No. 16-743

IN THE

Supreme Court of the United States

INDEPENDENCE INSTITUTE,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and business associations. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus curiae* briefs in cases raising issues of vital importance to the business community.

The Chamber has a strong interest in this important case. The Chamber and its members support policy advocacy on a broad range of issues at the federal and state level. That advocacy often concerns pending legislation, and it often urges the public to contact their legislators. The district court's decision, however, subjects all that advocacy to the onerous disclosure requirements of the Bipartisan Campaign Reform Act ("BCRA"), 52 U.S.C. § 30104(f). This is a serious concern for the Chamber, its affiliates, and its members.

Without anonymity, Chamber members and donors will be deterred from supporting policy advocacy—to

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, and its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. The parties have received notice and consented to the filing of this brief.

the detriment of the public and the interest of healthy democratic debate. Perhaps worse, the decision below will encourage states to impose disclosure requirements based on tangential connection to candidates or elections, a worrying possibility given that states have been even more adventurous than Congress in creating onerous disclosure requirements. For these reasons, the Chamber supports the Independence Institute's request for the Court to note probable jurisdiction and set this appeal for oral argument.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The Court notes probable jurisdiction in direct appeals and grants plenary review so long as the question is "a substantial one." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). That standard is not demanding. Plenary review is warranted unless "after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinion below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing would be a waste of time." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE 304 (10th ed. 2013).

The Court should grant plenary review. This appeal involves an application of BCRA's disclosure requirement to an "electioneering communication" that is *not* related to any election. The advertisement at issue urges viewers to contact both of Colorado's senators to urge them to support pending legislation. One of them, Mark Udall, was seeking reelection within 60 days of the advertisement's

planned broadcast. The advertisement otherwise made no reference to any election, campaign, or voting. *See* Jurisdictional Statement ("JS") 5-7. Thus, the Institute's advertisement is the archetype of policy advocacy—public discourse that goes to the heart of the right to free speech that the First Amendment protects.

Yet the district court rejected the Institute's as-applied challenge to BCRA's disclosure requirement, 52 U.S.C. § 30104(f). The district court read this Court's precedent as broadly rejecting any distinction between speech that advocates particular policies and speech that supports or opposes candidates for election. *See* JS App. 19-29. So long as an advertisement is covered by BCRA—*i.e.*, so long as it costs at least $10,000 to run and refers to a candidate by name within 60 days of an election (or 30 days of a primary)—Congress can constitutionally force contributors to disclose their identities. JS App. 22. Such advertisements are *always* election-related, in the district court's view, because "linking candidates with proposed legislation" can have an "electoral impact" and because urging constituents to contact their elected representatives "implies" that the official seeking reelection "is not already on board" with the policy. JS App. 25. Furthermore, because BCRA's disclosure requirement ""impose[s] no ceiling on campaign related activities,'" and "'do[es] not prevent anyone from speaking,'" it is always narrowly tailored. *Id.* at 31 (quoting *Citizens United v. FEC*, 558 U.S. 310, 366 (2010)).

The district court's analysis is subject to substantial doubt and warrants this Court's review:

First, the decision below obliterates the distinction between campaign speech and policy advocacy. From the Founding, all speech on matters of public concern has been subject to the most rigorous First Amendment protection. Unfortunately, the Court has abandoned that venerable tradition in the context of campaign speech out of concern for *quid pro quo* corruption. In recognition of the danger posed to political speech, though, the Court has confined that rationale to the narrowest category of speech possible; policy advocacy that is marginally connected to campaigns receives full protection. The same holds true for disclosure requirements. While disclosure laws may sweep slightly more broadly than substantive restrictions, the Court has upheld them only as applied to advertisements that are unambiguously election-related.

In so doing, the Court appropriately has recognized "that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003). The district court ignored that admonition, however. Indeed, it applied something akin to rational-basis review instead of exacting scrutiny. In the district court's view, the public's generic interest in information trumps the speaker's right to anonymity so long as a candidate's name is mentioned near an election. It ignored that the interests which made BCRA's disclosure requirement avoid facial invalidity—anticorruption, anticircumvention, and information about campaign speech—are entirely absent in the context of a genuine issue advertisement like the Institute's. Either policy advocacy is entitled to heightened First Amendment protection against disclosure laws, or the district court's ruling is correct. It cannot be both.

