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NOTE

Missouri Campaign Reporting Requirements in the Shade of *Citizens United*

Geier v. Missouri Ethics Commission, 474 S.W.3d 560 (Mo. 2015) (en banc)

*Benjamin N. Levin**

I. INTRODUCTION

In 1914, future Supreme Court Justice Louis Brandeis, writing about the corrosive effect of concentrated capital on democratic institutions, said, “Sunlight is said to be the best of disinfectants.”¹ One hundred and three years later, the mandatory disclosure of political contributions and expenditures remains one of the most popular tools governments use to enlighten citizens about the machinations of politics.² In an era where political contributions and expenditures are less regulated than ever, disclosure requirements have taken on outsized importance.³

In *Geier v. Missouri Ethics Commission*, the appellant, Gerald Geier, asked the Supreme Court of Missouri to consider the constitutionality of Missouri’s reporting requirement statutes as applied to Stop Now!, an inactive political action committee (“PAC”).⁴ Geier argued that the reporting requirement failed to meet the exacting scrutiny standard because the State’s interest in receiving reports of inactivity did not outweigh the burden placed on Geier by the requirement.⁵ This Note analyzes the court’s application of exacting scrutiny in the instant decision. It also notes the limits of PAC disclosure requirements as a public policy tool in the absence of sensible laws regarding what is and is not a PAC and discusses the practical import of narrow disclosure regulations in an era increasingly dominated by unlimited and independent political expenditures. The limits of Missouri’s PAC disclosure

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1. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT 65 (1914).

2. See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 273 (2010).

3. *Id.* at 274.

4. *Geier v. Mo. Ethics Comm’n*, 474 S.W.3d 560, 560 (Mo. 2015) (en banc).

5. *Id.* at 565–66.

requirements, illuminated by the court's reasoning in the instant decision, will continue to hinder the average Missouri citizen's ability to participate in his or her democracy, while enabling the richest Missourians to operate in the shade, away from the disinfecting light envisioned by Justice Brandeis.

II. FACTS AND HOLDING

In 1991, Gerald Geier created and registered the PAC "Stop Now!" with the Missouri Ethics Commission ("MEC"), with the intention of advocating against ballot initiatives to raise taxes in the Kansas City area.⁶ In 2003, the PAC became inactive, and in 2006, the PAC's bank account was closed after bank fees depleted its balance to zero.⁷ Geier did not notify the MEC of the account's closure as required under Missouri Revised Statutes section 130.021.7.⁸

The PAC, while bereft of any funds from 2006 onward, remained registered with the MEC, and from 2004 to 2010, Geier continued to file quarterly disclosure reports as required under Missouri law.⁹ In the first three quarters of 2011, Geier did not file these reports, at which point the MEC opened an investigation.¹⁰ Following the opening of the investigation, Geier filed the overdue reports and the necessary paperwork to dissolve the PAC.¹¹ Despite the dissolution of the PAC, the MEC filed a complaint against Geier, in his capacity as its treasurer, for failing to file the 2011 disclosure reports on time and for failing to notify the MEC that Stop Now!'s bank account was closed in 2006.¹²

Following a finding of probable cause against Geier in a closed hearing, Geier appealed to the Administrative Hearing Commission ("AHC").¹³ Geier admitted the statutory violations but attacked the constitutionality and applicability of the statutes themselves.¹⁴ First, he argued the reporting statutes were unconstitutional as applied in this case under the First Amendment to the U.S. Constitution because Stop Now! was inactive prior to the MEC's enforcement action, and, therefore, the application of the reporting statutes to inactive PACs ran afoul of the exacting scrutiny standard.¹⁵ Under *Citizens United v. Federal Elections Commission*, exacting scrutiny is applied to all campaign reporting statutes.¹⁶ Second, he argued the requirements imposed

6. *Id.* at 562–63.

7. *Id.* at 563.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 565.

such a burden that they had a chilling effect on the political speech of others.¹⁷ Third, he challenged the constitutionality of the MEC's closed hearing under the First Amendment and Sixth Amendment of the U.S. Constitution.¹⁸ Lastly, Geier argued any violations of law had to be attributed to Stop Now!, and not him personally, because there was no mechanism to hold an individual liable for a campaign committee's violations.¹⁹

The AHC rejected the first and second claims because it has no authority to invalidate statutes for any reason.²⁰ That power, according to the AHC, was reserved to courts of law.²¹ On the issue of personal liability for the illegal conduct of a PAC, the AHC found that Missouri Revised Statute section 130.058 designates a committee treasurer personally responsible for fulfilling the reporting requirements.²² Gerald Geier was the treasurer of his PAC.²³ On this basis, the AHC entered summary judgment for the MEC.²⁴ Geier appealed, adding a claim that the reporting requirement was unconstitutional not only as applied, but facially as well, because of its chilling effect on political speech.²⁵ The Circuit Court of Jackson County, after considering the AHC's rulings in an appellate capacity, also granted summary judgment for the MEC.²⁶ Geier appealed to the Supreme Court of Missouri.

The Supreme Court of Missouri held that the circuit court properly granted judgment in favor of the MEC because campaign disclosure regulations, as regulations on speech, are subject to "exacting scrutiny."²⁷ For a law to survive exacting scrutiny in a First Amendment context, there must be a substantial relationship between the law and a sufficiently important government interest that reflects the seriousness of the burden imposed on a citizen's First Amendment rights.²⁸ The Supreme Court of Missouri determined that the MEC's regulatory scheme did indeed serve such an interest and that this interest was present, even if the PAC was inactive.²⁹ The court reasoned that the interest survived because the MEC would have no way of knowing, absent a termination statement, which non-filing PACs were shirking their reporting duties and which were actually inactive.³⁰ Meanwhile, the Supreme

17. *Id.* at 569.

