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December 18, 2017

The Honorable Mac Warner
Secretary of State
West Virginia State Capitol
Building 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

Re: Response to Attorney General Morrisey's Advisory Opinion concerning the constitutionality of West Virginia Code § 3-8-12

Dear Secretary Warner:

On behalf of the Brennan Center for Justice at NYU School of Law, we write to address Attorney General Morrisey's October 17, 2017 Official Advisory Opinion regarding the constitutionality of West Virginia Code § 3-8-12.[1] At a time when the Supreme Court has invalidated other important campaign finance rules, strong transparency requirements for electoral communications are vital to protecting the integrity of government in West Virginia and across the nation. Indeed, the Supreme Court itself made this point while striking down other campaign finance rules in its well-known *Citizens United* ruling.[2] Courts have consistently upheld the constitutionality of such rules, and any implication to the contrary by the Attorney General is unfounded. We also respectfully disagree with the Attorney General's conclusion that § 3-8-12(a) in particular is unconstitutionally overbroad. While the First Amendment might require limited exceptions, the law can and should be fully enforced in most circumstances.

With the 2018 election cycle about to begin, it is essential that candidates and voters in West Virginia have confidence that you will fulfill your responsibility to ensure that political campaigns are waged transparently in accordance with the requirements set forth by the legislature. We therefore urge you to make clear to the public that you will continue to fully enforce all state disclosure and disclaimer rules with respect to candidates, political parties, and other groups that engage in electoral spending.

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[1] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The opinions expressed in this letter are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law.

[2] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010).

(1) *Background*

Your office asked the Attorney General to assess "whether prohibiting any anonymous campaign literature in West Virginia violates the First Amendment, thus rendering W. Va. Code § 3-8-12(a) unconstitutional."[3] The Attorney General analyzed the question presented as "whether § 3-8-12(a)'s prohibition on anonymous leaflets violates the First Amendment."[4] Relying on the Supreme Court's decision in *McIntyre v. Ohio Elections Commission*,[5] the Attorney General concluded that § 3-8-12(a) was unconstitutionally "overbroad" and therefore unenforceable with respect to these materials.[6]

Section 3-8-12(a) provides:

> A person may not publish, issue or circulate, or cause to be published, issued or circulated, any anonymous letter, circular, placard, radio or television advertisement or other publication supporting or aiding the election or defeat of a clearly identified candidate.[7]

Section 3-8-12(a) is one of several electoral transparency rules in the West Virginia Code. For example, West Virginia Code § 3-8-2(e) requires that "independent expenditures" containing express electoral advocacy "clearly identif[y] the person making the expenditure."[8]

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[3] Letter from Mac Warner, Secretary of State of West Virginia, to Patrick Morrisey, Attorney General of West Virginia (undated).

[4] Letter from Patrick Morrisey, Attorney General of West Virginia, to Mac Warner, Secretary of State of West Virginia 1 (Oct. 17, 2017), https://ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/AG%20Opinion%20Constitutionality%20of%203-8-12%20for%20SoS%20.PDF (hereinafter "Advisory Opinion"). We note that § 3-8-12(a) does not specifically mention "leaflets." However, for the purpose of this response, we assume that "leaflet" is a synonym for "circular," which is included in the statute. *See* W. VA. CODE § 3-8-12(a) (2010).

[5] 514 U.S. 334 (1995).

[6] Apart from the other matters discussed herein, we question whether the Attorney General applied a standard of constitutional review sufficiently deferential to the legislature. As the Attorney General notes, transparency rules like § 3-8-12(a) are subject to "exacting scrutiny." Advisory Opinion at 3-5 & n.4. In *McIntyre*, the Supreme Court said that exacting scrutiny requires a law to be "narrowly tailored to serve an overriding state interest," 514 U.S. at 347, which the Attorney General equates with "strict scrutiny" (traditionally the least deferential standard of constitutional review). Advisory Opinion at 3. Far more recently, however, in *Citizens United*, the Court explained that the "exacting scrutiny" applicable to campaign disclosure rules only requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 558 U.S. at 366-67. Subsequent Supreme Court and lower court opinions—including in the Fourth Circuit—have in turn applied this more deferential level of scrutiny. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186, 196 (2010); *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 549 (4th Cir. 2012) (describing exacting scrutiny as an "intermediate level of scrutiny"). The Attorney General did not address these precedents.

[7] W. VA. CODE § 3-8-12(a) (2010).

[8] W. VA. CODE § 3-8-2(e)(2) (2010); *see also* W. VA. CODE § 3-8-1a(16) (2013) (defining independent expenditure).

