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 *Amicus Curiae* of Free Speech Defense and Education Fund, Free Speech Coalition, United States Justice Foundation, Gun Owners Foundation, Gun Owners of America, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, Downsize DC Foundation, and DownsizeDC.org In Support of Appellant

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INTEREST OF THE *AMICI CURIAE*[1]

Free Speech Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, and Downsize DC Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Free Speech Coalition, Gun Owners of America, Inc., National Right to Work Committee, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

These legal and policy organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Many of these *amici* filed *amicus curiae* briefs in support of Appellant before the U.S. Court of Appeals

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

for the D.C. Circuit[2] as well as the U.S. District Court for the District of Columbia.[3]

STATEMENT OF THE CASE

This appeal from the ruling of a three-judge district court concerns the constitutionality of the disclosure requirements for so-called "electioneering communications" under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), as that requirement applies to the radio broadcast of a genuine issue ad by the Independence Institute, a nonprofit corporation exempt from federal income taxation under IRC Section 501(c)(3).

The issue ad in question was written to encourage the people of Colorado, pursuant to their constitutional right to petition the government, to contact their two sitting United States Senators to vote in favor of a controversial bill then pending in Congress — the Justice Safety Valve Act. This bill would authorize federal judges to sentence federal defendants below the statutorily prescribed mandatory minimum terms to prevent unjust sentences and to reduce prison overcrowding, while ensuring that dangerous offenders remain incarcerated. Many members of Congress were

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[2] *See* Brief *Amicus Curiae* of Citizens United, *et al.* (April 15, 2015), http://www.lawandfreedom.com/site/election/Ind%20Inst%20CU%20amicus%20brief.pdf.

[3] *See* Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* (June 24, 2016), http://lawandfreedom.com/wordpress/wp-content/uploads/2016/06/Independence-Institute-Amicus-Brief-as-filed.pdf.

reluctant to support this bill, fearing that they would be viewed by voters as being "soft on crime."[4] Strongly favoring that bill, Independence Institute sought to demonstrate public support for that legislation by stimulating grassroots lobbying directed at the two U.S. Senators from Colorado: Senator Michael Bennett, who was not a candidate for re-election in 2014, and Senator Mark Udall, who was.

Prior to BCRA, such issue advocacy had been unregulated. Certain incumbents realized that they could use campaign finance laws to squelch this unwanted pressure arising from their electorate. Mischaracterizing genuine issue ads as "electioneering communications," BCRA amended federal election law to ban certain types of effective broadcast communications which dared even mention the names of incumbent politicians during the period that Americans are generally most focused on the performance of their elected officials — immediately before primaries and general elections. Understandably, elected officials are tempted to misuse federal law to increase the already vast benefits of incumbency. BCRA is a prime example of the continuing effort by incumbents to protect themselves, here by requiring persons critical of incumbents to self-identify, not for the benefit of the public, but for the incumbents' own benefit. Incumbents know that mandatory disclosure chills the speech of many, thereby minimizing public pressure on incumbents. The very term "electioneering

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[4] *See, e.g.,* J. DelCour, "Soft on crime: The Great Divide dissolves," Tulsa World (Feb. 2, 2014).

communication" appears to have been crafted to give the impression that all issue ads are really campaign ads. Thus, genuine issue ads which even mention the name of an incumbent politician meet the statutory test for "electioneering communications," regardless of whether the advertisement advocates for or against a federal candidate.

Congress imposed substantial **civil penalties** for failure to file the electioneering communication notices required by 52 U.S.C. § 30104(f)(1): "the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation...." 52 U.S.C. § 30109(a). However, for a "knowing and willful violation," the civil penalties increase to "the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation....." *Id*. In addition, severe **criminal penalties** also may be imposed for a knowing and willful violation: imprisonment for up to one year for violations involving $2,000 to $25,000, and imprisonment of up to five years for violations involving $25,000 or more. [52 U.S.C. § 30109.]

