

THE UNCONSTITUTIONALITY OF THE CLOSE THE CONTRACTOR FRAUD
LOOPHOLE ACT OF 2008

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On June 30, 2008, then-President George W. Bush signed into law the Close the Contractor Fraud Loophole Act (“CCFLA”), a law enacted “[t]o require disclosure by Federal contractors of certain violations relating to the award or performance of Federal contracts.”¹ The CCFLA specifically required the Federal Acquisition Regulation (“FAR”) be amended within 180 days to “require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts[.]”² “Covered contracts or

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¹H.R. 5712, 110th Cong. (2d Sess. 2008) (enacted).

²Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, 122 Stat. 2386 (2008).

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subcontracts” were defined to include any contract exceeding \$5,000,000 in value and 120 days in duration.³

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“FAR Councils”) enacted the regulations required under the CCFLA on November 12, 2008. The implementing regulations enacted by the FAR Councils provided for potential suspension or debarment of any “covered contract[or]” whose principals “knowing[ly] fail[]” to “timely disclose to the Government” “credible evidence of . . . [v]iolation[s] of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code.”⁴

Representative Tom Davis of Virginia, a co-sponsor of a final amendment to the CCFLA in the House, commented on pre-amendment draft language of the CCFLA that would have required contractors to “self-report” if they have “reasonable grounds to suspect a violation of criminal law” in an April 2008 floor statement expressed “serious concerns” about the “unprecedented” and “controversial” nature of the law (as thus worded).⁵ Notwithstanding the substitution of the term “credible evidence” in place of “reasonable grounds” in the final version of the CCFLA, the CCFLA *does* apparently constitute an “unprecedented” law, as potentially the first instance in which the federal government has sought, through legislation, to compel individuals to admit to their involvement in violations of federal criminal law.

To date no company subject to the CCFLA has challenged the constitutionality of the CCFLA or its implementing regulations. If subject to challenge, as set forth below in this article, a court is likely to hold the CCFLA unconstitutional under the First Amendment, on three grounds. Specifically, a court is likely to hold the CCFLA void: for vagueness; on grounds of over-breadth; and because the law unconstitutionally mandates compelled speech that is inextricably intertwined with protected Fifth Amendment speech.

³ See *id.* at 2387.

⁴ 48 C.F.R. §§ 9.406-2(b)(1)(vi), 9.407-2(a)(8) (2009).

⁵ See Thomas Davis III, *Close the Contractor Fraud Loophole Act*, PROJECT VOTE SMART (April 23, 2008), <http://votesmart.org/public-statement/340279/close-the-contractor-fraud-loophole-act>.

I. BACKGROUND TO THE CCFLA

In July 1985, President Reagan convened a Blue Ribbon Commission on Defense Management to “study the issues surrounding [U.S.] defense management and organization, and report its findings and recommendations.”⁶ As of fiscal year 1985, the U.S. Department of Defense’s total expenditures on goods and services procured from private contractors stood at \$164 billion.⁷

The Blue Ribbon Commission reported interim findings in February 1986, including the conclusion that “[c]ontractors have a legal and moral obligation to disclose to government authorities misconduct discovered as a result of self-review.”⁸ Consistent with this observation, the commission recommended that “defense contractors . . . promulgate and vigilantly enforce codes of ethics that address the unique problems and procedures incident to defense procurement.”⁹ In response, the Department of Defense (“DOD”) instituted a “Voluntary Disclosure Program” for contractors in July of 1986.¹⁰ Under the Voluntary Disclosure Program, defense contractors could make disclosures of “potential fraud” to the DOD OIG.¹¹ Disclosures were accepted into the program if they contained sufficient information to be useful and if they were “not triggered by the contractor’s recognition that the potential criminal or civil fraud matter . . . [was] about to be discovered by the Government.”¹²

⁶PRESIDENT’S BLUE RIBBON COMM’N ON DEF. MGMT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT xi (June 30, 1986), *available at* http://usacac.army.mil/cac2/CSI/docs/Gorman/06_Retired/01_Retired_1985_90/07_86_PackardCommission_FinalReport/01_PackardCommission_FinalReport.pdf.

⁷*Id.* at 75.

⁸PRESIDENT’S BLUE RIBBON COMM’N ON DEF. MGMT., AN INTERIM REPORT TO THE PRESIDENT 20 (Feb. 28, 1986), *available at* <http://babel.hathitrust.org/cgi/pt?id=mdp.39015019783300;view=1up;seq=1>.

⁹*Id.* at 21.

¹⁰*See* Department of Defense Voluntary Disclosure Program, 931 Criminal Resource Manual (U.S. Dep’t of Justice), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00931.htm (last visited Apr. 12, 2014).

¹¹*See id.*

¹²INSPECTOR GEN., DEP’T OF DEF., THE DEPARTMENT OF DEFENSE VOLUNTARY DISCLOSURE PROGRAM: A DESCRIPTION OF THE PROCESS 5 (April 1990).

By 2009, DoD's total expenditures on private contractors had grown to \$387 billion.¹³ The Government Accountability Office, in a report issued that same year, concluded that the Voluntary Disclosure Program "had been largely ignored by contractors for the [] 10 years" preceding 2009.¹⁴ The CCFLA thus arose as one response to the problem of defense contractors "ignoring" the Voluntary Disclosure Program. One apparent byproduct of contractors' lack of adherence to the Voluntary Disclosure Program was a startling string of incidents of fraud by private contractors during the wars in Afghanistan in Iraq. The House Committee on Oversight and Government Reform noted that as of April 22, 2008, "the Department of Justice (DOJ) ha[d] charged 46 individuals and companies for contract fraud relating to contracts in Afghanistan, Kuwait, and Iraq."¹⁵