The same disclaimer requirement applies to "electioneering communications" that refer to a candidate within thirty days before a primary or sixty days before a general election.[9]

The Attorney General's opinion does not address the constitutionality of these provisions, or the constitutionality of § 3-8-12(a) with respect to the other forms of media enumerated in the statute, such as radio and television advertisements. **We therefore understand the scope of his opinion to be limited to written campaign materials not subject to any other disclaimer provision.**[10]

(2) *West Virginia disclosure and disclaimer rules are constitutional*

Notwithstanding this limitation, it is important to emphasize at the outset that transparency requirements for electoral communications—including requirements that a communication identify who is making it—are generally constitutional. While such rules usually take the form of affirmative disclaimer requirements (sometimes called "stand by your ad" rules), the general prohibition on anonymous electoral communications in § 3-8-12(a) performs an identical function.

A long line of cases, including *Citizens United*, underscores the solid foundation on which such requirements rest. Although *Citizens United* dismantled other campaign finance laws, the Court embraced robust transparency by an 8-1 vote. It characterized disclaimer and disclosure requirements as "a less restrictive alternative to more comprehensive regulations of speech" that would "help citizens make informed choices in the political marketplace."[11] Because such rules "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages," the Court rejected the notion that they are constitutionally suspect.[12] The Court has repeatedly reaffirmed this holding.[13]

Numerous lower courts have followed suit, including in West Virginia. In *Center for Individual Freedom, Inc. v. Tennant*, a federal trial court in the Southern District upheld West Virginia's disclaimer requirements for independent expenditures and electioneering communications against both facial and as applied challenges.[14] In finding such requirements

[9] W. VA. CODE § 3-8-2b(e)(2) (2007); *see also* W. VA. CODE § 3-8-1a(12)(A) (2013) (defining electioneering communication).

[10] While the above-referenced code provisions require disclaimers for independent expenditures and electioneering communications, we are not aware of any statutory requirement that candidates identify themselves on their own communications apart from § 3-8-12(a). One of the oddities of the Attorney General's approach is that it thus would leave actual candidates subject to less transparency than non-candidate groups.

[11] 588 U.S. at 367, 369.

[12] *Id.* at 371.

[13] *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (plurality opinion) (disclosure "offers a particularly effective means of arming the voting public with information" and also helps prevent "abuse of the campaign finance system"); *Doe*, 561 U.S. at 199 ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.").

[14] *See Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 715 (S.D. W. Va. 2011), *aff'd in part, rev'd in part on other grounds*, 706 F.3d 270 (4th Cir. 2013).

constitutional, the court explained that it was "[f]ollowing the Supreme Court's lead in *Citizens United*" and observed that "[a]voiding confusion and supplying the public with important information about the sources of election-related advertising serve important State interests."[15]

Indeed, although there have been many challenges to disclosure and disclaimer provisions in lower courts since *Citizens United*, the vast majority have been rejected, and the Supreme Court has declined to intervene.[16] **Under these precedents, West Virginia's campaign transparency rules plainly are constitutional, and we urge you to continue enforcing them to the fullest extent possible.**

(3) *Section 3-8-12(a) is not unconstitutionally overbroad*

In light of these precedents, we respectfully take issue with the Attorney General's conclusion that § 3-8-12(a) is unconstitutionally overbroad with respect to written campaign materials.

Under the overbreadth doctrine, a speech restriction that is constitutional in some circumstances can still be invalidated if it prohibits a "substantial amount" of other speech protected by the First Amendment.[17] The overbreadth doctrine is considered "strong medicine" that should be employed "sparingly and only as a last resort."[18] The Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in the absolute sense, but also relative to the statute's plainly legitimate sweep."[19] **In other words, the mere fact that some exceptions to a restriction may be required does not mean that it is unconstitutionally overbroad.[20]**

Section 3-8-12(a) does not, of course, prevent anyone from speaking. It merely prevents them from doing so anonymously. However, we recognize that under *McIntyre* there could be

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[15] *Id*. The court did narrow the definition of "electioneering communication" to exclude ads "published in newspaper, magazine, or other periodical" on First Amendment overbreadth grounds. 849 F. Supp. 2d at 697-98. The Fourth Circuit rejected the trial court's reasoning, however, and affirmed this holding solely because it found the statute's regulation of newspaper and other periodical ads to be "underinclusive" inasmuch as it did *not* cover other forms of written advocacy, such as direct mail. *See* 706 F.3d at 285. The legislature subsequently amended the definition of "electioneering communication" in light of the court's ruling to reach "mass mailings," which are mailings (including e-mail) "of more than 500 pieces … of an identical or substantially similar nature within any thirty-day period." W. VA. CODE § 3-8-1a(17) (2013); 2013 W.V. LAWS S.B. 604 (Apr. 30, 2013). As noted, the Attorney General does not question the constitutionality of the revised statute.