Second, the district court's uncritical acceptance of disclosure requirements has no limiting principle. The First Amendment, according to the district court, allows Congress to require full-blown disclosure based on the most tangential of connections to an election: the mere *mention* of a legislator's name who also happens to be seeking reelection. The consequences for federal elections are dire. Policy advocates can either watch their money dry up, or censor their speech by omitting information that tells constituents how to achieve their goals, by staying silent whenever issues arise during campaign season, or by running their advertisements when the public is not paying attention. But the consequences for state elections could be worse. The district court's decision, and similar decisions, send a message to states that no disclosure requirement, no matter how onerous, will violate the First Amendment. As states continue to pass laws that target issue advocacy under the guise of regulating "election speech," that is the wrong message to send, and this is the wrong time to send it. This Court should intervene.

ARGUMENT

This Court should note probable jurisdiction for two reasons. First, the Institute's as-applied challenge to the constitutionality of BCRA is compelling. In rejecting it, the district court failed to credit the important distinction between restrictions on election-related speech (exacting scrutiny) and restrictions on policy advocacy (strict scrutiny). Even under exacting scrutiny, the district court erred by upholding BCRA's disclosure requirement even though none of its purported goals is meaningfully furthered when applied to policy advocacy. Second, the district court's decision gives a constitutional pass to every

disclosure requirement that has even a remote connection to an election or candidate. The ruling sets a dangerous precedent that will substantially chill core political speech at a time when states are passing ever-more-restrictive disclosure requirements.

I. This Appeal Presents A Substantial First Amendment Challenge To An Expansive Application Of BCRA's Disclosure Provision To Policy Advocacy.

A. This Court has never removed policy advocacy from the full protections of the First Amendment.

This Court has always understood that speech "on matters of public concern" is one of the "classic forms of speech that lie at the heart of the First Amendment." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997). Uninhibited debate on important policy issues is crucial. The clash of ideas in the public square is what ignites democracy; "it has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980). At bottom, the right to speak freely "concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Speech "on any subject, cultural, philosophical, or political" thus is entitled to the utmost protection from government interference. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) (holding that "speech on public issues occupies the

highest rung of the hierarchy of First Amendment values, and is entitled to special protection"). In other words, government regulation of political speech—speech "about which information is needed or appropriate to enable members of society to cope with the exigencies of their period," *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940)—is subject to strict scrutiny. The government must show that the burdens on political speech are both necessary and narrowly tailored to satisfy a compelling government interest. *See Citizens United*, 558 U.S. at 340; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (op. of Roberts, C.J.) ("*WRTL II*").

In the context of regulating elections, however, the Court has tolerated greater interference with political speech than the First Amendment ought to allow. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell*, 540 U.S. 93.[2] To square that circle, the Court has held that there is "a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption'" out of concern that "large contributions could be given 'to secure a political *quid pro quo*.'" *Citizens United*, 558 U.S. at 345 (quoting *Buckley*, 424 U.S. at 26). But the Court has ensured that these interests are not wielded expansively to censor political speech. Where

2. The Chamber has consistently taken the position that the freedom of speech deserves the same rigorous protection in the context of elections that it does in other contexts. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (*amicus*); *Citizens United v. FEC*, 558 U.S. 310 (2010) (*amicus*); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (*amicus*); *McConnell v. FEC*, 540 U.S. 93 (2003) (party); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (*amicus*); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*amicus*).

a restriction on political speech has been divorced from the corruption rationale, it has not been sustained. *See id*. at 361 ("An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.").

The Court has extended that line of reasoning to election-related disclosure laws. *See id.* at 369. At least in some applications, such laws complement substantive restrictions on campaign speech by advancing the "important state interests" of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 191 (2010) (upholding state law requiring disclosure of referendum petitions as advancing Washington's "interest in preserving the integrity of the electoral process"). Here too, though, the Court has been careful to ensure that election-related interests are not misused to criminalize anonymous policy advocacy. JS 15-21.