A letter from the head of the Department of Justice's Criminal Division dated May 23, 2007, addressed to the Administrator for U.S. Federal Procurement Policy (Paul Denett), set in motion the events that led to the CCFLA's passage.¹⁶ As of that date, the FAR Councils were already in the process of drafting proposed regulations (under FAR 52.203-13) that would require contractors to create a "contractor code of business ethics and conduct and t[o] display [] Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters" and had invited comments regarding the same. Then-Assistant Attorney General Alice Fisher wrote to Mr. Denett in May 2007 to ask that the FAR Councils supplement draft FAR 52.203-13 by "requir[ing] contractors to establish and maintain internal controls to detect and prevent fraud in their contracts, and . . . notify contracting officers without delay whenever they become aware of a contract overpayment or fraud, rather than wait for its discovery by the government."¹⁷ In response, the FAR Councils amended the proposed FAR 52.203-13 to require contractors to develop an "internal control system" capable of "[f]acilitat[ing] timely discovery of improper conduct in connection with Government contracts[,] and [e]nsur[ing] corrective measures are promptly instituted and carried out," and to develop "[a]n

¹³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-591, DEFENSE CONTRACTING INTEGRITY: OPPORTUNITIES EXIST TO IMPROVE DOD'S OVERSIGHT OF CONTRACTOR ETHICS PROGRAMS 1 (Sept. 2009).

¹⁴ *Id.* at 21.

¹⁵ H.R. REP. NO. 110-599, at 2 (2008).

¹⁶ *See id.*

¹⁷ *Id.* (citing Letter from Alice Fisher, Assistant Attorney General, to Paul Denett, Administrator for U.S. Federal Procurement Policy (May 23, 2007)).

internal reporting mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports,” with an effective date of December 24, 2007.¹⁸ In discussing the amended rule (FAR 52.203–13), the FAR Councils deemed it consistent with the overall federal “trend to increase contractor compliance with ethical rules of conduct,” citing the Sarbanes-Oxley Act.¹⁹ The FAR Councils further proposed that FAR 52.203–XX(b)(3) be “[m]odif[ied]” “to require notification to the agency Office of the Inspector General, with a copy to the contracting officer, whenever the contractor has reasonable grounds to believe that a violation of criminal law has been committed in connection with the award or performance of the contract or any subcontract thereunder.”²⁰

In the view of Congress, however, the proposed modified proposed FAR 52.203–XX(b)(3) and amended FAR 52.203–13 did not go far enough. The amended FAR 52.203–13 contained an exemption for federal subcontracts “performed entirely outside the United States.”²¹ Rep. Peter Welch of Vermont, who sponsored passage of the CCFLA in the House, described this exemption as “outrageous” and “indefensible,” offering that “[n]o contractor should be given a green light to defraud taxpayers. We need to protect taxpayer dollars and our troops serving overseas by closing this loophole with the force of law.”²² Representative Bennie Thompson referred to the “loophole” that the CCFLA sought to remedy as “a loophole in Government procurement regulations that allows some contractors to avoid reporting violations of Federal law or overpayments.”²³

Beyond merely addressing the overseas contractor exemption to FAR 52.203–13’s applicability, as an effort to close the perceived “loophole” in

¹⁸Federal Acquisition Regulation; FAR Case 2006–007, Contractor Code of Business Ethics and Conduct, 72 Fed. Reg. 65,873, 65,882 (Nov. 23, 2007) (to be codified at FAR 52.203–13).

¹⁹*Id.* at 65,876.

²⁰Federal Acquisition Regulation; FAR Case 2007–006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019, 64,019–20 (proposed Nov. 14, 2007) (to be codified at 48 C.F.R. § 3.1004).

²¹*See* Contractor Code of Business Ethics and Conduct, 72 Fed. Reg. at 65,882; *see also* Federal Acquisition Regulation; FAR Case 2007–006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019, 64,022 (proposed Nov. 14, 2007) (to be codified at 48 C.F.R. § 3.1004).

²²Robert Brodsky, *Clinton Introduces Bill to Post Contractor Violations on the Web*, GOVERNMENT EXECUTIVE (May 1, 2008), available at <http://www.govexec.com/federal-news/2008/05/clinton-introduces-bill-to-post-contractor-violations-on-the-web/26817/>.

²³Davis III, *supra* note 5, at 1.

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existing regulations, the House Committee on Oversight and Government Reform drafted legislation in Spring 2008 going farther than requiring contractors to merely “discover” fraud and “take corrective measures” toward it, and to “encourage” reporting of it, so as to require all covered contractors and subcontractors to pro-actively report to the United States suspected instances of fraud. The original House version of the CCFLA thus proposed that contractors report such fraud whenever the contractor has “reasonable grounds [for] belie[f]” that fraud occurred:

A covered contractor shall submit written notification to the Office of Inspector General of the Executive agency that awarded the covered contract whenever the contractor *has reasonable grounds to believe* that the contractor, or a principal, employee, agent, or subcontractor of the contractor, has committed a violation of Federal criminal law, or has received a significant overpayment, in connection with the award or performance of the covered contract or any subcontract under the contract.²⁴

Reacting to this draft language, Representative Tom Davis (also of the House Committee on Oversight and Government Reform), stated that:

I had serious concerns about this legislation when it was originally introduced. The original version would have required a Federal contractor to self-report to the agency’s IG if the contractor had reasonable grounds to suspect a violation of criminal law . . . The concept of mandatory self-reporting by contractors of possible criminal violations, based on reasonable grounds, would have been unprecedented and obviously controversial.²⁵

Representative Davis, along with Representative Henry Waxman of California (Chairman of that Committee), accordingly offered an amendment to the original draft CCFLA on April 16, 2008, striking the words “reasonable grounds to believe” from the law to read as follows:

The Federal Acquisition Regulation shall be amended within 180 days after the date of the enactment of this Act pursuant to FAR Case 2007-006 (as published at 72 Fed

²⁴H.R. 5712, 110th Cong. (introduced April, 3 2008) (enacted) (emphasis added).

