No. 08-205

IN THE

# Supreme Court of the United States

CITIZENS UNITED,
*Appellant,*
v.
FEDERAL ELECTION COMMISSION,
*Appellee.*

**On Appeal from the United States District Court for the District of Columbia**

## BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

STEPHEN M. HOERSTING
*Counsel of Record*
BRADLEY A. SMITH
REID ALAN COX
CENTER FOR COMPETITIVE POLITICS
124 S. West Street
Suite 201
Alexandria, VA 22314
(703) 894-6800

*Counsel for Amicus Curiae*

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## BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

## INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, professor of law at Capital University Law School and a former chairman of the Federal Election Commission, and Stephen M.

[1] This brief is filed with the written consent of all parties. Appellant filed a letter of consent with this Court, and Appellee consented in writing to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Hoersting, a campaign finance attorney and former general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

## SUMMARY OF THE ARGUMENT

Like mandatory disclosure in candidate elections, anonymity in issue advocacy protects citizens from corrupt and abusive officeholders, who would punish citizens for opposing their policy preferences. Citizens learn something of the relative merits of a candidate by knowing who supports him; candidates may change positions to reward suppliants once elected. But citizens learn little about the relative merits of a policy issue by knowing which of their fellow citizens supports it—and abusive officeholders learn too much.

Mandatory disclosure always carries costs. Recent history demonstrates that donors for issue advocacy, donors to ballot initiative campaigns, and even contributors to candidate campaigns are subjected to retribution by officials and others that make use, either directly or derivatively, of government-compelled disclosure data.

Where disclosure of political speech furthers compelling interests, as in candidate elections, the burdens disclosure places on political speech may be justified, with limited exception. *See generally Brown*

*v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). Where mandatory disclosure does not further compelling interests, as in the case of issue advocacy, the impositions on First Amendment rights are not justifiable. Congress has constitutional authority to regulate elections, not issue advocacy, and mandatory disclosure of issue advocacy would further none of the informational, anti-corruptive, or compliance interests enunciated in *Buckley* and *McConnell*.

In *Buckley,* this Court permitted mandatory disclosure of independent express advocacy of candidates in order to further "informational" (but not anti-corruptive interests). The Court conditioned this disclosure on its being constitutionally narrowed to avoid issue advocacy. *Buckley v. Valeo,* 424 U.S. 1, 79-80 (1976). The Government's claim that issue advocacy can now be subject to compelled disclosure to further the same informational interest constitutes a "constitutional 'bait and switch.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652, 2673 (2007).

Because the disclosure provisions are unconstitutional as-applied to any speaker engaging in issue advocacy, Citizens United need not demonstrate a "reasonable probability" that its donors will suffer "threats, harassment, and reprisals" under *Brown.*

The political-file requirements of federal communications law require stations to keep detailed and publicly available information on requesters of ad time, including a list of the organization's executive committee. This allows the press to write about who is running the ads, citizens to complain or sue, and the FEC to issue subpoenas.

Because the "Wait," "Pants," and "Questions" ads are not substantially related to elections, the disclaimer requirements in § 311 are unconstitutional as-applied. Doing otherwise would signal, improperly, that the ads are related to elections, which could have implications for other provisions of federal election law, while furthering no interest not easily met by more narrowly tailored means, such as minimal disclaimers under federal communications law.

## ARGUMENT

### I. INTRODUCTION

In 2006, this Court rejected the assertion that BCRA § 203's funding source restrictions for "electioneering communications" are not susceptible to as-applied challenge. *See generally Wisconsin Right to Life, Inc. v. Fed. Election Comm'n* ("*WRTL I*"), 546 U.S. 410 (2006). In 2007, this Court reviewed an as-applied challenge to § 203, crafted its appeal-to-vote test, and permitted the regulation only of speech that is unambiguously related to a candidate campaign. All other political advertising remained exempt from § 203. *See generally Federal Election Comm'n v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652 (2007). *Amicus* will refer to this exempt speech as "issue advocacy." It must be stressed that the appeal-to-vote test crafted in *WRTL II* does not hinge on an inquiry into either the motives of the speaker or the effect the speech may have on listeners. *Id.* at 2665-66. Thus, *WRTL II* effectively did away with the pernicious concept that some issue-oriented political speech could be labeled "sham" speech by outside observers, and regulated on that basis, while others, whose motives or words were deemed pure by authorities, could speak at will. This Court had no

opportunity in *WRTL II* to review BCRA § 201, 116 Stat. 88, which requires organizations making electioneering communications to report their donations and the names of donors above certain monetary thresholds, or BCRA § 311, 116 Stat. 105, which requires electioneering communications to carry disclaimers. *See generally WRTL II*, 127 S. Ct. 2652.

This Court has already "assumed" that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 206 n.88 (2003), and has "reject[ed] the contention that issue advocacy may be regulated because express election advocacy may be," *WRTL II,* 127 S. Ct. at 2672. Nonetheless, Citizens United's challenge to BCRA §§ 201 and 311 as-applied to advertising the government concedes is beyond the appeal-to-vote test of *WRTL II* is being met by allegations that as-applied challenges are not available. Mot. to Dismiss or Affirm, at 12-14. And, even if as-applied challenges are available, the government seeks to compel the disclosure of issue advocacy, asserting that "its interest in providing information to the public extends beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues." Opp'n. to Mot. For Prelim. Inj. (Doc. 18), at 19; *see also* Fed. Election Comm'n's Summ. J. Mem. (Doc. 55), at 22.

*Amicus* will confine its brief to the mandatory disclosure provisions as-applied to ads that are beyond the appeal-to-vote test of *WRTL II*, will refer generally to §§ 201 and 311 as the "disclosure provisions,"

and will refer to speech beyond the appeal-to-vote test as "issue advocacy."[2]

*Amicus* will note that the danger in disclosure is in exposing donors and the internal workings of advocacy organizations and is rarely in the public knowing the name of the organization. Organizations and their positions on issues are usually known. The government may have added reasons to wish to know the identity of the organization that is speaking, including the need to establish jurisdiction and serve process in the event of a libel or other claim. But these are matters for federal communications law, not election law. Because the "Wait," "Pants," and "Questions" ads are not substantially related to elections, the disclaimer requirements in § 311 should be invalidated as-applied. Doing otherwise would signal, improperly, that the ads are related to elections without furthering an interest not easily met by more narrowly tailored means.