Although the Supreme Court rebuffed the first **facial** challenge to BCRA's electioneering communications ban in McConnell v. FEC, 540 U.S. 93 (2003), it later ruled that the ban was unconstitutional **as applied** to **genuine issue ads** in FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) ("WRTL II"). When challenged again in 2010, the Supreme Court decided that BCRA's electioneering communication prohibition was unconstitutional **as applied to a corporation** engaged in an

electioneering communication. *See* Citizens United v. FEC, 558 U.S. 310 (2010). However, in the same case, the Court upheld BCRA's disclosure and reporting requirements for such electioneering communications, including the disclosure of the names and addresses of certain donors to the organization making the communication.[5]

The Independence Institute realized that its radio communication could be considered by the Federal Election Commission ("FEC") to be an "electioneering communication." In 2014, when the ad in question was presented for review, the FEC took the position that it was an "electioneering communication," meeting all four criteria in the statute and the FEC's regulation,[6] and making it subject to BCRA's disclosure rules. *See* 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. These reporting requirements include

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[5] Although the FEC has interpreted the donor disclosure requirement to apply only to those donors who contribute for the purpose of electioneering communications, pending litigation challenges that interpretation. An incumbent congressman is litigating to have the disclosure requirement applied to **all** donors to the organization, regardless of the donors' intentions. *See* Plaintiff's Motion for Summary Judgment and Memorandum in Support at 9, n.3. Many of these *amici* filed an *amicus* brief in the first appeal of that lawsuit. *See* Van Hollen v. FEC, Brief *Amicus Curiae* of Free Speech Coalition, *et al.* in Support of Appellants and Reversal (June 27, 2012).

[6] First, Mark Udall, one of the two senators referred to in the ad, was a candidate for re-election. Second, the ad was scheduled to be broadcast within 60 days of a general election. Third, the ad was targeted to the relevant electorate. Fourth, the expenditure for the ad exceeded $10,000.

making a public filing with the FEC of the names and addresses of certain donors who gave an aggregate of $1,000 or more to the sponsor of the advertisement since the first day of the preceding calendar year.

On September 2, 2014, the Independence Institute filed suit in the U.S. District Court for the District of Columbia asserting that the BCRA disclosure requirement unconstitutionally abridged its freedom of speech. A single district court judge refused to convene the required three-judge district court. The U.S. Court of Appeals for the District of Columbia reversed, ordering that the case be heard by a three-judge court as required by BCRA.

The Independence Institute made two "as applied" First Amendment challenges. First, it claimed that the BCRA disclosure requirement was unconstitutional when applied to its "genuine issue advocacy." *See* Independence Institute v. FEC, 2016 U.S. Dist. LEXIS *18-*19. Second, it claimed the requirement was unconstitutional as applied to an IRC section 501(c)(3) organization such as the Institute. On November 3, 2016, a three-judge court ruled against the Independence Institute, granting summary judgment to the FEC. This *amicus* brief addresses the Institute's first contention.

SUMMARY OF ARGUMENT

In an area of constitutional law as heavily litigated as the First Amendment, the first responsibility of a lower court is to identify the issue presented and then to select the line of precedents which governs the case. The Independence Institute's challenge involved a genuine issue ad focused on stimulating grassroots advocacy, and chose to apply principles applicable to campaign finance law. This was a mistake. The challenge brought by the Independence Institute does not involve speech supporting or opposing candidates. It should make no difference that Congress chose to apply the term "electioneering communications" to issue ads — these ads remain issue ads, not electioneering. Believing that any such grassroots advertisement "could" have some "electoral impact," the court below applied McConnell v. FEC, 540 U.S. 93 (2003) and Citizens United v. FEC, 558 U.S. 310 (2010), thereby making a significant error.