[16] *See, e.g., Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 122-23, 133-34 (2d Cir. 2014) (upholding constitutionality of law that required electioneering communications to identify the name and mailing address of the person, candidate, political committee, or political party that paid for the communication), *cert. denied*, 135 S. Ct. 949 (2015); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 43-44, 61 (1st Cir. 2011) (Maine disclaimer law for campaign advocacy was "unquestionably constitutional"), *cert. denied*, 565 U.S. 1234 (2012).

[17] *United States v. Williams*, 553 U.S. 285, 298 (2008).

[18] *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

[19] *Williams*, 553 U.S. at 298.

[20] *See, e.g., Broadrick*, 413 U.S. at 615-16 (finding that the statute at issue was "not substantially overbroad," and thus, "that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.").

specific situations where the First Amendment protects the right to speak anonymously about an election. But the possibility of unconstitutional applications does not warrant wholesale invalidation of the statute with respect to all written campaign materials.

The plaintiff in *McIntyre* was an individual who personally distributed anonymous handbills regarding an upcoming referendum on a proposed tax levy (no candidates were mentioned or involved).[21] The Supreme Court ruled that a statute prohibiting anonymous pamphleteering was unconstitutional *as applied to Mrs. McIntyre's conduct*; it did not otherwise invalidate the statute.[22] As Justice Ginsburg observed in her concurrence:

> In for a calf is not always in for a cow. The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.[23]

Indeed, all of the justices who joined the majority opinion in *McIntyre* also authored or joined subsequent decisions upholding strong electoral transparency rules.[24] Moreover, the constitutionality of such rules does not depend, as the Attorney General implies, on being temporally limited.[25] The Supreme Court and lower courts have routinely upheld rules without such limits.[26] Nor is it relevant that a transparency rule may cover many communications that are not "false or misleading."[27] Although the Court in *McIntyre* observed in passing that there was "no suggestion that the text of [McIntyre's] message was false, misleading, or libelous[,]" it did so in response to the state's contention that the relevant disclosure law was designed "to prevent

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[21] *McIntyre*, 514 U.S. at 337.

[22] *Id.* at 339-40, 353 ("Ohio has shown scant cause for inhibiting the leafletting *at issue here*.") (emphasis added), 357; *see also id.* at 358 (Ginsburg, J., concurring) (noting that the Court "appropriately le[ft] open matters not presented by McIntyre's handbills").

[23] *Id.* at 358 (Ginsburg, J., concurring).

[24] *See, e.g.*, *Citizens United*, 558 U.S. at 316, 366; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 195 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. at 365-66. Only one member of the Court, Justice Clarence Thomas, appears to believe that *McIntyre* should be extended to invalidate most electoral disclosure and disclaimer requirements. *See Citizens United*, 558 U.S. at 480 (Thomas, J., concurring in part and dissenting in part). Justice Thomas concurred in the judgment in *McIntyre*, but did not join the Court's opinion. *See* 514 U.S. at 358 (Thomas, J., concurring in the judgment).

[25] Advisory Opinion at 6-7.

[26] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 62-64, 84, 143, 155-161 (1976) (per curiam) (upholding constitutionality of federal disclosure requirements for political committees, candidates, and independent expenditures); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 647-48 (6th Cir. 1997) (distinguishing *McIntyre* and rejecting plaintiffs' contention that K.R.S. § 121.190(1) infringed on First Amendment "right to publish anonymously" by requiring identification of sponsor on every independent expenditure); *see also* K.R.S. § 121.190(1) (1996) (current version, which was in effect at time of the Sixth Circuit's decision in *Terry*, makes no mention of temporal limits).

[27] Advisory Opinion at 6.

the dissemination of untruths."[28] The Court has otherwise never suggested that the truth or falsity of a message is relevant to whether it can be subject to disclosure.[29]

The way to reconcile this extensive pro-transparency jurisprudence with the Court's ruling in *McIntyre* is to recognize that decision as having established that there are circumstances in which even a generally valid campaign disclosure rule could be subject to an as-applied constitutional challenge. Apart from an individual leafleteer like Mrs. McIntyre, for example, *McIntyre* has been interpreted to protect a measure of anonymity for individuals gathering signatures to place an initiative on the ballot.[30] The decisions that the Attorney General cites that extended *McIntyre* farther to more generally call campaign transparency rules into question were all decided long before *Citizens United* and cannot be squared with the Supreme Court's more recent cases.[31] The Attorney General is simply wrong to suggest that there is any "uncertainty" in this regard.[32]

In short, *McIntyre* establishes that an individual leafleteer, petition circulator, or similarly situated person (like a volunteer going door-to-door to register voters) may have a right to anonymity, and a plaintiff in one of these circumstances could be entitled to have § 3-8-12(a) declared unenforceable in her case. The same is true for an organization able to show that transparency rules would create "a reasonable probability that the group's members would face threats, harassment, or reprisals . . . ."[33] But these hypothetical circumstances in no way justify facial invalidation of the statute with respect to an entire category of communications.