²⁵Davis III, *supra* note 5, at 1.

Reg. 64019, November 14, 2007) or any follow-on FAR case to include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.²⁶

The introductory language of the statute was then modified slightly prior to passage, yet without alteration of the law's substantive provisions requiring that the FAR Councils implement regulatory "provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items."²⁷ Rep. Davis further explained in his April 23, 2008 statement that he supported the final version of CCFLA in that the CCFLA's mandatory self-reporting requirement stood to be implemented subject to an "appropriate statutory acquisition rulemaking process,"²⁸ *i.e.*, the FAR Councils' rulemaking process.

The CCFLA then was passed by both houses of Congress and signed into law by President Bush.²⁹ The FAR Councils heeded the 180 day timeframe set forth under the CCFLA and implemented a Final Rule on November 12, 2008, made effective on December 12, 2008, providing that a contractor may be suspended or debarred for:

Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract . . . credible evidence of—
(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; (B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
(C) Significant overpayment(s) on the contract, other than

²⁶H.R. 5712, 110th Cong. (2008) (enacted).

²⁷Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, 122 Stat. 2386 (2008).

²⁸Davis III, *supra* note 5, at 2.

²⁹*See* Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, 122 Stat. 2386 (2008).

overpayments resulting from contract financing payments as defined in 32.001.³⁰

“Principal” is defined as “an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).”³¹ The FAR Councils similarly and separately enacted implementing regulations at FAR 52.203-13(2)(II)(F) providing that a covered contractor’s internal control systems shall include provisions for:

Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729–3733).³²

The FAR Councils also required contractors to adopt internal control systems providing for “[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions.”³³

II. THE CCFLA VIOLATES THE FIRST AMENDMENT.

The CCFLA, as implemented under 48 C.F.R. §§ 9.406-2(b)(1)(vi) and 9.407-2(a)(8), is unconstitutional under the First Amendment on grounds of vagueness, over-breadth, and because it mandates compelled speech that is inextricably intertwined with protected Fifth Amendment speech.

A. *The CCFLA is Void for Vagueness*

The First Amendment to the U.S. Constitution provides that “Congress shall make no law . . . abridging the freedom of speech[.]”³⁴ Corporations

³⁰ 48 C.F.R. §§ 9.406-2(b)(1)(vi), 9.407-2(a)(8) (2009).

³¹ *Id.* § 52.209-5(a)(2).

³² *Id.* § 52.203-13(c)(2)(ii)(F).

³³ *Id.* § 52.203-13(c)(2)(ii)(G).

enjoy rights of free speech, even though subject to a lesser degree of protection than those of individual citizens.³⁵ As explained by the high court in the recent decision *F.C.C. v. Fox Television Stations, Inc.*, the “requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.”³⁶ The CCFLA is palpably void under the First Amendment on grounds of vagueness. A statute is void for vagueness if it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”³⁷ The Supreme Court has explained that a statute “is not vague because it may be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.”³⁸ Thus, the vagueness doctrine links two “discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”³⁹

Under the CCFLA and FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8), “what must be proved” in order for the United States to suspend or debar a contractor is a failure by a contractor to disclose “credible evidence” of a federal crime, the commission of which one or more of the contractor’s principals have knowledge.⁴⁰

This standard is unlikely to pass constitutional muster. In 1983, the Supreme Court held the phrase “credible and reliable” to be standard-less, and therefore unconstitutionally vague, as utilized in a California anti-loitering statute.⁴¹ The California statute in *Kolender* (California Penal Code Section 647(e)) required persons who loiter or wander streets to provide “credible and reliable” identification and to account for their presence to a police officer upon request, or face criminal prosecution.⁴² In considering whether “credible and reliable” under Penal Code Section 647(e) was an unconstitutionally vague phrase, the Supreme Court reviewed the definition of “credible and reliable identification” under

³⁴ U.S. CONST. amend. I.

³⁵ See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 899 (2010).

³⁶ 132 S. Ct. 2307, 2317 (2012) (citing *United States v. Williams*, 553 U.S. 285, 304 (2012)).

³⁷ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

³⁸ *Fed. Commc’ns Comm’n*, 132 S.Ct. at 2317.

³⁹ *Id.*

⁴⁰ 48 C.F.R. §§ 9.406-2(b)(1)(vi), 9.407-2(a)(8) (2009).

⁴¹ *Kolender v. Lawson*, 461 U.S. 352, 359–60 (1983).

⁴² See *id.* at 353–54.

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Section 647(e) supplied by the California Court of Appeal: identification “carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself.”⁴³ The Supreme Court held that:

[California] Section 647(e), as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a “credible and reliable” identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute.⁴⁴

The Court therefore struck down the California anti-loitering statute.⁴⁵ *Kolender* portends that the CCFLA and its implementing regulations stand to be held unconstitutionally void for vagueness unless the United States can “meaningfully distinguish its statute from those discussed in [the Supreme Court’s] precedent[],”⁴⁶ i.e., *Kolender* and related precedent discussed below. As set forth *infra*, it is unlikely the United States can make out this showing.

1. “Credible Evidence”

Here, the term “credible evidence” as used in FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8) is no more precise, nor less vague, than the terms “credible and reliable” as at issue in *Kolender*.⁴⁷ The principals of federal contractors are not trained attorneys, much less federal prosecutors: save for the occasional lawyer *cum* contracting executive, contracting officials are not trained to weigh the “credibility” of evidence, for criminal law purposes or other purposes. The United States has not even attempted to supply a definition of “credible evidence” under the CCFLA. This lack of any definitional guidance renders the CCFLA constitutionally infirm.

In discussing the final version of FAR Sections 9.406-2 and 9.407-2, the FAR Councils openly addressed the issue of whether the wording of those rules was “vague” as initially proposed:

⁴³ *Id.* at 357.

⁴⁴ *Id.* at 358.