18. *Id.* at 569–70.

19. *Id.* at 571.

20. Geier, Mo. Admin. 12-2243 EC (Mo. Admin. Hearing Comm'n June 11, 2013), 2013 WL 4436626, at *5–6.

21. *Id.* at *4.

22. *Id.* at *6.

23. *Id.* at *2.

24. *Id.* at *6.

25. Geier v. Mo. Ethics Comm'n, 474 S.W.3d 560, 563 (Mo. 2015) (en banc).

26. *Id.* at 564.

27. *Id.* at 565 (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010)).

28. *Id.*

29. *Id.* at 568.

30. *Id.* at 567.

Court of Missouri did not reach Geier's substantive argument that the reporting statutes are facially unconstitutional because they chill speech, ruling that the issue was not justiciable because it was contingent on future events and facts that Geier did not allege in his petition.³¹ The court also did not accept Geier's argument that a closed administrative hearing was unconstitutional under the First and Sixth Amendments of the U.S. Constitution because the Sixth Amendment only guarantees a public trial when criminal liability is possible, and Geier's hearing could not have led to such liability.³² In addition, there is no authority that has extended to the media a First Amendment right to attend an investigative proceeding for assessing non-criminal liability.³³

III. LEGAL BACKGROUND

This Part first covers the basic contours of Missouri campaign finance law, with a focus on the reporting requirements that ensnared Geier and Stop Now! in the MEC's administrative procedures. Next, this Part gives an overview of the First Amendment in its application to campaign finance law, with an emphasis on previous Eighth Circuit rulings that concern campaign finance law and the exacting scrutiny standard.

A. Reporting Requirements

Under Missouri campaign finance law, every PAC shall have a treasurer with the authority to withdraw funds from a designated depository account.³⁴ A PAC like Stop Now!, which focused exclusively on ballot measures, is defined as "any combination of persons, who accepts contributions or makes expenditures for the primary or incidental purpose of influencing or attempting to influence the action of voters for or against . . . passage or defeat of any ballot measure."³⁵ The treasurer is the fiduciary of the committee and is responsible for creating, dissolving, and filing paperwork on behalf of the committee.³⁶ The treasurer is responsible for disclosing all contributions to and expenditures from the designated bank account, along with the names of all contributors, all debts, and an accounting of the committee's current balance.³⁷ The treasurer must file these reports at least quarterly until the com-

31. *Id.* at 571.

32. *Id.* at 570.

33. *Id.* at 570–71. Although some federal courts have extended a First Amendment right to access an adjudicatory hearing beyond strictly criminal proceedings, Missouri courts have not. See *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661–62 (8th Cir. 1983).

34. MO. ANN. STAT. § 130.021.4(2) (West 2016).

35. *Id.* § 130.011(9).

36. *Id.* §§ 130.021(5), (8).

37. *Id.* §§ 130.041, 130.058.

mittee has been dissolved, regardless of whether the committee has undertaken any activity in the previous quarter.³⁸ Although the Missouri General Assembly does not provide legislative histories of its bills, it is safe to assume the public policy rationale behind these laws tracks the judiciary's rationale for upholding them: To provide an informational benefit to the public, to combat the prospect of corruption, and to aid in enforcement actions for other violations of Missouri law.³⁹ In 2008, Missouri's campaign disclosure scheme was given a "B" rating from the Campaign Disclosure Project, ranking seventh out of all states.⁴⁰

B. *The Missouri Ethics Commission*

The MEC is an administrative agency whose purpose is to administer and enforce the State's campaign finance laws.⁴¹ If there are reasonable grounds for believing that a committee or a committee treasurer has violated these laws, the MEC will conduct a hearing pursuant to the Missouri Administrative Procedure Act, absent evidence that a criminal statute has been violated.⁴² The hearing will be closed, and a probable cause standard will be used to determine guilt.⁴³ A person found responsible can appeal the finding to the AHC, which will stay the MEC's decision until the matter is resolved.⁴⁴

C. *First Amendment*

Because the First Amendment was incorporated to the states in *Gitlow v. State of New York*, Missouri is required to abide by federal constitutional law concerning political speech when enforcing its campaign finance laws.⁴⁵ In *Citizens United v. Federal Election Commission*, the Supreme Court of the United States noted that although disclaimer and disclosure requirements may burden the ability to speak, they are distinguishable from other burdensome

38. *Id.* § 130.046.

39. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 347, 357, 369 (2010).

40. Campaign Disclosure Project, *State-by-State Grade and Ranking Chart*, CAMPAIGN DISCLOSURE, <http://www.campaigndisclosure.org/gradingstate/rankoverall.html> (last updated Sept. 17, 2008).

41. *Impey v. Mo. Ethics Comm'n*, 442 S.W.3d 42, 44 (Mo. 2014) (en banc); see also § 105.955.

42. § 105.961(3).

43. See *Impey*, 442 S.W.3d at 45.

44. *Id.* (citing § 105.961).

