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October 17, 2017

The Honorable Mac Warner
Secretary of State
West Virginia Capitol Complex
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Dear Secretary Warner:

You have asked for an Opinion of the Attorney General regarding the constitutionality of W. Va. Code § 3-8-12. This Opinion is being issued pursuant to W. Va. Code § 5-3-1, which provides that the Attorney General shall "give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the secretary of state . . . ." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General's Office.

You explain that the Secretary of State's office has received several complaints concerning anonymous leaflets. Those complaints have included requests that the Secretary of State enforce § 3-8-12(a), which states that "a person may not publish, issue or circulate, or cause to be published, issued or circulated, any anonymous letter, circular, placard . . . or other publication supporting or aiding the election or defeat of a clearly identified candidate."

Your letter raises the following legal question:

Does W. Va. Code § 3-8-12(a)'s prohibition on anonymous leaflets violate the First Amendment?

This is an issue of first impression that the United States Supreme Court has not squarely addressed and that has caused some confusion among federal courts of appeals. That said, we conclude that, under a proper application of First Amendment principles and a close reading of

existing precedent, the West Virginia law violates the First Amendment because it is overbroad and not narrowly tailored to a compelling state interest.

Relevant Supreme Court Precedent

By its terms, the First Amendment restricts laws that "abridg[e] . . . the freedom of speech . . . ." U.S. Const. Amend. I.[1] It is well-established that this amendment's protections extend to the distribution of political leaflets, pamphlets, handbills, and circulars. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Indeed, "[t]here is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176 (1983); *Schenk v. Pro-Choice Network of W. NY*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment."); *see also Woodruff v. Bd. of Trustees of Cabell Huntington Hosp.*, 173 W. Va. 604, 609, 319 S.E.2d 372, 377 (1984) ("[T]he distribution of leaflets is an activity protected under constitutional free speech guarantees.").[2]

In at least two cases, the United States Supreme Court has specifically affirmed that the First Amendment protects the right to distribute pamphlets and leaflets *anonymously*. In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court invalidated a Los Angeles city ordinance that prohibited the distribution of anonymous handbills "under any circumstances." *Talley*, 362 U.S. at 60. "There can be no doubt," the Court explained, "that [the] identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. "Anonymous pamphlets, leaflets, brochures and even books," the Court further noted, "have played an important role in the progress of mankind." *Id.*; *see also Van Hollen, Jr. v. Fed. Election Comm'n.*, 811 F.3d 486, 499 (D.C. Cir. 2016) ("The Supreme Court has vigorously protected the public's right to speak anonymously . . .") (citing *Talley*).

Of particular relevance here, the Supreme Court struck down, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), a state law that prohibited the anonymous distribution of leaflets in the context of a political campaign. The Ohio statute at issue mandated the inclusion of identifying information (*e.g.*, the name and address of the person responsible for the material being distributed) on any "notice, placard, dodger . . . or any other form of general publication" that was designed to "promote the nomination or defeat of a candidate or promote the adoption or defeat of any issue, or to influence the voters in any election." *Id.* at 338 n.3. Relying on the principles first established in *Talley*, the Supreme Court held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First

[1] The Supreme Court has held that the First Amendment was made applicable to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[2] The West Virginia counterpart to the First Amendment—Article III, section 7 of the West Virginia Constitution—has been interpreted to provide similar protection to the freedom of speech as its federal cousin. *State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 359 n.43, 472 S.E.2d 792, 805 (1996).

Amendment." *Id.* at 342. Distinguishing a line of election law cases, the Court explained that the challenged statute "d[id] not control the mechanics of the electoral process," but rather was "a direct regulation of the content of speech" in that it required certain identifying information. *Id.*[3] at 345. Indeed, "the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression." *Id.* at 347.

Specifically, the Supreme Court subjected the statute to "exacting" review, a term the *McIntyre* Court appeared to use synonymously with strict scrutiny. *See* 514 U.S. at 346 (drawing the term "exacting scrutiny" from *Meyer v. Grant*, 486 U.S. 414, 420 (1988)); *id.* at 346 n.10 (describing *Meyer* as a case in which the Court "unanimously applied strict scrutiny"); *id.* at 348 (applying "the strictest standard of review").[4]