⁴⁵ *Id.* at 361.

⁴⁶ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988).

⁴⁷ *See Kolender*, 461 U.S. at 359–60.

b. Vagueness of Rule

i. “Reasonable grounds to believe.” Numerous respondents were concerned that the rule does not specify what constitutes “reasonable grounds.” One respondent stated that “reasonable grounds” is subject to varying interpretations, and may be viewed as an even lower standard than “probable cause.” Should the contractor report based on mere suspicion or based on evidence that criminal activity has occurred? Because of this lack of clarity, several respondents were concerned that companies may tie up Government resources with a mountain of meaningless legal trivia. Numerous respondents stated that there will be substantial over-reporting because contractors may report even remotely possible criminal conduct out of an abundance of caution. One respondent considered that this will raise company costs through the investigation of baseless claims and incidents. Several other respondents stated that there will be an enormous amount of time spent sorting out the true criminal activity and truly significant problems.

One respondent suggested that the proposed rule will potentially subject an employer to civil actions brought by an employee when the reports forwarded by the employer to the Federal Government (because conceivably “reasonable grounds” existed) ultimately are determined to lack merit.

Response: The Councils have replaced “reasonable grounds to believe” with “credible evidence.” DoJ Criminal Division recommended use of this standard after discussions with industry representatives. This term indicates a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government.⁴⁸

⁴⁸Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,073 (Nov. 12, 2008).

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The FAR Councils itself thus admitted that there was a “lack of clarity” in the use of the term “reasonable grounds” in those rules originally proposed by the Councils in November 2007.⁴⁹ Notably, the concerns voiced by the public commenters in this regard mirrored those of Representative Davis as expressed months earlier, in April 2008.⁵⁰ The FAR Councils’ response to the public comments reflects the Councils’ solution to the problem that “[n]umerous respondents were concerned that the rule does not specify what constitutes ‘reasonable grounds’”: to substitute the phrase “credible evidence” in its place, apparently with the Department of Justice’s encouragement.⁵¹ However, in this fashion, the FAR Councils simply substituted one problem for another, without even going so far as to attempt to articulate a definition of “credible evidence.” There has not been any subsequent guidance given by the FAR Councils concerning the meaning of the phrase “credible evidence.”

The United States’ failure to supply any definition of “credible evidence” is nowhere more glaring than in the boilerplate “guidance” supplied by the General Services Administration (“GSA”) in August 2009 on the “applicability and implementation” of the CCFLA.⁵² In a published “Memorandum for all F[ederal] A[cquisition] S[ervice] Acquisition Activities,” with the subject, “Application of Contractor Business Ethics Compliance Program and Disclosure Requirements to the Federal Supply Schedule (FSS) Program,” the GSA purported to answer the rhetorical question, “What is considered ‘credible’ evidence’ [under FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8)]?”⁵³ In response to its own rhetorical question, the GSA responded:

⁴⁹Federal Acquisition Regulation; FAR Case 2007006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019, 64,023 (proposed Nov. 14, 2007) (to be codified at 48 C.F.R. pts. 3, 9, 42 and 52) (proposing to “[r]equire timely disclosure to the agency Office of the Inspector General (OIG), with a copy to the contracting officer, whenever the contractor has reasonable grounds to suspect a violation of criminal law in connection with the award or performance of the contract or any subcontract thereunder.”).

⁵⁰See Davis III, *supra* note 5, at 1.

⁵¹Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67,073.

⁵²See STEVEN J. KEMPF, ASSISTANT COMM’R, OFFICE OF ACQUISITION MGMT., GENERAL SERVS. ADMIN., FAS INSTRUCTIONAL LETTER 2009-06, MEMORANDUM FOR ALL FAS ACQUISITION ACTIVITIES, (Aug. 8, 2009), available at <https://www.asap.gsa.gov/datagov/fas-il/IL%202009-06.pdf>.

⁵³*Id.* at 4.

‘Credible evidence’ implies that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government.⁵⁴

This is a wholly circular statement, and contains no substantive definition of the phrase “credible evidence” whatsoever. The GSA simply punted on supplying an actual definition to the phrase “credible evidence.”

“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”⁵⁵ Here, there is no question but that the CCFLA “requires” the doing of an act by affected principals—to speak, and to identify information in their possession concerning potential criminal activity.⁵⁶ In like circumstances, the Supreme Court has stricken down similarly overly vague statutes.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Supreme Court held Nevada Supreme Court Rule 177 void for vagueness insofar as it proscribed any pre-trial statement by an attorney tending to have a “substantial likelihood of materially prejudicing an adjudicative proceeding,” save that a lawyer “may state without elaboration . . . the general nature of the . . . defense.”⁵⁷ A Nevada attorney had held a press conference after the arrest of his client for theft, announcing that “crooked cops” were the actual perpetrators of the crime.⁵⁸ The Nevada Supreme Court imposed discipline on the attorney in the form of a private reprimand.⁵⁹ The Supreme Court held Rule 177’s “‘general’ nature of the defense” “safe harbor” provision supplied “insufficient[ly]” precise “guidance” to parties affected by the rule (*i.e.*, attorneys) to pass muster under the First Amendment.⁶⁰

⁵⁴ *Id.*

⁵⁵ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

⁵⁶ *See* 48 C.F.R. § 9.406-2(b)(1)(vi) (providing for debarment of a principal’s employer, *i.e.*, a “covered” company, for the “[k]nowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence” of violations of federal criminal law.).

⁵⁷ 501 U.S. 1030, 1048 (1991).

⁵⁸ *Id.* at 1034.

⁵⁹ *Id.* at 1033.

⁶⁰ *Id.* at 1048–49.