45. *Gitlow v. State of N.Y.*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

campaign finance laws because they do not impose a ceiling on campaign-related speech.⁴⁶ This distinction matters because “laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction ‘furthers a compelling government interest and is narrowly tailored to achieve that interest.’”⁴⁷ Disclaimer and disclosure laws, although burdensome in the sense that it takes time and effort to comply with them, are subject to exacting scrutiny, a lesser standard.⁴⁸

Exacting scrutiny requires both a finding of a substantial relation between the speech-burdening regulation and a legitimate governmental interest, as well as a finding that the governmental interest is sufficiently important to justify the burden imposed.⁴⁹ In a 2006 case concerning a proposed photo identification voting requirement, the Supreme Court of Missouri held that the government has a compelling interest in ensuring the integrity of the election process.⁵⁰ In *Buckley v. Valeo*, the Supreme Court noted that disclosure requirements “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity” and “as a general matter, directly serve substantial governmental interests.”⁵¹ Exacting scrutiny requires a court to calculate, compare, and, in effect, weigh the governmental interest against the actual burden the government is placing on the party’s First Amendment rights.⁵²

In the past, courts using this standard have deemed unconstitutional certain disclosure requirements created by the Federal Bipartisan Campaign Reform Act.⁵³ In 2012, the Eighth Circuit Court of Appeals, in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, ruled that a Minnesota law requiring any non-PAC “association” to report, on an ongoing basis, all political expenditures in excess of \$100 was unconstitutional because such laws failed to survive exacting scrutiny.⁵⁴ According to the court, the independent-expenditure disclosure law “does not match any sufficiently important interest. Minnesota can accomplish any disclosure-related interests . . . through less problematic measures . . .”⁵⁵

In a similar case, *Iowa Right To Life Committee, Inc. v. Tooker*, the Eighth Circuit in 2013 ruled unconstitutional an Iowa law requiring a non-profit corporation that had made political expenditures of \$750 in a calendar year to disclose all funds raised over \$1000 on an ongoing basis, regardless of

46. 558 U.S. 310, 316 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

47. *Id.* at 340 (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

48. *Id.* at 366 (quoting *Buckley*, 424 U.S. at 64, 66).

49. *Doe v. Reed*, 561 U.S. 186, 196 (2010).

50. *Weinschenk v. State*, 203 S.W.3d 201, 217 (Mo. 2006) (en banc).

51. 424 U.S. at 67–68.

52. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008).

53. *See id.* at 739, 744.

54. 692 F.3d 864, 874–75 (8th Cir. 2012) (en banc).

55. *Id.* at 876.

whether that fundraising was for a political purpose.⁵⁶ According to the court, the statute did not survive exacting scrutiny because “[r]equiring a group to file perpetual, ongoing reports ‘regardless of [its] purpose,’ and regardless of whether it ever makes more than a single expenditure, is ‘no more than tenuously related to’ Iowa’s information interest.”⁵⁷

In *Minnesota Citizens*, the court compared the amount of funds needed to be raised before imposing reporting requirements to the amounts needed in other states.⁵⁸ It found that reporting thresholds above \$20 were generally held constitutional, while thresholds at or below that amount were generally held unconstitutional.⁵⁹ Although both Iowa’s and Minnesota’s reporting thresholds far exceeded \$20, the court nonetheless overruled both reporting statutes, choosing to focus instead on the “collective burdens” and costs of complying with the “cumbersome ongoing regulatory burdens,” whose operation can discourage participation in the political sphere.⁶⁰ However, in both cases, the courts also limited their holdings to non-PAC associations.⁶¹ The reason for this forbearance, which makes non-PAC entities less regulated and less transparent than PACs, was not given.⁶²

Gerald Geier also pointed to the chilling effect of Missouri’s regulatory scheme on other citizens as a reason to find the whole statute facially unconstitutional.⁶³ The Eighth Circuit in *Minnesota Citizens* did find the “chill” of Minnesota’s statute to be “more than a theoretical concern,” because the law has “interfered with the open marketplace of ideas” and “discourages associations . . . with limited resources[] from engaging in protected political speech.”⁶⁴ A Missouri court, following the Eighth Circuit’s lead, would presumably need to find a statute so onerous that its enforcement would actually deter political association and engagement by third parties in the future before finding for the plaintiff.

Although the language and application of Missouri’s reporting statutes are fairly simple and conceptually straightforward, the Eighth Circuit’s case law applying an exacting scrutiny standard in a political speech context is sparse and frequently unclear. The Supreme Court of Missouri, in spite of these vagaries, applied an exacting scrutiny standard in the instant decision.⁶⁵

56. 717 F.3d 576, 606 (8th Cir. 2013).

57. *Id.* at 597 (second alteration in original) (quoting *Minn. Citizens Concerned for Life*, 692 F.3d at 873).

58. *Minn. Citizens Concerned for Life*, 692 F.3d at 884.

59. *Id.*

60. *Id.* at 871, 874.

61. *Id.* at 877; *Iowa Right To Life*, 717 F.3d at 592.

62. *Minn. Citizens Concerned for Life*, 692 F.3d at 877 n.11; *Iowa Right To Life*, 717 F.3d at 594 n.4.

63. *Geier v. Mo. Ethics Comm’n*, 474 S.W.3d 560, 569 (Mo. 2015) (en banc).

64. 692 F.3d at 874.

65. *Geier*, 474 S.W.3d at 565 (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

IV. INSTANT DECISION

Geier presented multiple arguments of varying merit in his attempt to vacate the MEC's ruling. In the instant decision, the court lingered on its application of exacting scrutiny to the reporting statutes before quickly dispatching Geier's objections both to the constitutionality of the closed administrative hearing and the constitutionality of the statutes under a "chilling effect" theory. This Note will summarize these separate holdings in turn.