Applying that level of scrutiny, the Court found the law to be deficient. On the question of state interest, the Court accepted that States have a legitimate interest in "preventing fraud and libel" in the election context. *Id.* at 348. Nevertheless, the Court ultimately concluded that the "blunderbuss approach" in the statute was overbroad for several reasons. *Id.* at 357. *First*, "the prohibition encompasses documents that are not even arguably false or misleading." *Id.* at 351. *Second*, the law applied equally to "leaflets distributed on the eve of an election" (when the State's interest in combating fraud is greatest, because "the opportunity for reply is limited") as it did to "those distributed months in advance." *Id.* at 352. *Third*, the law did not distinguish between publications discussing ballot measures (which the Court viewed as less susceptible to libelous attacks) and those involving express advocacy for or against a candidate. *Id.* at 351-52. *Fourth*, the Court noted that Ohio had failed to articulate why the blanket ban on anonymous speech was preferable to the alternative—and more narrowly-tailored—remedy of enforcing the various provisions of its state law that specifically prohibit fraudulent statements and/or representations. *Id.* at 352-53; *see also id.* at 350 ("Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud.").

In its conclusion, the *McIntyre* Court again stressed the Ohio law's overbreadth. "Under our Constitution," the Court explained, "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 357. While "[t]he right to remain anonymous may be abused when it shields fraudulent conduct[,] . . . our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.* Thus, though Ohio could "punish fraud directly," it could not "seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id.*

[3] *Cf. Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

[4] Though some courts have drawn a distinction between "exacting" and "strict" scrutiny in the separate context of campaign-finance laws, *see, e.g.*, *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013), even they have recognized that "[t]he *McIntyre* Court equated 'exacting scrutiny' with 'strict scrutiny,'" *id.*

Critically, the *McIntyre* Court expressly distinguished, on two related grounds, the Ohio statute at issue from the campaign finance disclosure regulation approved previously in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *First*, the Supreme Court explained that the disclosure requirements on "independent expenditures" upheld in *Buckley* were a "far cry" from the level of intrusion demanded by the Ohio law at issue in *McIntyre*. 514 U.S. at 355. The Ohio law "compelled self-identification on all election-related writings." *Id*. That is "particularly intrusive," because "[a] written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint . . . . [and] reveals unmistakably the content of [the author's] thoughts on a controversial issue." *Id.* In contrast, the disclosure requirement in *Buckley* "entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate." *Id*. Comparatively, that law "reveal[ed] far less information" than the Ohio law at issue in *McIntyre*. *Id.*

Second, the Court explained that "[n]ot only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests." *Id.* at 356. The federal law at issue in *Buckley* "regulate[d] only candidate elections, not referenda or other issue-based ballot measures." *Id.* In that more limited context, the *McIntyre* Court observed, the government "can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures." *Id.* Unlike the broader Ohio law, a law mandating only the disclosure of campaign expenditures could advance that interest by "lessen[ing] the risk that individuals will support a candidate as a *quid pro quo* for special treatment after the candidate is in office." *Id.*[5]

Prior Precedent Addressing the Constitutionality of West Virginia Code § 3-8-12

In 1996, a little over a year after *McIntyre* was decided, the United States District Court for the Southern District of West Virginia found that the then-current version of West Virginia Code § 3-8-12 violated the First Amendment. *West Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036 (S.D. W. Va. 1996). At the time, West Virginia law included two "prohibition[s] of anonymous issue advocacy": Section 3-8-5(f) prohibited the "publication, distribution, or dissemination of a scorecard, voter guide, or other written analysis of a candidate's position within 60 days of an election unless the document includes the name of the party responsible for it"; and Section 3-8-12 prohibited "the publication, issuance or circulation of any anonymous letter, circular, or other publication tending to influence voting at any election." *Id.* at 1041. Recognizing the "broad protection the First Amendment gives to the right to publish anonymously," *id.*, the district court determined that the challenged provisions were not "narrowly tailored to serve a compelling state interest" and therefore were "unconstitutionally overbroad," *id.* at 1041, 1042.

[5] The Supreme Court's approval of mandatory disclosure requirements in *Buckley* has itself been criticized by prominent jurists as insufficiently protective of the right to speak anonymously and in need of reconsideration in light of *McIntyre*. *See, e.g.*, *Van Hollen, Jr. v. Federal Election Comm'n*, 811 F.3d 486, 500 (D.C. Cir. 2016) (noting conflict between *McIntyre*'s protection of anonymous speech and the "startling intrusions on this right" sanctioned by *Buckley*); *McConnell v. FEC*, 540 U.S. 93, 276 (Thomas, J. dissenting); *Majors v. Abell*, 361 F.3d 349, 355-56 (7th Cir.2004) (Easterbrook, J., dubitante).