The Supreme Court held that Nevada Rule 177 failed to give “fair notice to those to whom [it] is directed” “[g]iven [the rule’s] grammatical structure, and absent any clarifying interpretation by the state court.”⁶¹ In his majority opinion, Justice Kennedy explained that:

The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.⁶²

The term “credible” as contained in FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8) is not precise and there is no guidance provided by the Government concerning the term’s meaning; therefore, the risk of discriminatory enforcement by the United States is acute.

Also in accord with *Kolender* and *Gentile* is *Reno v. American Civil Liberties Union*.⁶³ There, the Supreme Court struck down, on vagueness grounds, the Communications Decency Act, which proscribed the “mak[ing] [of] ‘any comment, request . . . or other communication which is obscene or indecent’”⁶⁴ The Supreme Court held that “[t]he CDA’s burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.”⁶⁵ The undefined term “credible evidence” under the CCFLA is equally vague as the terms “obscene” and “indecent” in *Reno*.⁶⁶

Kolender, *Reno*, and *Gentile* signal squarely that the CCFLA fails on grounds of the vagueness of the phrase “credible evidence.”⁶⁷ As discussed further below, other defects underpinning the CCFLA call into question whether even a more “carefully drafted” version of the statute and the phrase “credible evidence” thereunder could save the CCFLA.

⁶¹ *Id.* at 1048 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)).

⁶² *Id.* at 1051 (internal citations omitted).

⁶³ 521 U.S. 844, 849 (1997).

⁶⁴ *Id.* at 859.

⁶⁵ *Id.* at 874.

⁶⁶ *Id.* at 871.

⁶⁷ *Kolender v. Lawson*, 461 U.S. 352 (1983); *Reno*, 521 U.S. 844; *Gentile*, 501 U.S. 1030.

2. “Significant” Overpayments

FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8) also provide for suspension or debarment of a covered contractor if the contractor fails to report a “significant” overpayment received from the United States under a federal contract. However, the term “significant,” is also undefined under the rules.

Several FAR provisions, including 48 C.F.R. Sections 52.232-25, 52.232-26, 52.232-27, and 52.212-4(i)(5), obligate contractors to return overpayments.⁶⁸ The FAR Councils carefully declined, however, to supply any definition of a “significant” overpayment under FAR §§ 9.406-2(b)(1)(vi) and 9.407-2(a)(8). Instead, they stated:

The Councils agree with the suggestion by the DoJ that it is appropriate to limit the application of suspension or debarment to cases in which the unreported overpayment is significant. This will resolve some of the respondents’ concerns over routine contract payment issues. The Councils have revised the final rule to address only significant overpayments, which implies more than just dollar value and depends on the circumstances of the overpayment as well as the amount. Since contractors are required by the Payment clauses to report and return overpayments of any amount, it is within the discretion of the suspension and debarment official to determine whether an overpayment is significant and whether suspension or debarment would be the appropriate outcome for failure to report such overpayment.⁶⁹

Here too, rather than supply any definition of what may constitute a “significant” overpayment, the FAR Councils admit that FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8) instead simply leave it to the “discretion of the suspension and debarment official” to define the term “significant,” *ex post*, depending on the views of the individual suspension and debarment official.⁷⁰

⁶⁸ 48 C.F.R. §§ 52.232-25, 52.232-26, 52.232-27, 52.212-4(i)(5) (2013).

⁶⁹ Federal Acquisition Regulations for National Aeronautics and Space Administration, 73 Fed. Reg. 67,064, 67,080 (Nov. 12, 2008) (to be codified at 48 C.F.R. pt. 1).

⁷⁰ *Id.*

The United States' apparent approach under the CCFLA mirrors that taken by the state of North Carolina in *Riley v. National Federation of the Blind of North Carolina, Inc.*—an approach deemed impermissible by the high court.⁷¹ North Carolina amended its Charitable Solicitations Act in 1985 to modify the terms governing permissible solicitation of charitable contributions by professional fundraisers.⁷² As amended, the North Carolina statute prohibited any “unreasonable” fees charged by fundraisers; fees of up to 20% of fundraising monies collected were deemed reasonable, while fees between 20% and 35% were to be deemed unreasonable upon a showing that the solicitation at issue did not involve the “dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation.”⁷³ Fees exceeding 35% were presumed unreasonable, but this prima facie presumption could be rebutted by a fundraiser based on a showing of necessity.⁷⁴ The statute further provided that “even where a prima facie showing of unreasonableness has been rebutted, the factfinder must still make an ultimate determination, on a case-by-case basis, as to whether the fee was reasonable.”⁷⁵

The Supreme Court summarized the posture in which parties affected by North Carolina's statutory regime found themselves: “According to the State [of North Carolina], we need not worry over this burden, as standards for determining ‘[r]easonable fundraising fees will be judicially defined over the years.’”⁷⁶ Rejecting this assertion, the Supreme Court held: “[s]peakers . . . cannot be made to wait for ‘years’ before being able to speak with a measure of security.”⁷⁷ The Court further held: “we could not agree to a measure that requires the speaker to prove ‘reasonableness’ case by case based upon what is at best a loose inference that the fee might be too high.”⁷⁸ Apparently, the FAR Councils' position under the CCFLA is that contractors should be content to wait for months or years until such time as a live issue is presented to a suspension-and-debarment official as to the meaning of the term “significant” under the terms of the contractor's

⁷¹ 487 U.S. 781, 784 (1988).

⁷² *Id.*

⁷³ *Id.* at 785.

⁷⁴ *Id.*

⁷⁵ *Id.* at 786.

⁷⁶ *Id.* at 793.

⁷⁷ *Id.* at 793–94.

⁷⁸ *Id.* at 793.

particular federal contract. Just as the CCFLA is void on grounds of vagueness as to the phrase “credible evidence,” it is similarly void for vagueness as to the term “significant” (modifying the term “overpayment”).