## II. LIKE DISCLOSURE IN CANDIDATE ELECTIONS, ANONYMITY BEYOND ELECTIONS PROTECTS CITIZENS FROM CORRUPT AND ABUSIVE OFFICE-HOLDERS

In proposals to disclose issue advocacy, we witness two canons of political law on an apparent collision course: that government corruption is cured by disclosure, and that the right of individuals to speak and associate freely depends upon their ability to do so anonymously. But the conflict is a false one because

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[2] *Amicus* believes that the ads in question would qualify for the Federal Election Commission's regulatory exception for commercial speech at 11 C.F.R. § 114.15(b), but for ease of discussion will refer to the ads as "issue advocacy."

these canons, applied in context, each work toward the same purpose: to protect citizens from corrupt and abusive officeholders. Anonymity in issue speech, like disclosure of candidate speech, advances the overriding government interest at the root of all campaign finance regulation: preventing corruption or its appearance. *Buckley,* 424 U.S. at 25.

Many believe that "[l]iberty cannot be preserved without a general knowledge among the people," just as many believe the disclosure of political speech is beneficial. John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE (1765) (available in Thomas Paine, *Common* Sense, 99, 108-09 (Edward Larkin ed., Broadview Press 2004)); *Buckley v. Valeo,* 424 U.S. 1, 60 (1976) ("appellants argue that 'narrowly drawn disclosure requirements are the proper solution to … evils Congress sought to remedy'"). But many miss the import in Adams's full quote: "Liberty cannot be preserved without a general knowledge among the people, who have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean *the characters and conduct of their rulers*." Adams, *supra* (emphasis added). Mandatory disclosure is harmful, not beneficial, when used to illuminate the inner workings of non-governmental organizations, or communication by and between citizens about political issues, potentially subjecting those organizations and citizens to both official and unofficial harassment or intimidation. Because mandatory disclosure for issue advocates does not illuminate the characters or conduct of public officials, any public interest in such disclosure is substantially diminished. Mandatory disclosure improperly applied in this way becomes a tool of abuse by government, rather than a tool to prevent abuse of government.

Disclosure regimes for candidate campaign contributions protect citizens from abuse of office by officials who have freewill and can confer benefits on large contributors (and pain on opponents) by passing future legislation. Disclosure regimes for direct lobbying activities, in which paid consultants engage in face-to-face meetings with officeholders, protect citizens in a similar manner. Disclosure of issues speech, however, does not further these goals. Rather, protecting the right to speak and associate anonymously with fellow citizens about issues (not candidate elections), even issues of official action or pending legislation, also protects citizens from abusive officeholders by reducing the officeholder's ability to retaliate against those who would oppose his policy preferences. *See Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton,* 536 U.S. 150, 166, 168 (2002) (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-42 (1995) ("'[d]ecision to favor anonymity may be motivated by fear of economic or official retaliation'"); *Talley v. California,* 362 U.S. 60, 64-65 (1960) ("[g]roups and sects … throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," and "identification and fear of reprisal might deter … discussions of public matters of importance").

Further, citizens learn something of the relative merits of a candidate by knowing who supports his election. *See Buckley,* 424 U.S. at 66-68 ("[s]ources of a candidate's financial support … alert the voter to the interests to which a candidate is most likely to be responsive[,] facilitate predictions of future performance in office[,]" and "may discourage those who would use money for improper purposes … before or after the election"). Citizens learn much about the

legislative process by knowing who is paying consultants to meet with officeholders directly. *See* Lobbying Disclosure Act of 1995, 109 Stat. 691 (codified at 2 U.S.C. § 1601 *et seq.*). Citizens, however, learn little about the relative merits of a policy issue by knowing which of their fellow citizens supports it. Policy issues do not change once enacted; little "informational interest" is furthered, and asserting otherwise is an argument from *ad hominem* that does little to advance debate or knowledge. Abusive officeholders, however, are provided with too much information—the information needed to abuse their official position to retaliate against political opposition. Disclosure regimes for issue advocacy provide abusive officeholders with knowledge of which groups and individuals support which issues, including the monetary intensity of that support. The possibilities for retaliation and intimidation impose too high a cost for too little benefit in our constitutional republic, which depends for its survival upon a vibrant and "unfettered interchange of ideas." *Roth v. United States*, 354 U.S. 476, 484 (1957).

## III. THE DANGER OF RETRIBUTION IS REAL

Mandatory disclosure essentially amounts to the government making a list of citizens' political preferences, then making that list publicly available to everyone—your family, your employer, your neighbors, your government, the media, even extremists with a penchant for violence. "[P]ublic disclosure of contributions … will deter some individuals who otherwise might contribute," and "[d]isclosure may … expose contributors to harassment or retaliation," requiring that these "burdens … be weighed carefully against the interests which

Congress has sought to promote." *Buckley,* 424 U.S. at 68. Exacting scrutiny[3] is "necessary even if any deterrent effect on the exercise of First Amendment rights arises, not [only] through direct government action, but indirectly as an unintended … result of the government's … requiring disclosure." *Id.* at 65.

The costs of disclosure and its infringements on free speech are often underestimated. Even where disclosure may be justified, as in the case of direct contributions to candidates, there is a real danger of governmental retaliation and citizen intimidation.