The line of precedent which the court below should have used is typified by McIntyre v. Ohio Elections Commission. There, this Court struck down an Ohio law which required that each advertisement relating to public issues identify the name and address of those sponsoring the ad — much the same as required by the BCRA "electioneering communication" disclosure provision. This Court laid down the principle that authors, publishers, or sponsors of such advertisements are free to disclose or withhold their identity — and cannot be forced by the government to reveal their identity — a matter within the editorial authority of the people secured by the freedom of the

press. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The press freedom's strong protections for the anonymity of authors and publishers, dates back to the colonial trial of New York printer John Peter Zenger in 1735. *See* Talley v. California, 362 U.S. 60 (1960).

Lastly, this Court should not defer to Congressional claims that this law is designed to inform the public about money in politics. The law was written to inform incumbents about their critics and thereby chill speech. Individual members of Congress benefit personally and politically from this particular law. Although the law purports to apply to incumbents and challengers, it was written by and for incumbents. It would be the rare "electioneering communication" that asks the public to contact a challenger to vote on a particular manner, since the challenger has no vote to cast. The political benefit to members of Congress of a law requiring critics to self-identify is clear. Any claim about the public's right to know should be understood to be nothing more than a smokescreen.

ARGUMENT

I. The Court Below Erroneously Assumed that the Independence Institute's Challenge Was Governed by Campaign Finance Cases.

The court below wrongly assumed that the constitutionality of the Institute's genuine issue ad was governed by two campaign finance cases, asserting

that McConnell v. FEC, 540 U.S. 93 (2003) and Citizens United v. FEC, 558 U.S. 310 (2010) "have already largely, if not completely, closed the door to the Institute's argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate." Independence Institute at *23.

Also, the court dismissed the Institute's "proposed constitutional exception for 'genuine' issue advocacy [to be] entirely unworkable as a constitutional rule" (*id.* at *26). The court assumed that there was no way to distinguish between "speech about legislative candidates" and "speech about legislative issues for which they will be responsible," basing its decision on its "imagination [as to the] electoral impact" that an issue ad "could" have (*id.* at *26-*27). The court opined that the constitutionality of disclosure requirements for an issue ad with even a scintilla of "electoral impact" — should be governed by McConnell and Citizens United.

The court below cared nothing about illicit, politically motivated congressional desires to minimize political pressure from their constituents. *See* Section V, *infra*. Rather, the court chose to protect incumbent elected officials, disregarding the need of the electorate for unfettered information about and access to ways to petition those officials. Benjamin Franklin observed that "[i]n free governments the rulers are the servants, and the people their superiors & sovereigns."[7]

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[7] R. Ketchum, edt., The Political Thought of Benjamin Franklin (Hackett Publishing: 2003) at 396.

Implicitly rejecting popular sovereignty in favor of a fictional American version of Parliamentary sovereignty, the court below summarily dismissed as "unworkable" an entire line of First Amendment cases establishing the right to anonymous speech, as demonstrated in Sections II-IV, *infra*. This was clear error and serves to establish jurisdiction in this case.

II. The BCRA Forced-Disclosure Rule Violates the First Amendment Anonymity Principle as Explained and Applied in McIntyre v. Ohio Elections Commission

A. Mrs. Margaret McIntyre and the Independence Institute: Anonymity in Action.

On April 27, 1988, a woman named "Margaret McIntyre distributed leaflets to persons attending a public meeting ... to discuss an imminent referendum on a proposed school tax levy." McIntyre v. Ohio Elections Commission, 514 U.S. 334, 337 (1995). Some of her leaflets identified her as the author, while others "purported to express the views of 'CONCERNED PARENTS AND TAXPAYERS.'" *Id.* The leaflets read, in part, as follows:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY
***
WASTE of tax payers dollars must be stopped.
Our children's education and welfare must come first.
WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO
ISSUE 19
THANK YOU.
CONCERNED PARENTS AND TAXPAYERS