The court offered several reasons in support of its conclusion. *First*, the court emphasized, under *McIntyre*, the "historical importance of anonymous publication, and the broad protection the First Amendment gives to the right to publish anonymously." *Id.* at 1041. *Second*, it concluded that the statutory provisions were "not narrowly tailored to apply only to misleading or deceptive publications." *Id.* Specifically, the court noted that there "has been no showing by defendants that the avoidance of corruption is a compelling need, or that the statute which the state enacted is narrowly tailored to meet that need." *Id. Third*, the court borrowed a distinction drawn in the *Buckley* line of cases concerning independent campaign expenditures and noted that the challenged laws were not "narrowly tailored so as to regulate only the anonymous publication of express advocacy [of identified candidates]." *Id.* The court earlier explained that, under *Buckley*, "the Supreme Court has made a definite distinction between express advocacy, which generally can be regulated, and issue advocacy, which generally cannot be regulated." *Id.* at 1039.

Relying on these rationales, the district court issued a permanent injunction, prohibiting enforcement of either statutory prohibition, but exempting from the scope of the injunction any anonymous publication that engaged in "express advocacy" for or against a specific candidate. *Id.* at 1043. A few years later, the West Virginia Legislature amended West Virginia Code § 3-8-12 to its current form, which states that "a person may not publish, issue or circulate, or cause to be published, issued or circulated, any anonymous letter, circular, placard . . . or other publication supporting or aiding the election or defeat of a clearly identified candidate." *See* H.B. 3175 "Elections—Contributions—Technical Revisions" (West Virginia 2001 Session Laws).

The Current Version of West Virginia Code § 3-8-12 is Overbroad

Even accounting for the amendments adopted in 2001, West Virginia Code § 3-8-12 is strikingly similar to the Ohio law struck down in *McIntyre*. Both laws apply broadly to any person. And both sweep in a broad array of potentially very personal election-related writings, including pamphlets and leaflets.

Applying strict scrutiny, as *McIntyre* did, we conclude that even with the 2001 amendment, West Virginia Code § 3-8-12 violates the First Amendment. While we acknowledge that this would appear to be an issue of first impression before the United States Supreme Court, the principles articulated in cases like *Talley* and *McIntyre*, and a proper understanding of the *Buckley* line of cases, support the conclusion that the statute is unconstitutional. Though the State clearly has a compelling interest in protecting the integrity of the electoral process,[6] the law as written is not narrowly-tailored enough to achieve that interest in a constitutional manner. For several reasons, the law is overbroad, and therefore "'burden[s] substantially more speech than is

[6] *McIntyre*, 514 U.S. at 349; *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999) ("States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."); *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("[A] State indisputably has a compelling interest in preserving the integrity of its election process."); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest . . . .").

necessary to further the government's legitimate interests.'" *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))

First, like the statute invalidated in *McIntyre*, Section 3-8-12 "encompasses documents that are not even arguably false or misleading." 514 U.S. at 351. As the Supreme Court has said on numerous occasions, "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014) ("We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures."); *In re Primus*, 436 U.S. 412, 432 (1978) ("This Court's decision in *Button* makes clear, however, that '[b]road prophylactic rules in the area of free expression are suspect.'"). Prophylactic rules seeking to prevent fraudulent speech, in particular, are overbroad because "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).[7] Indeed, the *McIntyre* Court found Ohio's law overbroad in part because the State had "detailed and specific prohibitions against making or disseminating false statements during political campaigns." 514 U.S. at 349.

Recent jurisprudence suggests, in fact, that even such more targeted prohibitions of false or misleading political speech can be overbroad and thus unconstitutional. The Sixth Circuit, for example, has found the more "detailed and specific" anti-fraud statute referenced in *McIntyre* to be overbroad. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) (holding Ohio's political false-statements statute was not narrowly tailored enough to survive strict scrutiny). And the Eighth Circuit has reached a similar conclusion about Minnesota's statute criminalizing the "dissemination . . . of . . . political advertising or campaign material . . . that is false." *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014). These cases suggest that in the nearly three decades since *McIntyre* was decided, courts have become even *less* tolerant of statutes that flatly prohibit or otherwise burden core political speech.