Indeed, there is no doubt that such laws would be unconstitutional outside the election setting. *See Majors v. Abell*, 361 F.3d 349, 355-56 (7th Cir. 2004) (Easterbrook, J., dubitante). In *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958), for example, the Court famously defended the NAACP's First Amendment right to protect the anonymity of its members. Disclosure would have imposed "a substantial restraint upon the exercise by [the NAACP's] members of their right to freedom of

association." *Id.* at 462. Though the decision emphasized "that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," *id.*, the Court more broadly recognized the "deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have," *id.* at 466.

The Court again defended the First Amendment right to anonymous speech in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Ohio's ban on distribution of anonymous campaign literature was unconstitutional because "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry." *Id.* at 342. Nor was the law saved because it targeted only "unsigned documents designed to influence voters in an election." *Id.* at 344. To the contrary, as the Court had "explained on many occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment." *Id.* at 346. Furthermore, "[t]hat this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id.* at 347 (internal citation omitted).

As cases such as *NAACP* and *McIntyre* underscore, the Court has validated the government's election-related

interest in disclosure only when the law "shed[s] the light of publicity on spending that is unambiguously campaign related." *Buckley*, 424 U.S. at 81. That does not mean that legislatures lack the authority to redress efforts to evade restrictions directed at campaign speech. Indeed, Congress confronted the problem posed by "sham issue ads" that, although "functionally equivalent" to express candidate advocacy, lacked the "magic words" *Buckley* required. *McConnell*, 540 U.S. at 193. By regulating "electioneering communications," 52 U.S.C. § 30104(f), federal law now subjects speech that is "'the functional equivalent of express advocacy' for or against a specific candidate" to the same restrictions as express advocacy. *Citizens United*, 558 U.S. at 324 (quoting *McConnell*, 540 U.S. at 206). The Court has afforded Congress similar latitude in keeping "independent groups" from "running *election-related advertisements* 'while hiding behind dubious and misleading names.'" *Id.* at 367 (quoting *McConnell*, 540 U.S. at 197) (emphasis added). Therefore, although disclosure laws are not strictly "limited to speech that is the functional equivalent of express advocacy," *id.* at 369, they have been upheld "based on a governmental interest in 'providing the electorate with information' about the sources of *election-related spending*," *id.* at 367 (quoting *Buckley*, 412 U.S. at 66) (alteration omitted; emphasis added).

The Court is thus presented with a substantial question: whether the line between campaign speech and policy advocacy continues to have constitutional significance in the disclosure context. There is every reason to believe that it should. The Court has held that as-applied challenges to disclosure laws will be heard, and that disclosure is a significant burden on speech.

See Buckley, 424 U.S. at 64; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986). The Court also has emphasized that speech restrictions are on especially shaky First Amendment footing when it comes to advocacy that is designed to "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *WRTL II*, 551 U.S. at 470.

Anticipating this very case, then, the Court has cautioned "that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 206 n.88. Yet the lower courts—including the district court here—have bulldozed this distinction. In short, there is a substantial constitutional issue whether the First Amendment right to engage in policy advocacy directed at lawmakers triggers Congress's authority to impose disclosure requirements simply because this political speech occurs in proximity to a federal election. This Court should grant plenary review to decide this important question.

B. BCRA's disclosure requirement violates the First Amendment as applied to policy advocacy, even under "exacting scrutiny."

Although BCRA's disclosure requirement should be subject to strict scrutiny as it applies to the facts of this case, the law cannot withstand even "exacting scrutiny." Exacting scrutiny requires "a sufficient relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67. This standard is not feeble or perfunctory; it is a "strict test." *Buckley*, 424 U.S. at 66. The government must prove

"a fit that . . . employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (second alteration in original) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). That standard is not easily met.