Helped by a friend and her son, Mrs. McIntyre managed to leaflet the automobiles in the school parking lot, only to be confronted by a school district official who advised that her actions did not "conform to the Ohio election laws." *Id.* at 338. "Undeterred, Mrs. McIntyre appeared at another meeting on the next evening and handed out more of the handbills." *Id.*

After the tax levy passed, the school official who had confronted Mrs. McIntyre filed a complaint against her with the Ohio Elections Commission ("OEC"), charging her with a violation of an Ohio law which provided, in relevant part, as follows:

> "No person shall write, print, post, or distribute ... a notice, placard, dodger, advertisement ... or any other form of general publication which is designed to ... promote the adoption or defeat of any issue, or to influence the voters in any election ... through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place ... the **name and residence or business address** of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." [*Id.* at 338, n.3 (emphasis added).]

The Commission found that Mrs. McIntyre had violated the statute and fined her $100.

B. The First Amendment Anonymity Principle As Applied in McIntyre.

In 1995, this Court reversed the order of the OEC requiring Mrs. McIntyre to pay the $100 fine. McIntyre at 357. Relying primarily upon Talley v. California, the Court found the Ohio forced-identity disclosure law to be a violation of the First Amendment principle of anonymity. McIntyre at 341-43. After a brief review of the history of the freedoms of speech and of the press, Justice Stevens (as had Justice Black before him in Talley) concluded that the decision whether to disclose the identity of the author, the publisher, or anyone else associated with the decision to speak out belongs, as a constitutional matter, not to the civil authorities, but to the speaker himself: "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." McIntyre at 342. Indeed, Justice Stevens continued:

> Anonymity ... provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," ... the most effective advocates have sometimes opted for anonymity. [*Id.* at 342-43.]

In sum, the McIntyre ruling stands for the fixed principle that a law which requires the public disclosure of the identity of the author, publisher, distributor, circulator, or sponsor of a communication advocating support or opposition to a government policy is unconstitutional, because such a law divests editorial control vested in the people by the freedoms of speech and the press, to the exclusion of the government's control. *See id.* at 348, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). As Chief Justice Burger wrote in Miami Herald:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.... The choice of material to go into a newspaper, and the decisions made as to limitations on the ... content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. [*Id.* at 258.]

C. The First Amendment Anonymity Principle Precludes BCRA's Disclosure Requirement from Being Applied to Genuine Issue Ads.

Fast forward a quarter century. In 2014, the Independence Institute, a nonprofit corporation with a strong track record in research and education on matters of public policy, wished to produce a radio advertisement urging Colorado voters to contact their two Senators to support a bill pending in Congress: the Justice Safety Valve Act, allowing federal judges

discretion in the sentencing of nonviolent offenders. The text of the radio advertisement simply informed listeners of the need for the legislation and urged them to contact their Senators' Washington offices to vocalize support for passage of the legislation. *See* Jurisdictional Statement at 6.

Like Mrs. McIntyre's handbills issued in the name of the Concerned Parents and Taxpayers, the advertisement proposed by the Independence Institute does not provide the names and addresses of the organization's donors on whose behalf the Institute is acting. Like the Ohio law which prohibited the circulation of any handbill without naming the person responsible for the content of the handbill, BCRA would require the disclosure of the names and addresses of the Institute's major donors, the persons ultimately responsible for the proposed advertisement. This Court should note probable jurisdiction in this case to strike down the BCRA requirement as applied to the Independence Institute, the same as this Court did to the Ohio forced disclosure law as applied to Mrs. McIntyre. As observed in McIntyre, "the [anonymous] speech in which Mrs. McIntyre engaged — handing out leaflets in the advocacy of a politically controversial viewpoint — is the essence of First Amendment expression" (*id.* at 347)." Likewise, the politically controversial viewpoint speech proposed by the Independence Institute is equally the essence of such First Amendment expression. Indeed, as Justice Stevens exclaimed in his McIntyre opinion: "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id.* at 347 (emphasis added).