A. Unconstitutional Under an Exacting Scrutiny Standard

The court began its analysis by noting that the U.S. Supreme Court in *Buckley v. Valeo* held that campaign finance regulations operate to limit political speech, the most fundamental of First Amendment activities, and are thus presumptively subject to strict scrutiny.⁶⁶ It noted that under *Citizens United*, reporting and disclosure requirements are subject to exacting scrutiny, which it considered a lesser standard, requiring only the finding of a substantial governmental interest in the regulation and a finding that the interest outweighs the burden on speech imposed.⁶⁷

Using this framework, the court first held that disclosure and reporting requirements serve at least three sufficiently important interests, as identified in *Buckley*.⁶⁸ First, the requirements serve an informational interest by giving citizens the ability to learn how money is flowing in politics.⁶⁹ Second, they serve to deter actual corruption and the appearance of corruption.⁷⁰ Third, they serve an enforcement interest by enabling the detection of other campaign finance violations.⁷¹

The court, for the purpose of comparing these interests against the burden the reporting statutes placed upon Geier, assumed that the PAC was only an "issue PAC," which narrows the governmental interest in regulating speech because there is a reduced risk of quid pro quo corruption⁷² when the money is not flowing to a candidate.⁷³ This effectively removes the second interest from consideration, leaving only an informational interest and an enforcement interest as valid justifications for the reporting statutes applying to an issue PAC like Stop Now!.

66. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

67. *Id.*

68. *Id.* (citing *Buckley*, 424 U.S. at 66–68).

69. *Id.*

70. *Id.*

71. *Id.*

72. Quid pro quo corruption is "[a]n action or thing that is exchanged for another action or thing of more or less equal value; a substitute." *Quid pro quo*, BLACK'S LAW DICTIONARY (10th ed. 2014).

73. *Geier*, 474 S.W.3d at 566 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999)).

Yet here, instead of turning to the remaining governmental interests in regulating Geier's specific PAC, the court noted that the MEC has a broad and compelling interest in preserving the integrity of the election process generally.⁷⁴ But because this was an as-applied challenge, not a facial challenge, the court moved quickly from analyzing the legitimacy of the MEC's mission in the broadest sense to analyzing Geier's specific challenge.⁷⁵

The court started its inquiry at the heart of Geier's argument, where he sought to analogize his situation to that of the plaintiffs in *Minnesota Citizens*, which also centered around the burden imposed by an ongoing reporting requirement.⁷⁶ The court summarized the holdings of *Minnesota Citizens*, paying particular attention to the Eighth Circuit's holding that "the ongoing reporting requirement chilled speech because it forced any association, no matter how small, to decide whether exercising its constitutional right was worth navigating the regulatory red tape."⁷⁷ The court quickly decided the case was misapplied, since the Eighth Circuit plainly said its holding only applied to independent committees and did not affect PACs.⁷⁸ The court noted that since Stop Now! is a PAC, *Minnesota Citizens* does not *ipso facto* render Missouri's reporting statutes unconstitutional.⁷⁹

With *Minnesota Citizens* dispatched, the court found a dearth of authority supporting Geier's proposition that Missouri has no interest in the disclosure of an inactive or terminated PAC.⁸⁰ The court stated that "Stop Now!'s inactivity . . . does not alter the State's interest in enforcing the reporting statutes."⁸¹ The court contemplated that without termination reports, the MEC would be unable to know when or if a PAC were dissolved for purposes of enforcing other campaign finance regulations and would additionally have no way to share with the public what the PAC's current status was.⁸²

After finding a substantial interest in requiring an inactive PAC to file reports, the court moved to the next phase of exacting scrutiny by examining whether the statutes were related to the already-established substantial interest.⁸³ It described the operation of the statutes and, without hesitation, concluded that they are related, stating that "the statutes serve the State's interests by allowing it to track where the money is being spent – or, in Stop Now!'s case – where it was spent."⁸⁴

74. *Id.* (citing *Weinschenk v. State*, 203 S.W.3d 201, 217 (Mo. 2006) (en banc)).

75. *Id.*

76. *Id.*

77. *Id.* (citing *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873 (8th Cir. 2012) (en banc)).

78. *Id.* at 567.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 568.

84. *Id.*

Finally, the court completed its exacting scrutiny analysis by measuring the burden placed on Geier by these reporting requirements.⁸⁵ Considering that Geier was only asked to fill out a one-page form, that Geier was aware of and complied with these requirements for many years, and that the termination statement only required information that he was obligated to have anyway, the court decided that there was no more than a minimal burden placed on Geier's First Amendment rights.⁸⁶

Put together, the court found that the reporting requirements meet the exacting scrutiny standard because there is a substantial governmental interest in providing accountability to the electorate, because the reporting requirements were substantially related to those interests, and because the interest was not outweighed by the burden placed on Geier's First Amendment rights.⁸⁷

B. Facially Unconstitutional Under the First Amendment

The court began its analysis of Geier's facial challenge of the reporting statutes by considering the MEC's contention that the claim was not justiciable.⁸⁸ The court summarized a justiciable controversy as requiring both a personal stake arising from a threatened or actual injury, as well as a claim that is sufficiently developed to allow the court to make an accurate determination of the facts, resolve a present conflict, and grant specific relief.⁸⁹ It quoted the U.S. Supreme Court in *Texas v. United States* in explaining a case cannot be ripe if it rests upon contingent future events that may not even occur.⁹⁰

The court took care to explain justiciability in the instant case because it considered Geier's attempt to invalidate the reporting statutes based on a chilling effect on future political speech as an attempt to seek relief on behalf of others not before the court.⁹¹ With this in mind, the court drew attention to Geier not having proffered any evidence of similarly situated committees or future plans to create similarly situated committees.⁹² The court disagreed with Geier's assertion that his own proclaimed fear of engaging in future political speech was sufficient to fix the ripeness issues here, stating that his assertion of a chilling effect, even if relevant to standing, "do[es] not address the ripeness of a pre-enforcement challenge to the reporting statutes on behalf of either hypothetically inactive PACs or Geier himself as a future PAC

85. *Id.*

86. *Id.* at 568–69.