Yet the scrutiny the district court applied (if it can be called "scrutiny" at all) was anything but "exacting." The court concluded that BCRA's disclosure requirement, as applied to policy advocacy that merely mentions the name of a sitting legislator who happens to be running for reelection, furthers all three interests that this Court has recognized for disclosure requirements: anticorruption, anticircumvention (specifically, the ban on electioneering communications by foreigners), and access to information. JS App. 30-33. This analysis does not pass muster.

To begin, the anticorruption interest is not possibly implicated. Policy advocacy is about "issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present . . . ." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (citation omitted). If independent expenditures that expressly advocate for the election or defeat of a candidate "do not give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357, *a fortiori* policy advocacy that merely mentions a candidate for office does not either.

Nor is the anticircumvention interest in preventing foreign influence implicated. This Court has never held that the government has a compelling interest in preventing foreign individuals from engaging in policy

advocacy that happens to coincide with an election. In any event, BCRA's disclosure requirement "is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. [The statute] therefore would be overbroad even if . . . the Government has a compelling interest in limiting foreign influence over our political process." *Id.* at 362.

The informational interest identified by the district court does not fit this case either. This Court has always described the public's "informational interest" in candidate-specific terms. *See, e.g.*, *Buckley*, 424 U.S. at 66-67 (describing the informational interest as "aid[ing] the voters in evaluating those who seek federal office," "allow[ing] voters to place each candidate in the political spectrum more precisely," and "alert[ing] the voter to the interests to which a candidate is most likely to be responsive . . . in office"); *Citizens United*, 558 U.S. at 369 ("[T]he public has an interest in knowing who is speaking *about a candidate* shortly before an election." (emphasis added)); *McConnell*, 540 U.S. at 206 n.88 (noting that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"). Because genuine policy advocacy is not related to an election and does not express support or opposition to a candidate, these interests do not apply. All that is left, then, is the voters' undifferentiated interest in knowing who is behind *any* statement about policy near an election. But that interest is insufficient to overcome the speaker's interest in anonymity. *See McIntyre*, 514 U.S. at 342.

The district court speculated that advertisements like the Institute's—which urge the public to contact their

representatives about a specific policy issue—necessarily express *electoral* opposition because they "impl[y] that the candidate is not already on board" with the policy. JS App. 25. That is not true, as a matter of logic (the candidate's opponent might not be on board either). And it is not true here. The FEC has never argued that the Institute's advertisement was a sham intended to advocate against Senator Udall's reelection. No reasonable voter would view the advertisement—which mentioned *both* Senators from Colorado, including the one not running for reelection—as an attempt to defeat Senator Udall.

Even assuming the disclosure requirement in BCRA implicates an important governmental interest, the district court conducted virtually no analysis of narrow tailoring. "In the First Amendment context," however, "fit matters." *McCutcheon*, 134 S. Ct. at 1456; *see Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure . . . cannot be justified by a mere showing of some legitimate governmental interest."). According to the district court, the disclosure requirement is narrowly tailored because it "impose[s] no ceiling on campaign related activities" and "do[es] not prevent anyone from speaking." JS App. 31 (alterations in original; citation omitted). That is, BCRA's disclosure requirement is narrowly tailored because it does not completely censor speech. But that is true of all disclosure requirements, and it is true of all but the most draconian restrictions on speech. This kind of analysis is not exacting scrutiny; it is a rubberstamp.

In essence, the district court held that this Court's precedent establishes a *per se* rule that disclosure may be imposed on policy advocacy that mentions the name of a candidate, even if that person is referenced only because

he or she is an elected official, and even if the advocacy includes no discussion of any election, candidacy, or voting. The district court basically held that First-Amendment review of policy advocacy is so weak that merely pointing in the general direction of a public informational interest will be enough to require disclosure. Unfortunately, it is not the first court to do so. *See, e.g.*, *Independence Inst. v. Williams*, 812 F.3d 787, 795-96 (10th Cir. 2016); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 481-83 (7th Cir. 2012); *Family PAC v. McKenna*, 685 F.3d 800, 808-10 (9th Cir. 2012).