Such a result would cause lasting damage to the electoral process in West Virginia. As the Supreme Court has long recognized, transparency requirements serve vitally important government interests, including "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof…."[34] The West Virginia legislature has

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[28] *McIntyre*, 514 U.S. at 337, 344.

[29] Nor does the constitutionality of a disclosure requirement depend, as the Attorney General suggests may be the case in some circumstances (though not this one), on whether it is limited to express electoral advocacy. *See* Advisory Opinion at 7-8. While the Attorney General is correct that pre-*Citizens United* decisions drew a line between express advocacy and so-called "issue advocacy," he ignores that the *Citizens United* Court explicitly rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent express advocacy." 558 U.S. at 369; *accord Sorrell*, 758 F.3d at 132 (observing that "*Citizens United* removed any lingering uncertainty concerning the reach of constitutional limitations in this context" and explaining that the Supreme Court rejected the notion that disclosure requirements must be limited to express advocacy "because disclosure is a less restrictive strategy for deterring corruption and informing the electorate"); *McKee*, 649 F.3d at 54-55 (noting that "the Supreme Court has explicitly rejected an attempt to 'import [the] distinction' between issue and express advocacy into the consideration of disclosure requirements" and concluding that it was "reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws").

[30] *E.g., Am. Const. Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1103-04 (10th Cir. 1997), *aff'd sub nom. Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182 (1999).

[31] Advisory Opinion at 8-9.

[32] *Id.* at 9.

[33] *Citizens United*, 558 U.S. at 370 (discussing *McConnell*, 540 U.S. at 198).

[34] *McConnell*, 540 U.S. at 196.

similarly concluded that "[d]isclosure provisions are appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions[.]"[35]

In his analysis, the Attorney General repeatedly invokes individuals like Mrs. McIntyre seeking to distribute "personally written election materials such as handbills or leaflets" without acknowledging that most written campaign materials are nothing of the sort.[36] It makes no sense to lump Mrs. McIntyre's personally written handbill in with the sort of sophisticated, mass-produced campaign literature on which candidates, political parties, and wealthy outside interests like super PACs frequently rely to disseminate their messages. The public has a vital interest in knowing who is trying to influence them through such materials, which is the primary and legitimate purpose of § 3-8-12(a) and justifies continued robust enforcement of the statute.

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The present challenge to transparency rules in West Virginia is not an isolated occurrence. Across the country, legal loopholes at the state and federal level have enabled hundreds of millions of dollars in "dark money" election spending by secretive outside entities who do not want the public to know the true motives behind their advocacy.[37] The Brennan Center's own research shows that this spending "frequently flows from special interests with a direct and immediate economic stake in the outcome of the contest in which they are spending, in contrast to what is often portrayed as the more broadly ideological outside spending at the federal level."[38] Given that many state and local elections are relatively low-cost compared to federal elections, it is "easy for dark money to dominate with unaccountable messages that voters cannot meaningfully evaluate."[39] Strong disclosure and disclaimer rules are crucial tools for addressing this threat to the integrity of the democratic process and empowering ordinary citizens.[40]

In light of this reality, we urge you not to follow the Attorney General's Advisory Opinion, and to continue fulfilling your constitutional and statutory responsibility to ensure robust transparency in West Virginia's elections as the 2018 cycle gets underway.

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[35] W. VA. CODE § 3-8-1(a)(4) (2010).

[36] Advisory Opinion at 8.

[37] *Political Nonprofits (Dark Money): Summary*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Dec. 14, 2017); ALICIA BANNON, ET AL., THE POLITICS OF JUDICIAL ELECTIONS, 2015-2016: WHO PAYS FOR JUDICIAL RACES? 2 (2017), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf; CHISUN LEE, ET AL., SECRET SPENDING IN THE STATES 5, 10 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf.

[38] LEE, ET AL., at 3.

[39] *Id.* at 10.

[40] *Id.* at 7, 9.

If you have any questions about the legal analysis in this letter, or if we can be of any other assistance, please do not hesitate to contact us.

Sincerely,

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