there is a big distinction between what happened to NAACP members and today’s incidents of harassment. “What happened in the NAACP case is very, very different. People were being shot at, being killed, offices being destroyed.”⁶⁴

Members of the Socialist Workers Party lost jobs, faced police harassment, property damage, threats and were the subject of a massive investigation by the FBI. At one point, the federal agency had 300 informants within the group and amassed 8 million documents about it.⁶⁵

Some deregulation proponents have proposed that ALL political contributions be anonymous.

Two scholars in 1997 proposed contributors should send checks to blind trusts operating on behalf of their favored candidates.⁶⁶

“Mandating anonymous donations- through a system of blind trusts- would make it harder for candidates to sell access or influence, because they would never know that the donor had paid the price.”⁶⁷

They noted that small donors already are effectively anonymous since most states have disclosure thresholds. In New Jersey, candidates are not required to list names and other details for those making contributions \$300 or less. Under ELEC’s legislative proposal, independent spenders would disclose contributions larger than \$5,000.

More recently, others envision a “federally chartered clearinghouse” to collect contributions and conceal their source.

“Imagine the confusion on Capitol Hill. Members of Congress wouldn’t know exactly whom to reward with special carve-outs. Union leaders might say they’re big supporters of certain candidates, but who could know for sure.”⁶⁸

Author Eric Wang argues that, particularly in relation to independent spenders, “the Court’s disclosure jurisprudence is hardly a model of coherence...and proponents of disclosure should be wary of putting too much stock in it.”⁶⁹

He recommends full disclosure of independent expenditures but limited disclosure of donor information for independent groups.⁷⁰

Disclosure advocates counter that donors will always figure out a way for candidates to know they supported them. Otherwise, they won’t be beholden. “It’s not as if the contributions are actually secret. The

⁶³ Abby K. Wood and Douglas M. Spencer, “In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns,” USC Gould School of Law, October 8, 2015.

⁶⁴ John Dunbar, “Koch Brothers Plight Likened to that of Civil Rights Workers in the 1950s,” Center for Public Integrity, July 5, 2016.

⁶⁵ Footnote 17, Richard Hasen, “Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age,” University of California, Irvine School of Law, October 24, 2011.

⁶⁶ Ian Ayres and Jeremy Bulow, “The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence,” September 17, 1997.

⁶⁷ Ibid.

⁶⁸ Marc Geoffrey and R.R. Reno, “Anonymity: A Secret Fix for Campaign Finance,” Washington Post, March 20, 2010.

⁶⁹ Eric Wang, “Staring at the Sun: An Inquiry into Compulsory Campaign Finance Donor Disclosure Laws,” Cato Institute, December 14, 2017.

⁷⁰ Ibid.

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donors know where it came from, the groups who got the money know, and the members will know. The only people who won't know are the American people.”⁷¹

In *Doe v. Reed* (2010), the late Supreme Court Justice Antonin Scalia, a Trenton, NJ native, forcefully argued against anonymity for those who participate in elections.

There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.⁷²

Ironically, some groups fighting to conceal political contributions would use the cloak of anonymity to turn around and sponsor vicious, even false, attacks on candidates. Aren't free speech rights of candidates being compromised if they must spend weeks or months trying to dispel baseless charges?

In his minority dissent in *McIntyre v. Ohio Elections Commission* (1995), which struck down an Ohio law that prohibited anonymous political or campaign literature, Scalia warned that it would lead to a “coarsening of the future.”⁷³

He noted: “...a person who is required to put his name to a document is much less likely to lie than one who can lie anonymously.” An anonymous attack “facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity,” he said.⁷⁴

In commenting on what Scalia termed the “right-to-speak-incognito,” a Trenton Times editorial on the *McIntyre* case raised issues that resonate today.

“Justice John Paul Stevens wrote for the majority. ‘Anonymity is a shield from the tyranny of the majority.’ Unfortunately, anonymity can also be a shield for recklessness and falsehood. It can be a shield from responsibility under libel law...,” said the editorial.⁷⁵ It also predicted the spread of hate speech.⁷⁶

It isn't a coincidence that some of the most noxious ads are done anonymously.

Anonymous, racially offensive political mailers aimed at Asian candidates in Edison and Hoboken were widely denounced during the 2017 fall elections. While stronger disclosure rules might not stop all such character attacks by people who ignore the law, they may give others pause. Interestingly, all three candidates targeted by the racist flyers won election.

As for corporate boycotts like the one involving the Target political contribution in 2010, a ban on such disclosure would hardly have insulated the company from public backlash. After Target disclosed that hackers in 2013 stole personal information on about 70 million customers, the company agreed to pay \$10

⁷¹ David Sarasohn, “Shh! Its Only Money. In Political Funding, the Emperor has No Disclose,” *The Oregonian*, November 24, 2010.

⁷² *Doe v. Reed* (2010).

⁷³ *McIntyre v. Ohio Elections Commission* (1995).

⁷⁴ *Ibid.*

⁷⁵ “High Court OK's Anonymous Speech,” Trenton Times editorial, April 30, 1995.

⁷⁶ *Ibid.*

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million to settle a class action lawsuit.⁷⁷ A second boycott in 2016 triggered by a blog post about use of bathrooms by transgender customers cost millions more.⁷⁸

In the California case involving the Koch brothers and others involving groups like NAACP, the courts can always intercede to restrict disclosure where they deem it necessary. In fact, in California, considered a notoriously liberal state by conservative critics, the courts so far have held in favor of the Koch brothers.

It is true, as disclosure opponents often note, that the 85 essays known as the Federalist Papers were distributed anonymously (though it eventually became clear they were written by James Madison, John Jay and Alexander Hamilton). It is also true that 56 members of Congress openly signed the Declaration of Independence.

Finally, a compelling reason for disclosure of contributions to independent groups is that they are just another form of 1990s “soft money” contributions that the Republican and Democratic National Committees routinely disclosed regardless of the amount.

There was little hue and cry about disclosure when wealthy donors would cut hefty checks to the national parties before the McCain-Feingold law outlawed unlimited “soft money” contributions to them after the 2002 federal elections.

Independent spending in elections, though sometimes a factor in campaigns even in the 1970s and 1980s, didn’t truly soar until after the soft money ban took effect.

Those who make large contributions in states like Pennsylvania and Virginia without contribution limits, but full disclosure requirements, show the courage of their convictions without protection from potential backlash that some insist is warranted for independent spenders.

For instance, when three executives at Susquehanna International Group in 2010 gave unsuccessful gubernatorial candidate Anthony Williams a combined \$5.4 million, the then-record contribution prompted big headlines and even an editorial scolding the candidate for late disclosure of the contributions. It didn’t lead to public crucifixion of the donors, who are advocates of school choice.

Some conflict is inevitable in a free society. Especially when it comes to politics.

In the words of the late Justice Scalia: “In life, people will disagree, sometimes passionately. And the way to resolve those disagreements is through ‘uninhibited, robust and wide-open’ debate. This give-and-take is central to the First Amendment, not a threat to it.”⁷⁹

Like the late Supreme Court judge, ELEC believes if someone is going to throw a punch, they should show their face.

⁷⁷ Miles Parks, “Target Offers \$10 Million Settlement in Data Breach Lawsuit,” National Public Radio, March 19, 2015.

⁷⁸ Hayley Peterson, “Target Boycott Cost More Than Anyone Expected- And the CEO was Blindsided,” Business Insider, April 6, 2017.

⁷⁹ Brian Levy, “Who Wants to Know-And Why? The Supreme Court’s Secret Purposivist Test for Exemptions from Association Membership Disclosure Laws,” New York University Law Review, 2012.

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