This trend should be disturbing. The lower courts are ignoring that, in every case upholding a disclosure requirement, the speech at issue was express advocacy or its functional equivalent. *See* JS 21-22; *e.g.*, *Citizens United*, 558 U.S. at 368 (explaining that the advertisement "contained pejorative references to [Senator Clinton's] candidacy"). They are ignoring that the First Amendment still imposes a "strict test" in the disclosure context. *Buckley*, 424 U.S. at 66. And they are ignoring that here too "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008). If the Court still believes that anything more than rational-basis review governs disclosure as applied to policy advocacy, it must grant plenary review.

II. This Case Raises Issues Of Broad Significance That Warrant Immediate Review.

The district court's decision is not just wrong; it is dangerous. By subjecting every piece of policy advocacy that even mentions a candidate's name to BCRA's onerous

disclosure requirements, the ruling will substantially curtail political speech. And by endorsing the broadest possible justifications for disclosure requirements of any stripe, the decision will have far-reaching effects on First Amendment freedoms. In short, the decision below (and the others like it) make it abundantly clear that the lower courts are unwilling to find *any* disclosure requirement unconstitutional in *any* circumstance. But there is a line to be drawn, and this Court should note probable jurisdiction and draw it.

Most immediately, the district court's decision will chill public advocacy on questions of government policy—"the type of speech indispensable to decisionmaking in a democracy." *Bellotti*, 435 U.S. at 777. This Court has "repeatedly" recognized that disclosure requirements "seriously infringe" political advocacy. *Davis*, 554 U.S. at 744 (quoting *Buckley*, 424 U.S. at 64-65). Would-be donors have many legitimate reasons to insist on anonymity—"fear of economic or official retaliation," "concern about social ostracism," the assurance "that readers will not prejudge [a] message simply because they do not like its proponent," or "merely [the] desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. Some Chamber members, for example, have made clear that they (or their donors) are not willing to be identified and will withhold (or retract) their support if anonymity is jeopardized. BCRA assures that disclosure, as it requires every donor's name and address to be published in a permanent and almost instant record that is available on the Internet. *See* FEC, *Electioneering Communications Disclosure Data Catalog*, goo.gl/Obn6gD.

If advocates want to comply with BCRA's disclosure requirements, they must choose between two unpalatable options. They can edit their advertisements to omit any reference to elected officials who happen to be candidates. *See* 52 U.S.C. § 30104(f)(3)(A)(i)(I). But that is easier said than done given the sheer number of federal legislators who are candidates in any given election cycle—virtually all members of the House and a third of the members of the Senate.[3] More fundamentally, inhibiting this speech will omit crucial information from the advertisement, limiting the effectiveness of the call-to-action. Urging one's fellow citizens to support a critical policy change is much less compelling if the listener does not know what to do or who to contact. *See* Kendall Breitman, *Poll: Majority of Millennials Can't Name a Senator from Their Home State*, POLITICO (Feb. 3, 2015), goo.gl/oh7Bmx (reporting that only 33% of Americans between 18 and 34 can name one of their Senators); Elizabeth Mendes, *Americans Down on Congress, OK with Own Representative*, GALLUP (May 9, 2013), goo.gl/pp0VQy (finding that only 35% of all Americans can name their House member).

Alternatively, advocates can curtail their speech whenever a primary, general election, special election, runoff, convention, or caucus is approaching. *See* 52 U.S.C. § 30104(f)(3)(A)(i)(II). But that will choke off a substantial amount of policy advocacy, since "campaigns themselves

3. Indeed, members of Congress are often candidates throughout their entire tenure. Representative Lloyd Doggett, for example, filed his official Statement of Candidacy for the recently held 2016 election the day after his election in 2014. *See* Statement of Candidacy of Lloyd Doggett for the 2016 Election (filed Nov. 5, 2014), http://docquery.fec.gov/pdf/791/14952573791/14952573791.pdf.

generate issues of public interest." *Buckley*, 424 U.S. at 42. Similarly, pulling issue advocacy near elections would seriously limit the size of the audience, as elections are precisely when voters are most attuned and receptive to discussions of policy. *See* 145 Cong. Rec. S12575 (daily ed. Oct. 14, 1999) (letter from Laura W. Murphy, Director, ACLU Washington Office) ("The [60-day] period when non-PAC issue groups are locked out is the very time when everyone is paying attention!").