B. The CCFLA is Overbroad

A wide array of federal criminal statutes “involv[e]” “fraud, conflict of interest, bribery, or gratuity violations.”⁷⁹ The CCFLA requires that principals at covered companies familiarize themselves with the content of *all* of them, notwithstanding that the federal criminal statutes in question are not specifically enumerated under FAR Section 9.406-2; notwithstanding, also, that the “principals” in question are almost uniformly laypersons (*i.e.*, non-attorneys).⁸⁰ Not only this, but the requirement set forth under FAR Section 9.406-2 is not limited to a duty to report suspected fraud, conflict of interest, bribery, or gratuity violations committed *on behalf of* the company, but even if solely committed for the personal benefit of another employee.⁸¹ In other words, FAR Section 9.406-2 operates, on its face (as worded), as a type of informer statute, requiring “principals” to inform on their fellow principals—and all fellow employees—if the principal becomes aware of a suspected fraud, conflict of interest, bribery, or gratuity “violation,” so long as it is committed in “connection with” the award or performance of a given contract or any subcontract thereunder, even if committed solely for the other employee (or principal’s) personal benefit.⁸² The CCFLA thereby effectively conscripts federal contractor principals into serving in the role of private attorneys general.

In this fashion, the CCFLA violates the First Amendment on grounds of overbreadth. A statute will be deemed unconstitutional on overbreadth grounds where it “sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected”⁸³ The overbreadth doctrine seeks to balance the “harmful effects” of “invalidating a law that in some of its applications is perfectly constitutional” against the possibility that “the

⁷⁹ See generally 18 U.S.C. §§ 641, 1001, 1341, 1343, 1349 (2013).

⁸⁰ 48 C.F.R. §§ 9.406-2(b)(1)(vi), 9.407-2(a)(8) (2008) (“Causes for debarment” and “Causes for suspension”).

⁸¹ 48 C.F.R. §§ 9.406-2(b)(1)(vi) (2008).

⁸² *Id.*

⁸³ *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech.”⁸⁴

Owing to the CCFLA’s exceedingly broad (and vague) scope, a contractor, acting on information supplied by one of its principals, could even come forward with a good faith, well-intentioned effort to disclose credible evidence of what it believed could be a violation of one particular statute, only to have investigators later conclude, based on that same information, that the company (or its principals) did *not* violate the initially reported statute, but *another* criminal statute instead. Though the United States would presumably welcome such a result, this hypothetical further demonstrates that the CCFLA as implemented under FAR Sections 9.406-2(b)(1)(vi) and 9.407-2(a)(8) is palpably, and unconstitutionally, overbroad.

C. The CCFLA Unconstitutionally Mandates Compelled Speech.

Speech compelled by the government is disfavored because it “invades the sphere of intellect and spirit which is the purpose of the First Amendment.”⁸⁵ The First Amendment encompasses “both the right to speak freely and the right to refrain from speaking at all.”⁸⁶ The First Amendment presumes that “speakers, not the government, know best both what they want to say and how to say it.”⁸⁷ The doctrine promotes the First Amendment’s “very purpose” by foreclosing “[the] public authority from assuming a guardianship of the public mind through regulating . . . speech.”⁸⁸ The CCFLA seeks to compel speech on a defined subject area—knowledge of fraud—under threat of debarment.

1. The CCFLA Impinges Fifth Amendment Interests

The constitutional concerns created by the CCFLA are comparably unique because not only does the law seek to compel speech in the guise of an overbroad and vague statute, but the content of the speech sought to be compelled is protected under the Fifth Amendment as to individual speakers. The Supreme Court has held that commercial speech does not “retain[] its commercial character when it is inextricably intertwined with

⁸⁴United States v. Williams, 553 U.S. 285, 292 (2008).

⁸⁵W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

⁸⁶Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citations omitted).

⁸⁷Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 791 (1988).

⁸⁸Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

otherwise fully protected speech.”⁸⁹ Though corporate entities do not possess any privilege against self-incrimination under the Fifth Amendment, the CCFLA clearly seeks to elicit speech from those individual corporate “principals” that have “knowledge” of fraud.⁹⁰

The Supreme Court has held that the Fifth Amendment “extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.”⁹¹ The same principle surely applies to senior level government contracting executives.⁹² The Fifth Amendment prohibits a state from making a person “an instrument in his or her own condemnation,” and is violated by “officially coerced self-accusation[s].”⁹³

The CCFLA’s speech disclosure burden falls squarely on a covered company’s *principals*, thereby impinging upon those principals’ individual Fifth Amendment rights.⁹⁴ The statute and its implementing regulations thus burden the very real Fifth Amendment rights of all “principals” at covered companies.

The FAR Councils responded to public comments received during the course of their rulemaking under the CCFLA; the FAR Councils’ responsive comments, while explicitly acknowledging that the Councils were aware of concerns that proposed FAR Sections 9.406-2 and 9.407-2 could impede Fifth Amendment interests, belittled those concerns without discussing them in any substantive detail:

⁸⁹ *Riley*, 487 U.S. at 796.

⁹⁰ *See, e.g., Hale v. Henkel*, 201 U.S. 43 (1906); 48 C.F.R. § 9.406-2(b)(1)(vi) (2008).

⁹¹ *Spevack v. Klein*, 385 U.S. 511, 513–14 (1967) (overturning lower court decision that had held that “the constitutional privilege against self-incrimination [is] not available to” an attorney).

⁹² *E.g., Lefkowitz v. Turley*, 414 U.S. 70, 76 (1973) (government may not bar an individual from participating in public contracts based on refusal, on self-incrimination grounds, to testify before the grand jury).

⁹³ *Mitchell v. United States*, 526 U.S. 314, 325 (1999); *see also Estelle v. Smith*, 451 U.S. 454, 463 (1981) (“Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.”); *United States v. Washington*, 431 U.S. 181, 187 (1977).

⁹⁴ *See* 48 C.F.R. § 9.406-2(b)(1)(vi) (2008) (providing for debarment of a covered company for the “[k]nowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence” of violations of federal criminal law) (emphasis added).