Second, Section 3-8-12 is also overbroad because, like the statute found unconstitutional in *McIntyre*, it applies with the same force to speech made three months or three weeks before an election as it does to speech three days or three hours before. When speech occurs has a material impact on whether there is an adequate opportunity for counterspeech, which, in most circumstances, is the preferred (and obviously less restrictive) alternative to a prohibition on speech. As a plurality of the Supreme Court recently explained in *United States v. Alvarez*, in most cases "[t]he remedy for speech that is false is speech that is true. That is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." 132 S. Ct. 2537, 2550 (2012) (plurality op.).[8]

[7] *See also Riley*, 487 U.S. at 803 (Scalia, J., concurring) ("Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made.").

[8] The cases in which the Supreme Court has found counterspeech to be an insufficient remedy involve statutes that specifically (and narrowly) target defamation. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that

The *McIntyre* Court specifically faulted the Ohio statute for applying "not only to leaflets distributed on the eve of an election, *when the opportunity for reply is limited*, but also to those distributed months in advance." 514 U.S. at 352 (emphasis added). That distinguished the statute from a Tennessee law upheld in *Burson v. Freeman*, 504 U.S. 191 (1992), which prohibited electioneering within 100 feet of a polling place and only on Election Day. In that case, the *McIntyre* majority noted, "[t]he State's interest in preventing voter intimidation and election fraud was . . . enhanced by the need to prevent last-minute misinformation to which there is no time to respond." 514 U.S. at 352 n.16.

The same infirmity exists with respect to Section 3-8-12. The statute prohibits all anonymous leaflets related to specific candidates, regardless of when they are distributed. Yet, a candidate who is subject to an anonymous attack several months before an election has ample time to rebut the false or misleading claims. In such a circumstance, "[s]peaking the truth in response to the lie . . . is a less restrictive yet equally effective means to prevent voter deception about [a] candidate[]." *List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 778 (S.D. Ohio 2014), *aff'd sub nom Driehaus*, 814 F.3d 466. In an era where political campaigns begin months or even years before an election is scheduled to take place, Section 3-8-12 forecloses far more speech than is necessary to advance the State's interest in election integrity.

The Limitation to Express Advocacy Does Not Save the Statute

We recognize that the West Virginia Legislature made a good-faith attempt to save Section 3-8-12 from constitutional infirmity by limiting its reach to publications that engage in "express" advocacy, in response to the federal district court's decision in *Smith*. The court in *Smith*, in turn, deemed the distinction between anonymous "express" and "issue" advocacy as determinative of the constitutional question, based on one possible reading of the Supreme Court's campaign-finance decisions in *Buckley* and its progeny. The federal courts of appeals are divided on this question, and the Supreme Court has not explicitly addressed the issue. Accordingly, reasonable minds can and do disagree on whether the distinction between "express" and "issue" advocacy should be imported from the context of campaign expenditures into the context of anonymous leafleting. That said, we believe that the statute is not saved by its limitation to publications that engage in "express" advocacy for or against a specific candidate.

As noted, the federal district court that issued the permanent injunction in *Smith* purported to draw a line between "express" and "issue" advocacy from its reading of *Buckley* and *McIntyre*. According to the *Smith* court, "the extent to which political speech may be regulated turns on the distinction between express advocacy and issue advocacy." 960 F. Supp. at 1039. More specifically, the court read *Buckley* to hold that express advocacy "generally can be regulated" and that issue advocacy "generally cannot be regulated." *Id.* It then asserted that the *McIntyre* Court followed *Buckley* by striking down a law based on "the First Amendment's protection of the right to publish anonymous *issue advocacy*." *Id.* at 1042 (emphasis added).

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cannot easily be repaired by counterspeech, however persuasive or effective."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) (explaining that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.").

This reasoning, however, fails to account for key distinctions that the Supreme Court has drawn between campaign expenditure laws—in which the difference between "express" and "issue" advocacy has proved critical—and the anonymous speech law struck down in *McIntyre*. The law upheld in *Buckley* merely required the disclosure of financial support—"nothing more than identification to the [Federal Election] Commission of the amount and use of money expended in support of a candidate." *McIntyre*, 514 U.S. at 355. In contrast, the law struck down in *McIntyre* compelled an individual to reveal his or her identity on "a personally crafted statement of a political viewpoint," like a handbill or a leaflet. *Id.* In addition, the disclosure requirement upheld in *Buckley* was supported by a state interest that is less compelling outside of the context of campaign finance—namely, the avoidance of "corruption" or appearance of *quid pro quo* arrangements that can attend political donations and campaign contributions. *See id.* at 356.[9]