For example, the now infamous "K Street Project" used data provided by mandatory campaign-contribution disclosures to "compile a list of the 400 largest

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[3] Since the time of *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court has held that disclosure statutes must be subjected to "exacting scrutiny," *see, e.g., Buckley,* 424 U.S. at 64, which this Court has held is strict scrutiny, *see*, *e.g.*, *McIntyre*, 514 U.S. at 346, n.10. The *Buckley* Court narrowed the disclosure requirements for independent campaign activity, 2 U.S.C. § 434(c), and in doing so, indicated that the Court "must apply the … strict standard of scrutiny" it used in *NAACP v. Alabama,* "for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's *members* to advocate their personal points of view in the most effective way." *Buckley*, 424 U.S. at 75 (citing *NAACP*, 357 U.S. at 458, 460) (emphasis added). *Amicus* notes that the Court's treatment of political disclosure in *Buckley* is a departure from, or at the outer limit of, its treatment of political disclosure in most of its speech cases, which note that rights of speech and association are furthered in an environment of anonymous speech. *See generally, Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton,* 536 U.S. 150 (2002); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995); *Talley v. California,* 362 U.S. 60 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); *Thomas v. Collins,* 323 U.S. 516 (1945). This indicates that the Court should be careful not to unduly expand the government's ability to require disclosure in the political realm.

PACs, along with the amounts and percentages given to each party. Lobbyists were invited into [then-Majority Whip Tom] DeLay's office and shown their place in 'friendly' or 'unfriendly' columns." Nicolas Confessore, *Welcome to the Machine,* WASH. MONTHLY, July 1, 2003, at 30. DeLay explained to *The Washington Post*: "If you want to play in our revolution, you have to live by our rules." Peter Perl, *Absolute Truth,* WASH. POST MAGAZINE, May 13, 2001, at W12.

Just under two years ago, Senator John Kerry used 527-disclosure[4] to lean on Swift Boat donor Sam Fox "during [a] Senate Foreign Relations Committee hearing to consider Fox's nomination to be ambassador to Belgium." Mary Ann Akers, *Kerry Puts GOP Donor on Defensive,* WASH. POST, Feb. 28, 2007, at A17. Kerry asked Fox how "the nominee feel[s] about the level of 'personal destruction' in politics these days," and "[w]hy did [Fox] give such a large chunk of money to help Swift Boat?" *Id.* Mr. Fox didn't speak

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[4] Disclosure for Internal Revenue § 527 organizations, *see* 26 U.S.C. § 527(j), is arguably justified because 527 organizations, such as the famed Swift Boat Veterans for Truth, are deemed "political organizations" by the IRS, even though their communications fell well short of the express advocacy defined by this Court in *Buckley*—a necessary predicate to making an "expenditure" under FECA. The Commission used a discredited and unconstitutional definition of express advocacy at 11 CFR § 100.22(b), *see generally Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), to later convince Swift Boat Veterans to accept civil penalties for failing to register as a "political committee." The FEC believed it could resuscitate the failed definition of express advocacy and redraw the line for "expenditures" because the *McConnell* Court called the express advocacy test "functionally meaningless," even though that Court did not have before it the FECA terms "expenditure" or "political committee" narrowed by *Buckley*.

much about his First Amendment rights of association during the hearing. Rather, he backed down; called Kerry a "hero," and called the political speech of all 527s "disgraceful." *Id.*

Gigi Brienza wrote Presidential primary candidate John Edwards a $500 check after listening to "a moving speech about poverty in America." Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.,* WASH. POST, July 1, 2007, at B3. Her modest contribution, she wrote, "didn't propel Edwards … atop the Democratic ticket. It did, however, make me the target of an extremist animal rights organization, a consequence of transparency … that still makes me wary when I open my mail." *Id.* The security department of her employer, Bristol-Myers Squibb, alerted Brienza (and 100 of her colleagues) that her name, "appeared on a list of 'targets' issued by the radical group Stop Huntingdon Animal Cruelty" ("SHAC") an organization the FBI named a "serious domestic terrorism threat[]" in 2005. *Id.* Brienza's "address was printed [on the target list] under the message: 'Now you know where to find them.'" *Id.* According to Brienza, the FBI confirmed that the information came from mandatory campaign finance lists. *Id.* "If I am moved to write a check" in future elections, Brienza said, "I will limit my contribution to $199.99: the price of privacy in an age of voyeurism and the cost of security in an age of domestic terrorism." *Id.*[5]

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[5] Some websites, such as the popular *Huffington Post,* helpfully supply would be harassers with maps to donors' homes. *See* <http://fundrace.huffingtonpost.com/neighbors.php?type=name&lname=smith&fname=bradley&search=Search>. A site called www.EightMaps.com also exists. Its tag line? "Proposition 8 changed the California state constitution to

Mandatory disclosure in ballot-initiative and referenda campaigns also carries heavy burdens for citizens that would participate, but unlike candidate races, doesn't even further the ability of citizens to monitor the performance of their elected officials. "[T]he invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley,* 424 U.S. at 66 (internal citations omitted).

For example, in the wake of voting on California's controversial Proposition 8 to prohibit same sex marriage, Scott Eckern, formerly the artistic director of the California Musical Theatre was forced to resign "amid controversy over a donation he made to the Proposition 8 campaign." Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support,* SACRAMENTO BEE, Nov. 12, 2008 (available at <http://www.sacbee.com/1089/story/1391705.html>). The theatre board "thanked Eckern for '25 years of invaluable service to the organization and the advancement of musical theatre as an art form.'" *Id.* Eckern gave $1,000 to support Proposition 8, "a donation that sparked criticism from theater workers and the gay, lesbian, bisexual and transgender community." *Id.* Eckern "'honestly had no idea' that the contribution would spark such outrage and made the donation … on his belief [that] the traditional definition of marriage be preserved." *Id.* Eckern said he is "disappointed that my personal convictions have cost me the opportunity to do what I love most … to

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prohibit same-sex marriage. These are the people who donated in order to pass it."

continue enriching the Sacramento arts and theatre community." *Id.*

In another example, after Proposition 8 passed, dozens of "activists descended on the El Coyote restaurant with signs and placards. They chanted 'Shame on you,' cussed at patrons and began a boycott of the cafe." Jim Carlton, *Gay Activists Boycott Backers of Proposition 8,* WALL ST. J., Dec. 27, 2008, at A3. "The restaurant's crime: A daughter of the owner donated $100 to support Prop 8." *Id.*