Sometimes, moreover, urgent public policy issues arise during campaign season for reasons unrelated to the election calendar. In September 2008, for instance, while two sitting Senators were running for President, Lehman Brothers filed for bankruptcy, setting off a financial crisis of historic magnitude. President George W. Bush quickly proposed the Emergency Economic Stabilization of Act of 2008, and Congress had to debate and vote on the proposal within weeks. Senator McCain even suspended his campaign for President to return to Washington and participate in the debate. *See* Jesse Holcomb, *How the Lehman Bros. Crisis Impacted the 2008 Presidential Race*, Pew Research Ctr. (Sept. 19, 2013), goo.gl/5V8sHJ. To say that advocates who value anonymity had to refrain from urging these two Senators, as well as virtually every member of the House (most of whom were running for reelection), to vote for or against the bailout of the U.S. financial system during one of the worst economic disasters in our history borders on the absurd.

Beyond its immediate consequences, the *reasoning* of the district court's decision is more dangerous still, as it has no logical stopping point. Although the district court briefly mentioned the specific limits in BCRA, *see* JS App.

22, it ultimately held that *all* disclosure requirements are constitutional. *See id.* at 23-24. After all, the mere mention of a lawmaker who is also a candidate, according to the district court, triggers all of the government's interests in regulating speech because it "links an electoral candidate to a political issue." *Id.* at 30. Similarly, all disclosure laws by definition are "tailored to substantially advance those interests" because they burden speech but do not entirely prevent it. *Id.* at 31.

In other words, the specific limits set forth in BCRA are merely a matter of legislative grace. A future Congress could lower the $10,000 threshold on advertisements or the $1,000 threshold on disclosure. 52 U.S.C. § 30104(f)(1), (2)(E). Or Congress could expand the 30- and 60-days-before-an-election requirements to 90 days, or 180 days, or even 365 days. *See id.* § 30104(f)(3)(A)(i)(II). And why would it not; policy advocacy (unlike campaign speech) is aimed exclusively at incumbents for the obvious reason that only those in office can pass or defeat the legislation to which such speech is addressed.

These concerns are not hypothetical: many states have enacted disclosure requirements that sweep even more broadly than the federal regime. For example, some states cover more forms of media than just certain broadcasts. *See, e.g.*, Md. Code, Elec. Law § 13-307(a)(3)(i) (covering "broadcast television or radio communication, a cable television communication, a satellite television or radio communication, a mass mailing, an e-mail blast, a text blast, a telephone bank, or an advertisement in a print publication"). Some states have considerably lower monetary thresholds. *See, e.g.*, Mass. Gen. Laws ch. 55, § 18F (requiring reporting for making expenditures of

more than $250 per calendar year). Some states impose extreme penalties for violations. *See, e.g.*, Wash. Rev. Code §§ 42.17A.750, 42.17A.765(5) (allowing for penalties triple the amount unreported). And some states expand the temporal window far beyond 60 days. *See, e.g.*, Ala. Code § 17-5-2(a)(6) (120 days before any election); Mass. Gen. Laws ch. 55, § 1 (90 days before any election); N.Y. Comp. Codes R. & Regs. tit. 19, § 938.3 (2016) (lobbyist disclosure law applied 365 days a year, including nonelection years, and applied to appointed as well as elected officials).

Given the neverending nature of modern political campaigns, there are no real limits on legislatures' ability to impose disclosure requirements—at least under the district court's reasoning. Indeed, if the district court is right, and political speech does not need a meaningful connection to an election before it can be subject to a disclosure requirement, then no organization is truly safe. In the name of the generic informational interest accepted by the district court, legislatures could demand the donor rolls of Planned Parenthood, Black Lives Matters, the Mexican American Legal Defense Fund, or any other group that raises the ire of those exercising political power based on a threadbare connection to elections. None of this bodes well for First Amendment freedoms, which are "delicate and vulnerable" and "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). And all of it directly contravenes our Nation's "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

CONCLUSION

The Court should note probable jurisdiction and set this case for oral argument.

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