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Many respondents expressed concern that compliance with the rules requiring disclosure and full cooperation [under FAR 52.203-13)(c)(2)(II)(F)] would be interpreted to—

Require contractors waive an otherwise valid claim of attorney-client privilege or protections afforded by the attorney work product doctrine, both protecting attorney-client communications; or

Interfere with an employee’s right under the Fifth Amendment of the U.S. Constitution covering the right of an individual not to be compelled to incriminate itself.

One respondent recommended addition of strong language to preserve privilege protections.

DoJ and an agency OIG indicated awareness of these concerns in their comments and recommended clarification in the final rule. DoJ proposed that the final rule state explicitly:

“Nothing in this rule is intended to require that a contractor waive its attorney-client privilege, or that any officer, director, owner, or employee of the contractor, including a sole proprietor, waive his or her attorney-client privilege or Fifth Amendment rights.”

Response: It is doubtful any regulation or contract clause could legally compel a contractor or its employees to forfeit these rights. However, the Councils have revised the final rule to provide such assurance. To address concern that cooperation might be interpreted to require disclosure of materials covered by the work product doctrine, the Councils have added a definition of “full cooperation” at 52.203-13(a) to make clear that the rule does not mandate disclosure of materials covered by the attorney work product doctrine.

...

Moreover, the Fifth Amendment has no application to corporations, so the only sensitive area is mandatory

disclosure or cooperation by individuals or sole proprietors, which is addressed in the clarification.⁹⁵

Contrary to the FAR Councils' assertion, the Councils' final rules do nothing to "provide such assurance" concerning forfeiture of Fifth Amendment rights as promised by the FAR Councils.⁹⁶ Although the final version of the CCFLA's implementing regulations do state:

"Full cooperation" [under FAR 52.203-13(c)(2)(II)(F)] does not require—

Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights⁹⁷

Neither this regulation nor the FAR Councils' public comments offer anything beyond bland, circular, and tautological platitudes. The Councils' public comments speak nothing to the threat of debarment (and attendant loss of livelihood) that FAR Section 9.406-2 creates as against "principals" if a principal should elect to exercise his or her Fifth Amendment rights and "knowingly" fails to disclose "credible evidence" of fraud and related crimes. The Councils' breezy statement that it is "doubtful any regulation or contract clause could legally compel a contractor or its employees to forfeit [Fifth Amendment and attorney-client privilege] rights" is simply conclusory and callow.⁹⁸ A reviewing court may *agree* with the FAR Councils that the Councils cannot "legally compel a contractor or its employees to forfeit Fifth Amendment rights"—and ensure that the FAR Councils do not so "compel" such forfeiture by striking down the CCFLA and its implementing regulations.⁹⁹

2. Level of Scrutiny to be Applied

The Supreme Court has stated that its "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the

⁹⁵Federal Acquisition Regulations for National Aeronautics and Space Administration, 73 Fed. Reg. 67064, 67076–77 (Nov. 12, 2008) (to be codified at 48 C.F.R. pt. 1).

⁹⁶*Id.*

⁹⁷48 C.F.R. § 52.203-13(a)(2) (2008).

⁹⁸Federal Acquisition Regulations for National Aeronautics and Space Administration, 73 Fed. Reg. at 67076–77.

⁹⁹*Id.*

speech taken as a whole and the effect of the compelled statement thereon.”¹⁰⁰ Constitutional protections against compelled speech are not limited to natural persons, and extend to corporations.¹⁰¹

a. Strict Scrutiny

Application of strict scrutiny to the CCFLA’s compelled speech requirement is appropriate. Schema that make the assertion of the Fifth Amendment privilege more “costly” are unconstitutional.¹⁰² “‘Since *all* speech inherently involves choices of what to say and what to leave unsaid,’ one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”¹⁰³

Under the CCFLA, the United States seeks to compel admissions from contracting principals that would otherwise be afforded protection to those principals under the Fifth Amendment. “[T]he Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”¹⁰⁴ “[The] general rule[] that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid”¹⁰⁵

The CCFLA seeks to advance the dubious proposition that principals employed by federal contractors effectively check their Fifth Amendment privileges at the door the moment they accept employment. Such

¹⁰⁰Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). (citing Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620 (1980), and Sec’y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984)).

¹⁰¹See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 557 (1995) (holding that Massachusetts may not “require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey . . .”).

¹⁰²Griffin v. California, 380 U.S. 609, 614 (1965) (holding that any urging by a prosecutor or the court of an inference of guilt predicated on a criminal defendant’s refusal to testify constitutes a violation of the Fifth Amendment).

¹⁰³Hurley, 515 U.S. at 573 (emphasis in original) (internal citations omitted) (quoting Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal., 475 U.S. 1, 11 (1986) (plurality opinion)).

¹⁰⁴Malloy v. Hogan, 378 U.S. 1, 8 (1964).

¹⁰⁵Hurley, 515 U.S. at 573 (citing McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995); Riley, 487 U.S. at 797–98).

proposition was tested, and rejected, in *Lefkowitz v. Turley*.¹⁰⁶ In *Lefkowitz*, the Supreme Court considered a New York state law which:

require[d] public contracts to provide that if a contractor refuses to waive immunity or to answer questions when called to testify concerning his contracts with the State or any of its subdivisions, his existing contracts may be canceled and he shall be disqualified from further transactions with the State for five years.¹⁰⁷

The Supreme Court struck down the statute, holding that the government may not bar an individual from participating in public contracts based on a refusal to testify before the grand jury on self-incrimination grounds.¹⁰⁸ The Court explained that “there is no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises, as it does here, in the context of official inquiries into the job performance of a public contractor.”¹⁰⁹ The Court held that the “waiver sought by the State [of New York], under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device”¹¹⁰ “A waiver secured under threat of substantial economic sanction cannot be termed voluntary.”¹¹¹ *Lefkowitz* follows *Perry v. Sinderman*, holding that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”¹¹²

Because the CCFLA seeks to compel that same speech held in *Lefkowitz* to be protected under the Fifth Amendment, *Lefkowitz* speaks to the constitutional infirmity of the CCFLA. Under the CCFLA, the government threatens to take away principals’ livelihoods by debarring principals’ employers.

b. Exacting Scrutiny

To the extent a reviewing court were to decline to apply strict scrutiny to the CCFLA’s compelled speech requirement, exacting scrutiny would

¹⁰⁶ 414 U.S. 70, 76 (1973).