Richard Raddon, former director of the Los Angeles Film Festival, resigned after "being at the center of controversy" for giving "$1500 to Proposition 8." Rachel Abramowitz, *Film fest director resigns; Richard Raddon steps down over reaction to his support of Prop. 8.*, L.A. TIMES, Nov. 26, 2008, at E1. Raddon, a Mormon, gave for religious reasons. *Id.* After Raddon's contribution was "made public online," Film Independent was "swamped with criticism from No on 8 supporters," and "in the blogosphere." *Id.* One fellow board member noted, "Someone has lost his job and possibly his livelihood because of privately held religious beliefs." *Id.* Since Proposition 8 has passed, "Hollywood has been debating whether and how to publicly punish those who supported the … amendment," including boycotts of the "Cinemark theater chain, whose chief executive, Alan Stock, donated $9,999 to 'Yes on 8.'" *Id.*

These are not isolated examples. In the aftermath of Proposition 8, numerous blacklists are now being established, and those establishing them note that the existence of reliable data over the internet makes such lists easier to compile. "Years ago we would never have been able to get a blacklist that fast and quickly," said one opponent of Proposition 8. Richard

Abowitz, *Where's the Outrage? Online*., LAS VEGAS WEEKLY, Jan. 8, 2009 (available at <http://www.lasvegasweekly.com/news/2009/jan/08/wheres-outrage-online/>). While citizens have a right to organize boycotts that do not violate anti-trust or non-discrimination laws, the government does not have a compelling interest in making political preferences public so that citizens who support the "wrong" side can be subjected to harassment and blacklisting. This harassment emphasizes *Amicus'* point, *see* Section II, *supra*, that, unlike information on donations to candidates, once a ballot initiative has been enacted, mandatory public disclosure of financial donors serves no anti-corruption purpose because it does not allow citizens to evaluate the performance and character of their elected officials. But it does allow for efforts to chill and intimidate speakers in the future.

Even worse, mandatory disclosure for issue advocacy has the danger of intimidating funding and supporters away from issues, not just candidates and campaigns.

For example, in a letter[6] to ExxonMobil CEO Rex Tillerson, Senators Olympia Snowe and Jay Rockfeller "urge[d]" the company to end its support of what the Senators called "climate change denial front groups" like the Competitive Enterprise Institute, and said the company "should repudiate its climate change denial campaign and make public its funding history." Editorial, *Nobles and Knaves*, WASH. TIMES, Nov. 11, 2006, at A12; Editorial, *Political Science,*

[6] The letter is available at <http://snowe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9acba744-802a-23ad-47be-2683985c724e>.

INVESTORS BUS. DAILY, Nov. 14, 2006, at A12. They also "ask[ed]", in a way only the federal government can, that ExxonMobil "acknowledge the dangers and realities of climate change [and] the role of humans in causing or exacerbating it," stating that findings to the contrary are "pseudo science." WASH. TIMES, *supra.* As one editorial page put it, "[i]f [the Senators] are so sure of their facts, why are they trying to shut off debate?" INVESTORS BUS. DAILY, *supra.* Another called this "bullying at its worst—lawmakers don't like what a private organization [like CEI] believes, so they try to ensure that those organizations can't get private funding." WASH. TIMES, *supra*. Both Senators sit on the Senate Commerce Committee, which oversees much business regulation.

Even where this Court has attempted to protect issue advocacy in *WRTL II,* the mandatory disclosure provisions of § 201 have made retribution real. In the wake of *WRTL II,* in an FEC rulemaking codifying the opinion, two national party committees, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, urged "[t]he Commission [to] take special care not to narrow the range of disclosure now required from electioneering communications sponsors," saying "[p]arty committees like the DSCC and DCCC have a *real, direct interest* in having access to information of this character, which is essential to their own strategic decision-making." DSCC & DCCC Comments, at 3 (available at <http://fec.gov/pdf/nprm/electioneering_comm/2007/dscc_dccc_eccomment12.pdf>) (emphasis added).

Had the DCCC and DSCC merely noted that this Court did not review § 201 in *WRTL II,* that would be

one thing. But their added position, that they have an "interest" in the mandatory disclosure of issue advocacy, is unfortunate when one considers who the DCCC and DSCC really are: they are the campaign arms of, respectively, of the majority party in the United States House of Representatives and Senate. *See*, *e.g.*, DCCC Website, *About the DCCC* (available at <http://www.dccc.org/pages/about/>); DSCC Website, About the DSCC (available at <http://www.dscc.org/about>). *Amicus* knows of no case that shows a legitimate or compelling interest in Congressional leaders obtaining disclosure of political issue advocacy to either prevent corruption or its appearance, or to gain the information needed to vote intelligently. Nor is *Amicus* aware of a case that shows an interest in political party committees obtaining disclosure of issue advocacy. Perhaps the DCCC's and DSCC's "real, direct interest" is merely the same "interest" a school-board official had in learning the name of school-levy opponent and grassroots leafletter, Margaret McIntyre, whom one Ohio Supreme Court Justice believed "retaliate[ed] against McIntyre "for her opposition." *See McIntyre v. Ohio Elections Comm'n,* 618 N.E. 2d 152, 157 (Ohio 1993) (Wright, J., dissenting). Indeed, the "interest" of the DSCC and DCCC is not difficult to guess. Consider this from a contemporaneous editorial:

> Meanwhile, Democrats under [former-DCCC Chairman] Rep. Rahm Emanuel and [then-DSCC Chairman] Sen. Schumer have quietly erected their own K Street Project, and employ some of the same strong-arm tactics they once deplored. "I've never felt the squeeze that we're under now to give to Democrats and to hire them," says one telecom industry representative. "They've put out the word that if you have an issue on trade,

> taxes, or regulation, you'd better be a donor and *you'd better not be part of any effort to run ads against our freshmen incumbents*."

Stephen Moore, editorial, *Comfy with K Street,* WALL ST. J., Oct. 20, 2007, at A18 (emphasis added). Mandatory disclosure of issue advocacy within the electioneering communications windows allows the DCCC and DSCC to know who is speaking out against their members' legislative agenda and facilitates retaliation.