In short, we believe *McIntyre* made clear that it is not enough to take a statute like West Virginia Code § 3-8-12, which applies to personally written election materials such as handbills or leaflets, and simply limit it to the regulation of express advocacy. Even with that limitation, the law is "particularly intrusive" for First Amendment purposes. *McIntyre*, 514 U.S. at 356. Unlike a disclosure requirement made on a government form in the specific context of expenditures made for or against a specific candidate, the requirement of self-identification on a pamphlet or leaflet "reveals unmistakably the content of [an individual's] thoughts on a controversial issue." *Id.*

Indeed, several federal courts of appeals have stressed this aspect of *McIntyre*. For example, in *American Civil Liberties Union of Nevada v. Heller*, the Ninth Circuit read *McIntyre* to recognize "a difference of constitutional magnitude between mandatory identification with a particular message at the time the message is seen by the intended audience and the more remote, specific disclosure of financial information." 378 F.3d 979, 1002 (9th Cir. 2004). The lesson from *McIntyre*, the court explained, is that there is a "constitutionally determinative distinction" between "requiring a speaker to reveal her identity while speaking and requiring her to reveal it in an after-the-fact reporting submission to a governmental agency." *Id.* at 991-92. That is because "[t]he former necessarily connects the speaker to a particular message directly, while the latter may simply expose the fact that the speaker spoke." *Id.* at 992. Laws like the one at issue in *McIntyre*, which require self-identification on the speaker's own publication, constitute a "content-based limitation on core political speech." *Id.*

The Tenth Circuit has likewise noted the weight that the *McIntyre* court placed on the fact that a law, like West Virginia Code § 3-8-12, mandates the inclusion of specific content on a speaker's own publication. According to the Tenth Circuit, *McIntyre* "recognized that disclaimer statutes, which require that a speaker include specified language or information in her speech, impose more substantial burdens on First Amendment rights than disclosure or reporting provisions." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d

[9] We take no position on whether a narrower law placing restrictions only on the activities of candidates for office or their campaigns in the course of an election would survive constitutional scrutiny under current law.

1174, 1199 (10th Cir. 2000). Indeed, *McIntyre* found that distinction to be "a constitutionally significant difference." *Id.*

We recognize that other federal appeals courts appear to read *McIntyre* differently. On at least one occasion, the Sixth Circuit placed greater emphasis on the fact that the law struck down in *McIntyre* was not limited to express advocacy of candidates, but rather reached anonymous issue advocacy, as well. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 647-48 (6th Cir. 1997). And the Seventh Circuit has concluded that more recent Supreme Court opinions may have "narrowed" *McIntyre* such that it applies only to disclaimer statutes that reach issue advocacy. *Majors v. Abell*, 361 F.3d 349, 354 (7th Cir. 2004).

Accordingly, the question how best to reconcile the anonymous speech principles articulated in *McIntyre* with the *Buckley* line of campaign-finance cases remains unsettled. In a decision last year, the D.C. Circuit noted the "unmistakable tension that exists in campaign finance law between speech rights and disclosure rules." *Van Hollen, Jr. v. Federal Election Comm'n*, 811 F.3d 486, 499 (D.C. Cir. 2016). The court further described the holdings of *Buckley* and *McIntyre* as "fiercely antagonistic." *Id.* at 500. On one hand, the Supreme Court in *McIntyre* (and *Talley*) "vigorously protected the public's right to speak anonymously." *Id.* at 499. But on the other hand, the Court in *Buckley* "sanctioned startling intrusions on this right to anonymity." *Id.* at 500.

In the face of this uncertainty, we choose to read *all* aspects of *McIntyre* robustly. We do so in accordance with the Supreme Court's repeated admonition that its decisions are to be followed faithfully until the Supreme Court itself narrows or overrules a case. *See, e.g., Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). To our knowledge, the Supreme Court has not expressly narrowed or overruled *McIntyre*. Since *McIntyre*, the Court has issued several decisions relating to the constitutionality of various disclosure requirements, *see, e.g., John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases), but it has yet to resolve another challenge involving a disclaimer statute like the Ohio law in *McIntyre*.

In the absence of any express modification of *McIntyre*, we believe that the correct reading of that decision supports the conclusion that West Virginia Code § 3-8-12 violates the First Amendment. Although West Virginia has a compelling state interest in protecting the integrity of its electoral processes, the statute the legislature has enacted to effectuate that interest sweeps too broadly to survive First Amendment scrutiny. And while the statute has been amended to forbid only anonymous writings that engage in express advocacy, that alone is likely insufficient to save the statute under the reasoning of *McIntyre*.

Sincerely,

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