87. *Id.*

88. *Id.* at 569.

89. *Id.*

90. *Id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

91. *Id.*

92. *Id.*

treasurer.”⁹³ Because the court determined that Geier’s challenge was contingent on future events and did not involve a present conflict, it declined to reach the substantive question of whether the statutes are facially unconstitutional and instead affirmed the judgment of the lower court.⁹⁴

C. Unconstitutional Under the First and Sixth Amendments

Turning finally to the least developed arguments made by Geier, the court began its analysis of Geier’s Sixth Amendment claim by stating that the MEC is an administrative body that conducted a hearing to determine if there was probable cause to believe that Geier violated the reporting requirements.⁹⁵ The court noted that pursuant to Missouri Revised Statutes section 105.961.1, this hearing “shall be a closed meeting and not open to the public.”⁹⁶ The court acknowledged that the Sixth Amendment provides for a right to a public trial in criminal prosecutions but disagreed with Geier’s assertion that the closed hearing was criminal or quasi-criminal because there was no evidence in the record that the hearing did lead or could have led to criminal liability.⁹⁷ It concluded that because there was no actual or potential criminal prosecution, Geier had no constitutional right to an open trial, and his claim that section 105.961.1 was unconstitutional as applied was therefore invalid.⁹⁸

The court began its analysis of Geier’s last-ditch First Amendment claim by noting that the First Amendment does provide “a qualified right for the news media and general public to attend criminal trials and proceedings,” and that, in some cases, this right had been extended beyond criminal proceedings in certain circumstances.⁹⁹ However, the court noted again that this was not and could not have been a criminal proceeding. Because there was no authority cited that would grant the public or news media a right to attend a non-criminal investigative hearing of this type, the statute’s failure to provide an open hearing was not unconstitutional under the First Amendment.¹⁰⁰

V. COMMENT

First, this Part analyzes the merit of the Supreme Court of Missouri’s application of exacting scrutiny to the particular facts of Stop Now!’s case and Missouri’s reporting statutes. Next, this Part examines the probable impact of such a ruling in a post-*Citizens United* landscape and the implications

93. *Id.*

94. *Id.* at 571.

95. *Id.* at 570.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 570–71.

100. *Id.* at 571.

for the future of Missouri's ability to provide voters with information about political spending.

A. Missouri's Disclosure Requirements Under Exacting Scrutiny

In the wake of *Citizens United*, disclosure requirements are one of the few tools left to states as they endeavor to ensure accountability and fairness in their election processes.¹⁰¹ It is notable that in an opinion otherwise extremely hostile to campaign regulation, the reporting requirements of the Bipartisan Campaign Reform Act were not just upheld but celebrated as important tools allowing “the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁰² Yet in practice, states have had difficulty crafting reporting laws that manage to provide the real public benefits of disclosure without excessively burdening citizens and PACs' First Amendment rights.¹⁰³ In *Geier*, the Supreme Court of Missouri decided that Missouri's disclosure scheme, and in particular its ongoing disclosure requirements, passes muster under an exacting scrutiny analysis.¹⁰⁴ However, upon close analysis of the Eighth Circuit's prior decisions in this area and the policy rationale underlying *Citizens United*, the logic advanced by the court raises troubling questions about the future of reporting requirements in Missouri and highlights the need for clarity regarding the exacting scrutiny standard.

The Supreme Court of Missouri distinguished *Minnesota Citizens* from the instant case because Stop Now! was a PAC and the Minnesota plaintiff was not.¹⁰⁵ And indeed, the Eighth Circuit only overruled the reporting requirement to the extent that it applied to associations not qualifying as PACs under Minnesota law and did not affect the regulation of Minnesota political committees.¹⁰⁶ But just because the Eighth Circuit declined to reach the explicit question in *Minnesota Citizens* does not mean its analysis is inapplicable. Even though the Eighth Circuit in *Minnesota Citizens* ruled on non-PACs and the Supreme Court of Missouri in *Geier* ruled on PACs, both analyzed similar reporting statutes with, crucially, the same level of scrutiny.¹⁰⁷

101. See Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723, 723 (2012).

102. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 312 (2010).

103. See *id.*

104. *Geier*, 474 S.W.3d at 565.

105. *Id.* at 567.

106. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc) (“Accordingly, we reverse the district court’s denial of the appellants’ motion for a preliminary injunction to the extent it requires ongoing reporting requirements from associations not otherwise qualifying as PACs under Minnesota law.”).

107. Compare MINN. STAT. ANN. §§ 10A.01 subdvs. 27, 28 (West 2016), with MO. REV. STAT. § 130.046 (Cum. Supp. 2013).

Not only are the reporting requirements similar and the constitutional tests identical, but the interests and burdens in both cases are aligned as well: In *Minnesota Citizens* and *Geier*, the government's interest is providing information to citizens, while the burden created by the statutes is placed on the appellants' First Amendment rights.¹⁰⁸