¹⁰⁷ *Id.* at 71.

¹⁰⁸ *Id.* at 70.

¹⁰⁹ *Id.* at 78.

¹¹⁰ *Id.* at 70.

¹¹¹ *Id.* at 82–83.

¹¹² 408 U.S. 593, 597 (1972).

alternatively be appropriate. The Supreme Court recently explained in *Citizens United v. Federal Election Commission* that exacting scrutiny is appropriate if a speech requirement compels “disclosure” of a private group’s members: “The Court has subjected [disclaimer and disclosure] requirements to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”¹¹³ Under *Buckley v. Valeo*—as subsequently reiterated in both *McIntyre* and *Citizens United*—exacting scrutiny dictates that a statute must fall in the face of an as-applied challenge if the compelled speech requires disclosure of information that would subject the corporation’s personnel to “threats, harassment, or reprisals” from the government.¹¹⁴ Here, that criterion is satisfied in that the compelled speech mandated under the CCFLA stands to expose affected covered company principals to criminal prosecution.

CONCLUSION

The CCFLA’s passage has not, of course, had the effect of stamping out fraud completely under “covered” contracts (those exceeding \$5,000,000 in value and 120 days in duration).¹¹⁵ Recently reported instances of criminal violations under “covered” contracts have included the sentencing of two contracting executives for bribery in connection with the overcharging of \$907,000 to the Marines under a contract for machine products (June 2013);¹¹⁶ the sentencing of two contractors for bribery and conspiracy in a scheme to steal \$7,000,000 from the U.S. Navy (May 2013) (under a U.S. Navy contract separate from that at issue in the above-noted July 2012 bribery conviction);¹¹⁷ a bribery scheme to funnel U.S. Marine freight

¹¹³ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam), and *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 203, 231–32 (2003)).

¹¹⁴ 424 U.S. at 74; *Citizens United*, 130 S. Ct. at 916; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356–57 n.21 (1995) (per curiam) (quoting *Buckley*, 424 U.S. at 74) (“a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”).

¹¹⁵ Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, 122 Stat. 2386–87 (2008).

¹¹⁶ Office of Public Affairs, Dep’t of Justice, *Three Georgia Residents Sentenced for Their Roles in Bribery Scheme Related to the Award of Government Contracts*, DEP’T OF JUSTICE (June 6, 2013), <http://www.justice.gov/opa/pr/2013/June/13-crm-651.html>.

¹¹⁷ *Two Corrupt Defense Contractors Get Prison*, COURTHOUSE NEWS SERVICE (May 21, 2013), <http://www.courthousenews.com/2013/05/21/57809.html>.

hauling business to a local transportation company in Georgia (May 2013);¹¹⁸ conspiracy to commit bribery in connection with a Department of Homeland Security contract for security consulting services (April 2013);¹¹⁹ and a guilty plea in July 2012 for conspiracy to commit bribery and lying to the FBI in connection with the invoicing of between \$7 million and \$20 million for work never performed under a U.S. Navy contract.¹²⁰

Combatting fraud remains an imperative objective for federal policymakers. Yet policy goals, no matter how noble, cannot override constitutional prerequisites. The Supreme Court in *Kolender* emphasized that it was not unsympathetic to the goals underpinning the California anti-loitering statute at issue in that case; yet “weighty concerns” cannot justify legislation that runs afoul of the First Amendment:

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.¹²¹

Equally applicable is the Supreme Court’s admonition in the 1988 *Riley* decision, wherein the Court noted that it was not “suggest[ing]” that North Carolina “sit idly by and allow [its] citizens to be defrauded”:

In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to

¹¹⁸Office of Public Affairs, Dep’t of Justice, *Georgia Men Plead Guilty to Receiving Bribes in Transportation Scheme at Local Military Base*, DEP’T OF JUSTICE (May 8, 2013), <http://www.justice.gov/opa/pr/2013/May/13-crm-522.html>.

¹¹⁹Office of Public Affairs, Dep’t of Justice, *Former Regional Director of Federal Protective Service Pleads Guilty to Accepting Bribes from Government Contractor*, DEP’T OF JUSTICE (April 11, 2013), <http://www.justice.gov/opa/pr/2013/April/13-crm-417.html>.

¹²⁰Office of Public Affairs, Dep’t of Justice, *Former Navy Engineer Pleads Guilty to Organizing and Managing Multi-Million Dollar Fraud Scheme; Associate Admits to Stealing Government Funds*, DEP’T OF JUSTICE (May 30, 2013), <http://www.justice.gov/usao/ri/news/2013/may2013/navy.html>.

¹²¹*Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

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enforce it. Further North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.¹²²

No one questions the validity of the United States' interest in combating pervasive fraud, but solutions to such problem that *are* constitutionally permissible include strengthened oversight of contractor performance; better training of contracting officials; more aggressive weeding out of lax and incapable contracting officers; and more aggressive civil False Claims Act prosecution of corrupt contractors. The "serious concerns" expressed by Representative Davis about the "unprecedented" and "controversial" nature of the CCFLA were prescient. The federal government may not "sacrifice speech for efficiency," (nor may it impermissibly infringe upon protected Fifth Amendment interests.¹²³ The CCFLA is likely to be stricken down if challenged.

¹²²Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988) (citations omitted).

¹²³*Id.*