Meanwhile, "[n]early 10,000 of the biggest donors to Republican candidates and causes across the country will probably receive a foreboding 'warning' letter in the mail next week," reported the *New York Times* this past summer, just before the 2008 elections. Michael Luo, *Group Plans Campaign Against G.O.P. Donors,* N.Y. TIMES, Aug. 8, 2008, at A15. "The letter is an opening shot across the bow from an unusual … group on the left that is poised to engage in hardball tactics to prevent similar groups on the right from getting off the ground this fall." *Id.* The group, the self-styled "Accountable America," is "hoping to create a chilling effect that will dry up contributions"; describing its effort as "'going for the jugular.'" *Id.* What is the warning letter's purpose? "[A]lerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure, and watchdog groups digging through their lives." *Id.* (The letter is available at <http://graphics8.nytimes.com/packages/pdf/politics/20080808caucus/09caucus.accountableamericawarningletter.pdf>.)

Accountable America also encourages harassment by offering a bounty for any information leading to the successful prosecution of right-leaning donors:

> Accountable America is offering a $100,000 reward for information that is material to either a criminal conviction for committing a felony or a misdemeanor, or a final and unappealed judicial or administrative determination of civil liability that entails the imposition of fines or penalties of at least $10,000, for a violation of federal campaign finance, tax or other statutes or regulations by an organization that operates or purports to operate under Internal Revenue Code Sections 501(c)(4), 501(c)(6) or 527 and *that primarily serves business or ideologically conservative interests*.

*See* Accountable America, *$100,000 Reward* (available at <http://www.accountableamerica.com/reward>) (emphasis added).

As this short review shows, the potential for both official and unofficial retaliation is growing. The chilling effect it has on speech is real. Government has no anti-corruption or informational interest in disclosure of issue speech. The purpose of disclosure laws, as illustrated by mandatory disclosure of contributions to candidates, is to permit citizens to monitor their government. It is not to permit the government to monitor citizens, or to foster private boycotts and harassment of citizens who engage in political speech through issue advocacy.

## IV. CONGRESS HAS NO AUTHORITY TO REGULATE POLITICAL SPEECH BEYOND ELECTIONS, AND FURTHERS NO IMPORTANT OR COMPELLING GOVERNMENT INTEREST BY DOING SO

### A. Congress Has No Authority to Regulate Political Speech Beyond Elections

Article I, Section 4 of the Constitution provides Congress the authority to regulate elections to federal office. *See Buckley,* 424 at 14, n.16. Congress has no authority to regulate political speech beyond elections. U.S. CONST., amend. I; *WRTL II,* 127 S. Ct. at 2672-73 (Court "did not suggest" that the corruption interest identified in *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652 (1990), "extended beyond campaign speech"); *Buckley,* 424 U.S. at 80 (disclosure provision "[a]s narrowed … does not reach all partisan discussion[;] it only requires disclosure of … expenditures that expressly advocate a[n] election result"). The First Amendment provides the "broadest protection to … political expression" to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley,* 424 U.S. at 14 (quoting *Roth,* 354 U.S. at 484). This protection extends to "political association," individuals donating to advocates they believe in, "as well as to political expression." *Buckley*, 424 U.S. at 15.

Accordingly, Congress's disclosure provisions for political speech have always been tied to elections. "The first federal disclosure law was enacted in 1910," reaching "political committees and … organizations operating to influence congressional elec-

tions." *Id.* at 61 (internal citations omitted). The Federal Corrupt Practices Act of 1925 mandated disclosure for "political committees, defined as organizations that accept contributions or make expenditures 'for the purpose of influencing'" a Presidential campaign. *Buckley,* 424 U.S. at 62. Both laws were replaced by provisions in the Federal Election Campaign Act of 1971, as amended, *id.,* and Congress added to them in BCRA, legislation dedicated to the regulation of campaigns for federal office. *See generally McConnell,* 540 U.S. 93.

Similarly, Congress has mandated disclosure of direct, paid lobbying of officials. In *United States v. Harriss,* 347 U.S. 612 (1954), this Court "upheld limited disclosure requirements for lobbyists," because [t]he activities of lobbyists, who have *direct* access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre,* 514 U.S. at 357 n.20 (emphasis added). The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq*. (requiring lobbyists to make detailed disclosures about their direct lobbying efforts), operates to cure the same appearance. The regulated lobbying activities do not include attempts to advocate issues with fellow citizens. Rather they are "'representations made directly to the Congress, its members, or its committees' … and do[] not reach … attempts 'to saturate the thinking of the community.'" *United States v. Rumely,* 345 U.S. 41, 47 (1953) (internal citations omitted).

In this case, the parties have agreed that the "Wait," "Pants," and "Questions" ads are not the functional equivalent of express advocacy. Thus the ads are insufficiently related to elections to be regulated. In the absence of constitutional authority,

congressional power is non-existent. *See generally United States v. Morrison,* 529 U.S. 598, 608 (2000) ("Congress' regulatory authority is not without effective bounds"). This is the premise of our Constitution, only the more evident in political speech because of the First Amendment's proscriptions. "*McConnell*'s analysis was grounded in the evidentiary record before the Court," *WRTL II,* 127 S. Ct. at 2664, which was based largely upon "two key studies," *id.*, flawed as they were, finding that ads run near elections are tied to elections. *See McConnell v. Fed. Election Comm'n,* 251 F. Supp. 2d 176, 307, 308 (D.D.C. 2003) (opinion of Henderson, J.). Congress did not attempt to tie the ads to, say, interstate commerce and thus its authority to regulate advertising under the interstate commerce clause. *See* U.S. CONST., art. I, § 8, cl. 3. This Court, having recently determined that ads beyond the appeal-to-vote test of *WRTL II* are not related to elections, *see WRTL II*, 127 S. Ct. at 2667-69, now faces the question of whether Congress has the authority to compel the disclosure of political speech that is beyond candidate elections, nor even about elections at all. Congress does not.

### B. The Interests Recognized In *Buckley,* and by Extension *McConnell,* Are Inapplicable To The Disclosure Of Issue Advocacy

There must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed." *Buckley,* 424 U.S. at 65. Mandatory disclosure of speech beyond the appeal-to-vote test enunciated in *WRTL II* lacks a "relevant correlation" or "substantial relation" to

elections and, thus, to government interests recognized by this Court.