For these reasons, the court's determination that "on its face, *Minnesota Citizens* does not apply to this case" is unduly dismissive of the resonant parallels between the cases.¹⁰⁹ *Minnesota Citizens* cannot be mechanically applied to *Geier*, but neither should its analytical framework be ignored. Also unacknowledged in *Geier* is the Eighth Circuit's 2013 ruling in *Iowa Right To Life Committee, Inc. v. Tooker*, where a similar ongoing reporting requirement was ruled unconstitutional as applied because the ongoing reporting burden and termination notice burden placed on the Iowa plaintiff outweighed the State's interest in providing accountability.¹¹⁰ Like in *Minnesota Citizens*, the plaintiff was not a PAC, but again, the exacting scrutiny analysis did not hinge on whether or not the organization was, formally, a PAC.¹¹¹ The court instead, when conducting its exacting scrutiny analysis, focused on the burdens imposed and interests sought in that specific case.¹¹²

The informational interest reporting requirements fulfill is, first and foremost, a practical interest – it is only useful to the extent that it conveys materially useful information to the citizenry. In contrast, contribution limits have a practical import (preventing actual corruption) but also have a substantial *symbolic* dimension – citizens are heartened to know their leaders cannot be on the dole of moneyed interests and discouraged when candidates receive large amounts of contributions from the economic elite.¹¹³ Taking into account the practical nature of the interest considered in *Tooker*, the Eighth

108. *Minn. Citizens Concerned for Life*, 692 F.3d at 881 ("Under the exacting scrutiny framework, disclosure laws survive if the government shows 'a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed.'" (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008))); *Geier*, 474 S.W.3d at 569 ("In sum, the reporting statutes are substantially related to the State's sufficiently important informational, accountability, and enforcement interests. . . . Further, they imposed no more than a minimal burden on *Geier* and *Stop Now!*'s First Amendment rights.").

109. *Geier*, 474 S.W.3d at 567.

110. *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 599 (8th Cir. 2013) ("The perpetual supplemental reporting requirements discourage groups from participating in the 'open marketplace of ideas protected by the First Amendment.'" (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 354 (2010))).

111. *Id.* at 589–91 (engaging in extensive discussion of the exacting scrutiny standard with no weight given to whether the Iowa Right To Life Committee was or was not a PAC).

112. *Id.* at 592–96.

113. Patrick O'Connor, *Influence of Money in Politics a Top Concern for Voters*, WALL ST. J.: WASH. WIRE (June 21, 2015, 9:00 AM), <http://blogs.wsj.com/washwire/2015/06/21/influence-of-money-in-politics-a-top-concern-for-voters/>.

Circuit's holding is not surprising: From a voter's perspective, there is little help offered by requiring a small Iowa non-profit to perpetually file reports that show no political activity. The courts in both *Tooker* and *Minnesota Citizens* avoided the idea that there is an intrinsic interest in making every group report all its activity – such an interest is grounded in the actual, practical value of information that is given to voters.¹¹⁴

Michael Gilbert of the University of Virginia conceives the informational interest as containing an inherent tradeoff between the chilling effects of disclosure and the value of source revelation – the idea being that if too much reporting is allowed to occur, the overall amount of information in the polity will decrease because the value of the chilled (and thus lost) speech will outweigh the value of knowing where the remaining speech comes from.¹¹⁵ Gilbert fears a situation that reduces the amount of information beyond what is warranted because of the ephemeral power assigned to the informational interest.¹¹⁶ The Eighth Circuit's hostility to reporting schemes in the context of exacting scrutiny as applied against smalltime donors – that is, its minimization of the interests sought and emphasis on the burdens imposed – is unsurprising and sensitive to the real tradeoffs that Gilbert explores in relation to the informational interest.

Whatever its reasons, the function of the Supreme Court of Missouri's wholesale abandonment of *Minnesota Citizens* (and failure to even acknowledge the import of *Tooker*) is not so sensitive, and it instead creates space for its own unmoored application of exacting scrutiny to Missouri's disclosure requirements. Recall that Geier's sin was failing to file timely disclosure forms that would have shown a totally defunct PAC.¹¹⁷ The burden on Geier's First Amendment right is small – the forms are short and do not ask for especially detailed information.¹¹⁸ And the State has a sufficient interest, affirmed by *Citizens United*, in maintaining some sort of disclosure regime that provides accountability to voters.¹¹⁹ Although at first glance the

114. *Iowa Right To Life*, 717 F.3d at 590; *Minn. Citizens Concerned for Life, Inc. v. Swanson* 692 F.3d 864, 873 (8th Cir. 2012) (en banc).

115. Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1863–65 (2013).

116. *Id.* at 1865.

117. *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 563 (Mo. 2015) (en banc).

118. MO. ETHICS COMM'N, STOP NOW! COMMITTEE STATEMENT OF LIMITED ACTIVITY (2012), <http://www.mec.mo.gov/CampaignFinanceReports/Generator.aspx?Keys=B2G41dEVPKgI8cDcdGFsgJsm99XwPL2GqWuBVgRCWLHUPfPcFj4jpO3nlfwbw8VuwN3rpXqD7aL8U1pwiDUTJOqJT6901ruZ> (showing extent of information needed to complete a statement of limited activity).

119. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010) (“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

“weighing” of the interest against Geier’s burden appears an easy task, it is important to remember this was an as-applied challenge – the court was not asked to scrutinize the general constitutionality of the reporting statutes but instead to evaluate their particular application here.¹²⁰

The court states, “Apart from *Minnesota Citizens*, Geier offers no authority for the proposition that the State has no interest in receiving disclosure reports from inactive PACs.”¹²¹ But who says Geier needs any authority for this proposition? The proposition seems to be a corollary – the justification is self-evident. After all, the State’s interest in disclosure is based on a desire to provide information to its citizens regarding who is participating in their democracy and how.¹²² This interest dissolves in the case of Stop Now!, a defunct PAC that was emphatically *not* participating in Missouri’s democracy.¹²³ The court here has implicitly held there is a sufficient government interest in disclosing information about who is *not* participating in its democracy.¹²⁴ This holding has no home in the Eighth Circuit’s jurisprudence.

So what is the relation between applying the reporting requirements to inactive PACs and the State’s interest in disclosing information about political actors? The court thought the State’s interest would be frustrated if inactive PACs did not need to file reports because “the MEC would be forced to continually sift through each PAC that did not file disclosure reports to determine which were shirking their disclosure obligations and which were merely inactive.”¹²⁵ But nothing would require the MEC to sift through each PAC that did not file a report. After all, it is easy to imagine a regulatory scheme where the absence of a report could convey the same information that a report showing total inactivity conveys now.¹²⁶ In this scheme, the absence of a report would only be a violation when the PAC has, at any point over the

speakers and messages. . . . We find no constitutional impediment to the application of BCRA’s disclaimer and disclosure requirements . . .”).

120. *Geier*, 474 S.W.3d at 563. Geier also made a facial challenge, but the court declined to rule on the issue because it was not ripe. *Id.* at 569.

121. *Id.* at 567.

122. *Id.* at 566 (“Assuming that Stop Now! was truly an ‘issue PAC’ speaking only about tax-related ballot initiatives, the reporting statutes here must be justified by (1) the State’s interest in gathering data to detect other violations of campaign finance laws and/or (2) the informational interest: ‘the need to provide the electorate with information about the sources of election-related spending.’” (footnote omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976))). The argument for an enforcement interest is even weaker than the argument for an informational interest because one cannot violate a campaign finance law by *not* engaging in political activity.

123. *Id.* at 565.

124. *Id.*

125. *Id.* at 567.

126. If political action is detected and accredited to a PAC that did not file a report, the PAC would obviously be in violation of the reporting statutes. Likewise, a PAC that filed a report would be in violation of the reporting statutes if political action is detected that is not contained in its filing.

filing period, participated in the political process. The court noted, “The MEC had no way of knowing, absent a termination statement, that Stop Now! had effectively dissolved.”¹²⁷ Left unexplained is what the State’s interest is in knowing whether or not a political organization has legally dissolved when it is functionally inactive either way. Although the State surely has justification under an exacting scrutiny standard to force disclosures from PACs that participate in the political process, the rote application of this logic to defunct PACs like Stop Now! leaves many questions.

B. *The Limits of Disclosure After Citizens United*

In *Citizens United*, the value attached to informing citizens about who is engaging in political speech is founded on the idea that citizens need the information about election-related spending to make informed decisions about candidates and political causes.¹²⁸ Stated another way by one scholar, “The informational interest in disclosure is currently seen as a kind of inoculation against free speech in campaigns.”¹²⁹

Yet *Citizens United*, far from heralding in an era of transparency in American politics, quickly led to situations where secret independent donors anonymously gave tens of millions of dollars to independent advocacy groups, while smaller donors remained attached to schemes that forced them to disclose every source, and expenditure, of funds.¹³⁰ In Missouri, well-funded nonprofit groups have poured millions of dollars into Missouri campaigns and candidates with no obligation to disclose where this money is coming from.¹³¹ If these organizations were to choose to organize as PACs, they would be forced to disclose the source and use of their funds under Missouri’s reporting requirements.¹³² But why would they do that? *Citizens United* is, on its face, friendly to state regulatory schemes that compel political actors to disclose financial information.¹³³ In reality, it has created a situation where small-time, largely innocuous actors like Gerald Geier are burdened by Missouri’s reporting requirements, while large donors operate with

127. *Geier*, 474 S.W.3d at 567.

128. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

129. Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 433 (2012).

130. See Kenneth P. Vogel, *A Look Back at 2010 Spending*, POLITICO (Dec. 13, 2010, 11:51 PM), <http://www.politico.com/story/2010/12/a-look-back-at-2010-spending-046355> (last updated Dec. 14, 2010, 9:52 AM).

131. Jo Mannies, *Missouri Groups with Secret Donors Have Big Impact*, ST. LOUIS PUB. RADIO (Feb. 4, 2015), <http://news.stlpublicradio.org/post/missouri-groups-secret-donors-have-public-impact>.

132. MO. REV. STAT. § 130.041.1 (2000).

133. *Citizens United*, 558 U.S. at 370–71.

less oversight, hidden in the shadows of their “independent” non-profit status.¹³⁴

This policy failure cannot be laid at the feet of the Supreme Court – *Citizens United* gave state and national legislators the bailiwick to enact stricter disclosure laws that would apply to *all* forms of political spending, not just spending through PACs.¹³⁵ Fault instead lies with the legislators who have been unwilling to create schemes that pull independent expenditure committees out of the shadows. In 2016, legislation was filed in the Missouri House of Representatives that would expand the MEC’s disclosure requirements to independent committees; however, it received no hearing.¹³⁶

On the federal level, independent expenditure committees have been the frequent target of complaints about a lack of transparency, complaints that could be resolved by the imposition of more stringent disclosure requirements.¹³⁷ The only major legislative effort to strengthen disclosure requirements in the wake of *Citizens United* was the DISCLOSE Act, which was proposed in the immediate aftermath of the case and passed by the House of Representatives by a 219-206 vote.¹³⁸ It was eventually defeated in the Senate, after a 59-39 party-line vote came one short of defeating a Republican filibuster.¹³⁹ Although there is clearly a popular desire to expand reporting requirements at the state and federal levels, advocates have thus far been unsuccessful in turning this desire into law. The failure to meaningfully enhance reporting requirements since 2010 puts the lie to the assumption, made by many, that disclosure remains an “uncontroversial regulatory technique.”¹⁴⁰ It might be more accurate to say it was the *least* controversial regulatory technique when regulators had a host of techniques to pick from – and therefore the one that enemies of campaign finance regulation spent the least time fighting.¹⁴¹ Now that the pickings are slim, reporting requirement reforms have, predictably, slowed or halted entirely.¹⁴²

The failure of legislative assemblies across the country to adjust the scope of the reporting requirement is jarring in the wake of *Citizens United*, which left reporting requirements as one of few tools left in the box that had

134. Mannies, *supra* note 131 (“501C4s don’t have to report their donors or file detailed reports on their spending, as PACs must do.”).