The first interest is the "informational interest." *Buckley,* 424 U.S. at 81. Disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Id.* at 66-68. The parties to this case have agreed that the three ads in question are not campaign speech. Therefore, compelling Citizens United to disclose the funding of those ads will not provide the public with information as to "where political campaign money comes from," or with information on "how [money] is spent by [a] candidate." *Id.*

The second interest is to "deter actual corruption and [its] appearance … by exposing large contributions and expenditures to the light of publicity." *Id.* But the terms "contribution" and "expenditure" discussed in *Buckley* derive from FECA. Each subsumes the phrase "made … for the purpose of influencing an[ ] election," s*ee* 2 U.S.C. §§ 431(8) & (9), and not for some other purpose. That "critical phrase" was narrowed in *Buckley's* discussion of the disclosure requirements at § 434(c) to express advocacy, which ensured that its reach was unambiguously campaign related. 424 U.S. at 80-81. Candidates and officeholders are not corrupted by issue campaigns. Issue advocacy increases the probability of citizen-to-lawmaker contact, the very goal of a democratic republic. No matter how a citizen first hears about an issue—be it in a Citizens United ad, a *New York Times* editorial, or a conversation with a neighbor—once the citizen engages he does so for reasons of his

own and calls his representative directly to express his opinion.

The third interest in disclosure is to "gather[] the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 66-68. In upholding the disclosure of electioneering communications against facial challenge in *McConnell*, however, Justice Kennedy stated that "BCRA § 201 … does not substantially relate to a valid interest in gathering data about compliance with contribution limits [*Buckley's* third interest] or in deterring corruption [*Buckley's* second interest]." *McConnell,* 540 U.S. at 321 (Kennedy, J. concurring in part and in dissenting in part). Justice Kennedy's holding is all the more accurate when the electioneering communications in question are issue advocacy protected by *WRTL II*. Thus, requiring the names, addresses and dollar commitments of citizens engaged in issue advocacy does not substantially relate to any of the informational, anticorruption, or compliance interests upheld as compelling in *Buckley*. There is no government interest recognized by this Court that is furthered by mandatory disclosure of issue advocacy.

### C. This Case is Not About Electoral Speech, and, Therefore, Not About The Right to Engage in Anonymous Electioneering

It would also seem there is no apparent government interest recognized by this Court that is furthered by compelling the disclosure of political speech for or against ballot initiatives or referenda. This issue was discussed but not decided in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n.32 (1978). *McIntyre*, 514 U.S. at 353-54 (*Bellotti*'s comments "on the prophylactic effect of requiring the

identification of the source of corporate advertising [for referenda elections]" was "*dicta*").[7] Because candidates—human beings possessing freewill and a potential to be corrupted—are not on the ballot, compelling the disclosure of information on the funding of ballot initiatives or referenda does not "aid voters in evaluating those who seek federal office," *Buckley,* 424 U.S. at 66, and does not deter corruption. And, because this Court has invalidated limits on contributions to ballot-initiative committees as a restraint on the rights of speech and association, *see Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981), disclosure would not aid in the enforcement of contribution limits. *See Buckley,* 424 U.S. at 66-68.

As Chief Justice Rehnquist stated, reviewing another section of BCRA, "[i]n this noncandidate-

[7] Some suggest that this Court already determined the constitutionality of disclosure in ballot-initiative campaigns in *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, (1981), where it said "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing [and], if it is thought wise, legislation can outlaw anonymous contributions." *Id.* at 299-300. The Court, however, did not. In *Citizens Against Rent Control,* the appellants challenged contribution limits to ballot initiative committees in Berkeley ordinance § 602, and did not challenge the disclosure provisions of § 112. Therefore, when the City of Berkeley claimed that the contribution limits must be upheld as a "prophylactic measure to make known the identity of supporters and opponents of ballot measures," *id.* at 298, the Court merely answered that the identities are made known through the disclosure provisions of ordinance § 112, *see id.* at 298-99. This Court had no opportunity to decide whether Berkeley's § 112 was constitutional, or to decide whether the government may compel the disclosure of communications for or against ballot initiatives or referenda. *Id.* at 291-93 (explaining that only the contribution limitations, and not the disclosure requirements, had been challenged).

related context, this goal" of enabling viewers to evaluate the message transmitted "is a far cry from the government interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of federal candidates." *McConnell*, 540 U.S. at 361-62 (Rehnquist, C.J., dissenting) (reviewing BCRA § 504, which amends federal communications law to require broadcast stations to keep records of requests to purchase airtime for issues of national importance).

*Buckley's* informational interest—reviewed in the context of candidate campaigns—is not furthered by mandatory disclosure of issue advocacy, even in ballot-initiative or referenda campaigns. What did California's voters learn of the relative merits of gay versus traditional marriage, or of the wording and import of Proposition 8, by knowing that Scott Eckern gave $1,000 to Yes on [Proposition] 8, that Richard Raddon gave $1,500, or even that Alan Stock gave $9,999? *Amicus* suggests the answer is: Nothing. What did those eager to retaliate against the supporters of Prop. 8 learn? Everything they needed to know.

But even if there were reasons supporting mandatory disclosure in ballot-initiative and referenda campaigns, this Court need not decide the question in this case because electoral speech of any kind is not at issue here.

Justice Scalia, dissenting in *McIntyre,* has written that there is no "right" to engage in anonymous electioneering. *McIntyre*, 514 U.S. at 371-385 (Scalia, J., dissenting). To reach this result he addressed three questions: "[w]hether protection of the election process justifies limitations that cannot constitutionally be imposed generally," *id.,* at 378; "[w]hether a 'right to anonymity' is such a prominent value … that

even protection of the electoral process cannot be purchased at its expense," *id.* at 379; and finally "[w]hether the prohibition of anonymous campaigning is effective in protecting… democratic elections," *id.* at 381. But this case is not about the "right" to speak anonymously in elections; elections are not at issue here.[8]

In contrast with *McIntyre,* this case is about Congress' authority to compel the disclosure of issue advocacy: political speech beyond elections. The answer to this question is implied in Justice Scalia's first question, where he suggests that a measure not substantially related to protecting "the election process … cannot constitutionally be imposed." *McIntyre,* 514 U.S. at 378 (Scalia, J. dissenting). Thus, even if the Court believes that mandatory disclosure might be appropriate in the context of ballot issues and referenda, it should find in favor of Appellant Citizens United in this case.