135. *Citizens United*, 558 U.S. at 371.

136. H.R. 188, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

137. See David Frum, *Twilight of the Super PAC*, ATLANTIC (Feb. 24, 2016), <http://www.theatlantic.com/politics/archive/2016/02/super-pacs-2016/470697>.

138. DISCLOSE Act, H.R. 5175, 111th Cong. (2009–2010).

139. *Id.*

140. See, e.g., Daniel R. Ortiz, *The Informational Interest*, 27 J. L. & POL. 663, 664 n.9 (2012) (citing Briffault, *supra* note 2, at 274) (“Disclosure generally gets high marks from the public, academics, and the courts. Opinion polls find very high levels of public support for campaign finance disclosure. Among academics, both campaign finance reformers and campaign finance skeptics have endorsed disclosure.”).

141. See *id.* at 664.

142. *Id.* at 666.

clear support from eight Justices.¹⁴³ After all, such regulations are essential to a functioning democracy: A comparative study published in the *Election Law Journal* found a strong correlation between the robustness of reporting requirements and the health of democratic legislatures.¹⁴⁴ Anecdotal evidence also vividly supports the conclusion that reporting requirements are important.¹⁴⁵ In 2009, the U.S. Supreme Court was asked to weigh in on whether a due process violation occurred when a West Virginia appellate judge accepted a \$3 million campaign donation from a mining company weeks before that same company would come before that judge seeking to vacate a \$50 million trial court judgment entered against it.¹⁴⁶ The Court ruled an ethical violation had occurred – a violation that might never have come to light had West Virginia not required the judge to report the donation.¹⁴⁷

From an equity standpoint, the current discrepancy in Missouri law that burdens committees like Stop Now!, while allowing others to push money into politics unhindered, represents a serious problem. If the State indeed has a compelling interest in providing information to its citizens, then how can it not require the *largest political spenders* to provide basic donor information to voters? It is easy to understand Geier's frustration with the current scheme: He, operating on his own, was dragged through an administrative proceeding because he failed to adhere to reporting requirements that, if fulfilled, would have shown precisely nothing, while other – actually meaningful – players in Missouri politics plied vast sums into politics through mechanisms that obviate any responsibility to reveal themselves.¹⁴⁸

From a pragmatic standpoint, situations like Geier's could plausibly lead to an exodus from pre-*Citizens United* regulatory structures that channel money through Missouri PACs. Now that independent non-profit committees can engage in unlimited political spending, it is difficult to imagine many cases where a person seeking to engage with a Missouri ballot initiative would choose to submit himself or herself to the MEC's regulatory strictures. The reason that PACs were subject to these strictures was because their major purpose was to engage in politics.¹⁴⁹ Independent committees, which had

143. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).

144. Joel W. Johnson, *Democracy and Disclosure: Electoral Systems and the Regulation of Political Finance*, 7 *ELECTION L.J.* 325, 326 (2008).

145. *Id.*

146. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873–74 (2009).

147. *Id.* at 886.

148. See *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 563 (Mo. 2015) (en banc).

149. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (“Since designation as a political committee often entails a significant regulatory burden – as evidenced by the requirements imposed by North Carolina – the Court held that only entities ‘under the control of a candidate or the major purpose of which is the nomination or election of a candidate’ can be so designated.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 79 (1976))).

only a limited ability to engage in politics, were not thought to deserve such treatment.¹⁵⁰ In a world where the limits of independent committees to engage in politics have been so eroded, this reasoning no longer makes sense. Until disclosure requirements move beyond this outdated logic, Missouri's ability to provide its citizens with meaningful information about political spending will suffer. And concerns about exacting scrutiny aside, Missourians like Gerald Geier will continue to play by different and more burdensome rules than other sophisticated and influential actors.

VI. CONCLUSION

In *Geier v. Missouri Ethics Commission*, the court found Missouri's reporting statutes constitutional as applied to the statutory violations committed by Stop Now!. Lurking behind a unanimous (and largely *pro forma*) opinion, however, are substantial questions about whether there is a sufficient governmental interest in disclosing to citizens the absence of political activity, as well as concomitant questions about whether there is a substantial relationship between the disclosure requirements and the legitimate government interest in providing information to voters in light of the burden placed on on Geier.

Additionally, the court's opinion raises questions about whether the distinction between PAC and non-PAC political actors is a pre-*Citizens United* artifice that mostly serves to punish actors, like Geier, who have organized under PACs, instead of as independent political spenders. The constitutionality of the disclosure statutes as applied to inactive PACs aside, it is hard to escape the conclusion that the policy merits of chasing citizens like Gerald Geier are weak. Going forward, the Supreme Court of Missouri should clarify the nature of the government's interest in burdening citizens who have withdrawn from the political process, as well as the connection between this interest and the reporting requirement. Missouri legislators, meanwhile, should confront the weakness of our campaign disclosure regulatory scheme by ensuring that the light provided by disclosure is reaching every corner of Missouri's political landscape.

150. *Id.*