Finally, this Court should not hold that advertising protected by the appeal-to-vote test of *WRTL II* is "issue advocacy" as to the source prohibition of § 203, but somehow "electioneering" as to the disclosure provisions of §§ 201 and 311. Such a schizophrenic holding would be a disservice to the citizenry, and would require mandatory disclosure of speech already determined to be unrelated to elections, *see WRTL II, supra,* in contradiction to a long line of

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[8] *Amicus* CCP might relish the opportunity to argue for the right in a future case on the question of disclosure in ballot-initiative or referenda campaigns. *See McIntyre*, 514 U.S. at 371 (1995) (Thomas, J., concurring) ("[W]eight of the historical evidence" indicates that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in anonymous fashion").

cases including *Talley v. California*, 362 U.S. 60 (1960), and *NAACP v. Alabama*, 357 U.S. 449 (1958).

## V. THIS COURT HAS ALREADY INVALIDATED CONGRESSIONAL ATTEMPTS TO COMPEL THE DISCLOSURE OF ISSUE ADVOCACY ON CONSTITUTIONAL GROUNDS

Furthermore, this Court will not write on a blank slate. In *Buckley,* this Court narrowed the statutory definition of "political committee" to avoid *vagueness* and an *impermissible* intrusion into issue discussion. 424 U.S. at 79.[9] But the Court also narrowed the definition of "expenditure" in the Act's disclosure requirements for independent speakers to cure *overbreadth* and thus to prevent an *unconstitutional* intrusion into issue discussion.

> But when the maker of the expenditure is … an individual other than a candidate or a group other than a political committee[] the *relation of the information sought to the purposes of the Act may be too remote.* To insure that the reach of § 434(e) is *not impermissibly broad,* we construe "expenditure" for purposes of that section … to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. *This reading is*

[9] The *Buckley* Court in protecting issue advocacy from disclosure was well aware that express advocacy and issue advocacy both have an "effect" on elections, and saw this fact as little reason to curtail issue advocacy. 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat … may often dissolve in practical application. Candidates … are intimately tied to public issues[,] campaign on the basis of their positions on … issues, [and the] campaigns themselves generate issues of public interest").

> *directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate*.

*Buckley,* 424 U.S. at 79-80 (emphasis added). The Court noted that only through narrowing could the provision "bear[] a sufficient relationship to a substantial governmental interest," for § 434(e) would "not reach all partisan discussion" and would "only require[] disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80 (emphasis added).

Indeed, the *Buckley* Court seemed proud that its narrowing would "increase the fund of information" by "shed[ding] the light of publicity on spending … that would *not otherwise* be reported because it takes the form of independent expenditures." 424 U.S. at 81 (emphasis added). Chief Justice Roberts, however, has warned of the dangers in a "constitutional 'bait and switch'" when he reviewed the scope of § 203's funding source prohibition. *WRTL II,* 127 S. Ct. at 2673. The potential for "bait and switch" is no less before this Court in its review of the disclosure provisions of § 201. *Buckley* saved the disclosure of independent expenditures from unconstitutionality only by ensuring that disclosure would *not* reach issue advocacy under the government's asserted informational interest. It would be an improper "bait and switch" to now hold that issue advocacy must be disclosed to further the same interest.

## VI. CITIZENS UNITED NEED NOT DEMONSTRATE THAT IT WILL BE SUBJECT TO THREATS, HARASSMENT, OR REPRISALS BECAUSE THE DICLOSURE PROVISIONS ARE UNCONSTITUTIONAL AS-APPLIED TO ANY ORGANIZATION ENGAGED IN ISSUE ADVOCACY

If this Court were to uphold mandatory disclosure for issue advocacy, it would require challengers seeking exemptions under *WRTL II* to go forward with evidence that their speech is unrelated to campaigns, and, if successful, to then demonstrate that they would be subject to reprisals for advocating their policy position publicly. Such burdens upon would-be speakers are unworkable given the short time frame issue advocates have to be effective, and unjustified in a system of unfettered information exchange.

But the government believes an as-applied challenge to § 201's disclosure regime can be successful "in a single situation: when an organization's disclosure would result in a 'reasonable probability' of 'threats, harassment, and reprisals' of its members." Fed. Election Comm'n's Summ. J. Mem. (Doc. 55), at 25. But this grudging admission is far too narrow.

In *Brown v. Socialist Workers '74 Campaign Committee,* this Court had to determine whether an otherwise constitutional disclosure requirement, related to elections, could be applied to a political party committee that "historically has been the object of harassment by government officials and private parties." 459 U.S. 87, 88 (1982). The Court affirmed the finding of the district court, following the rationale in *Buckley*. *See generally Brown,* 459 U.S. at 92-102. But §§ 201 and 311 are not otherwise

valid disclosure provisions as-applied to communications beyond the appeal-to-vote test of *WRTL II*. Issue advocacy communications are not related to elections. Therefore, Citizens United need not demonstrate a reasonable probability that it will be subject to threats, harassment, or reprisals by operation of the disclosure provisions. It is enough for Citizens United to demonstrate that the disclosure provisions are unconstitutional as-applied to any organization running political advertising protected by this Court's opinion in *WRTL II*.[10]

Furthermore, there are practical problems with *Brown's* "reasonable probability" inquiry. People such as Gigi Brienza, Scott Eckern, or Richard Raddon did not know at the time they first decided to speak that they would be targeted, nor could they—and it is highly unlikely that any court would have granted their request (or even the request of organizations they donated to) to remain anonymous on the authority of *Brown*. But with the knowledge they could likely be targeted comes questions. Is each donor supposed to march into court and say he or she is likely to face reprisals, or should he wait for the organization to do so on his behalf? If he may proceed on his own, would the proceedings be sealed? Could Gigi Brienza, victim of animal rights activists,

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[10] Some may argue that a "political committee" could be required to disclose its issue advocacy communications. But political committees do not make or report "disbursements for … electioneering communications" under BCRA. Rather, political committees report all disbursements for communications as "expenditures." The terms "electioneering communication" and "expenditure" are mutually exclusive in BCRA. *See* 2 U.S.C. § 434(f)(3)(B)(ii) (electioneering communication does not include "a communication which constitutes an expenditure or independent expenditure under this Act").

now demonstrate a reasonable probability of threats, harassment, or intimidation? *See Brown*, 459 U.S. 93-94, 98-102. How about the 100 of her colleagues also placed on the "target list"? Can all employees of Bristol-Myers Squibb now make the showing? How about all employees of the pharmaceutical industry?

Have the activities of Accountable America now made it possible for any right-leaning organization to demonstrate a reasonable probability of threats, harassment, and intimidation on behalf of its donors? Surely such a demonstration, if successful, would swallow *Buckley's* rule and undercut disclosure even in candidate elections for whole categories of contributors and donors. This is why such a broad demonstration will never be successful in a district court, and why the purported protection of *Brown* would be no comfort to donors to issue campaigns—and why the threats, harassment, and intimidation from Accountable Americas everywhere would proceed apace, with their targets including donors to issue campaigns.

This Court should resist the temptation to uphold mandatory disclosure for issue advocacy on the belief that *Brown* will provide adequate protection to the chilled donor.

## VII. THE ENFORCEMENT OF OTHER PROVISIONS CAN BE ADDRESSED BY EXISTING MEANS MORE NARROWLY TAILORED THAN MANDATORY PUBLIC DISCLOSURE

The danger in disclosure is rarely in the public knowing the name of the organization, and, therefore, not in having advocates place a disclaimer on their advertising. Organizations and their positions on

issues are usually known. Anyone can visit the website of Citizens United and see that it is a conservative organization. Few in the South in the 1950s did not know of the NAACP and its positions on civil rights. It is widely known and readily ascertainable that the Mormon Church supports a traditional definition of marriage. Thus, mandatory disclosure of donors is an intrusion on First Amendment rights of far greater magnitude than a simple requirement that an organization's name appear on its ads.

Additionally, the government may have added reasons to wish to know the identity of the organization that is speaking, including the need to establish jurisdiction and serve process in the event of a libel or other claim resulting from the speech. These interests, however, do not require the compelled disclosure of donors (or details on the inner workings and funding of the organizations), potentially subjecting those donors to official and unofficial harassment and abuse. One reason why people join an organization, in addition to amplifying their collective voices, is to have the organization serve as a mediating shield between them and the public. Although it is true that organizations such as the NAACP or the Mormon Church might face vandalism or retaliation for their political speech, they are better equipped to anticipate and deal with it than are the individual members who make up those organizations.

This is not to say that § 311 is constitutional as-applied to issue advocacy. The government's interest in knowing the identity of the organization that is speaking is a matter of federal communications law, not election law. And this Court should in no way

signal, by upholding § 311 as-applied, that ads beyond the appeal-to-vote test remain within the jurisdiction of federal election law. The ads captured by § 311 would always be conveyed via broadcast, cable, or satellite. *See* 2 U.S.C. § 434(f)(3) (definition of electioneering communication). Federal communications law already requires all broadcast "licensees to maintain, and make available for public inspection … record[s] of … request[s] to purchase broadcast time" for any communication that "communicates a message relating to any political matter of national importance." 47 U.S.C. § 315(e)(1)(B)(i)-(iii) (upheld against facial challenge in *McConnell,* 540 U.S. at 238). The political-file requirement extends to any communication reached by BCRA's definition of "electioneering communication" because it captures communications run over cable, satellite, or airwaves on any "[c]andidate," let alone any "issue[s] of public importance." *Id.*

The political-file requirements provide plenty of information for a press and public looking to write, sue, or complain.[11] *See* 47 U.S.C. §§ 315(e)(2)(C)

[11] There was the suggestion by the government and its *amici* in *McConnell* that the improbable names selected by citizens making "electioneering communications" rendered disclaimers inadequate and justified a full, public disclosure of donors so that the public may know who these groups really are. 540 U.S. at 128-29. The most famous example was the group Republicans for Clean Air, about which the press found in a matter of hours or days—and without benefit of today's political-file requirements of communications law—was sponsored by Sam and Charles Wyly. *Id.* at 128, n.23 (citing McConnell, 251 F. Supp. 2d at 232-33). *Amicus* notes that "Sam [Wyly] founded Green Mountain Energy in 1997," *see* <http://www.charlesandsamwyly.com/business-environment.htm>, "America's largest retailer of cleaner energy to residential and commercial

(must provide date and time communication airs); 315(e)(2)(E) (name of candidate or issue to which communication refers); 315(e)(2)(G) (name of person requesting time, and detailed information on the contact person for such organization, as well as a listing of its executive officers, executive members, or board of directors). The requirements even let the FEC know whom to subpoena.

The ability for any person to file a complaint is preserved by the press's and public's ability to know the makers of electioneering communications, both through the political file requirements of communications law and a disclaimer system more limited than those applicable to federal candidate elections in § 311.

Because the "Wait," "Pants," and "Questions" ads are not substantially related to elections, the disclaimer requirements in § 311 should be invalidated as-applied. Doing otherwise would signal, improperly, that those issue ads are related to elections, and would further no interest not easily met by more narrowly tailored means, such as minimal disclaimers under federal communications law.

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customers," *id.*, making it fair to call him, then as he is now, a Republican for clean air.

## CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be reversed.

Respectfully submitted,

STEPHEN M. HOERSTING
*Counsel of Record*
BRADLEY A. SMITH
REID ALAN COX
CENTER FOR COMPETITIVE POLITICS
124 S. West Street
Suite 201
Alexandria, VA 22314
(703) 894-6800

*Counsel for Amicus Curiae*

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