D. There Is No Good Reason Not to Apply the Anonymity Principle Here.

In its Jurisdictional Statement, the Independence Institute emphasizes that forced disclosure of the names of the Institute's major donors violates their "associational privacy." Jurisdictional Statement at 12, 24. But the right of the people to associate together for a common cause also enhances their ability to persuade others by presenting a united front behind the Institute's policy positions. *See id.* at 12 (quoting Buckley v. Valeo). *See also* NAACP v. Alabama, 357 U.S. 449, 460 (1958). Oftentimes, individuals associate with one another, designating some brave souls to lead the way, leaving the tactics, priorities, and strategies in the hands of others. Forced disclosures upend these tactical decisions, and might even cause divisions and dissension within the ranks, eroding the effectiveness of the association in reaching its policy goals.

Additionally, the Institute expressed concern about how the strength of the government's purported interest in a more fully informed people is carefully circumscribed, contending that, whatever "informational interest" the government has is "properly tailored [to] 'spending that is unambiguously campaign related.'" *See* Jurisdictional Statement at 12-13. Relying on the anonymity principle, however, Justice Stevens flat-out stated that "Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement." McIntyre at 349. Not only did Justice Stevens find the OEC's informational interest a weak reed, but more

importantly, he also found that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." *Id.* at 348.

To be sure, Justice Stevens did concede that the state's informational interest, **if** coupled with a disclosure requirement governing campaign expenditures, could justify the mandatory disclosure of campaign donors in the interest of combating *"quid pro quo"* corruption. McIntyre at 356. But that is not the case here. As the Institute's Jurisdictional Statement ably points out, the ad contains no unambiguously campaign-related speech, and is an electioneering communication in name only — since there is no electioneering in fact. *See* Jurisdictional Statement at 7-8.

E. The McIntyre Anonymity Rule Should Prevail.

Mrs. McIntyre's leaflet activity opposing a local school board tax levy may appear pedestrian when compared with the Independence Institute's polished radio ad addressing national criminal sentencing policy. But the constitutional rule of anonymity applies equally to both. Paraphrasing Justice Stevens' observation in McIntyre: "Urgent, important, and effective speech [like that of the Independence Institute] can be no less protected than impotent speech [like that of Mrs. McIntyre], lest the right to speak be relegated to those instances when it is least needed." *See* McIntyre at 347. The rule of anonymity applies across the board regardless of the importance

of the policy issue at stake, or of the likely impact of the communication involved. *See id.* at 348-49.

III. The BCRA Forced-Disclosure Rule Violates the Freedom of the Press, as Expressed in Talley v. California.

As noted above, Talley v. California — the primary precedent upon which McIntyre rests — traced the anonymity principle back to the freedom of the press. *See* McIntyre at 341-42. As Justice Black observed in Talley:

> The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. [*Id.* at 64-65.]

To be sure, BCRA does not employ the literal historic rack and screw, but as the Institute has demonstrated, "[b]ecause none of the statutory electioneering communication exemptions apply, the Independence Institute is left to choose between burdensome

regulation and the violation of its donors' privacy, or remaining silent." Appendix ("App.") at 81.

Like the English licensing system condemned in Talley, the BCRA disclosure mandate imposes a form of censorship, with the heaviest burden falling on those organizations that do not have the wherewithal to pay the administrative costs of compliance in addition to the cost of the distribution of the advertisement. And, as Talley points out, "'[l]iberty of circulating is as essential to [the freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* at 64. It is no wonder, then, that "[b]efore the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts." *Id.* at 65.

But there is an even greater principle at stake here than assessing costs and benefits, as modern courts are wont to do, in deciding whether a law unconstitutionally "burdens" a First Amendment right. Concurring in the judgment in McIntyre, Justice Thomas faulted the majority for not asking the right question: "whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting." *Id.* at 359 (Thomas, J., concurring). With that introduction, Justice Thomas dove into early American history, zeroing in on the "most famous American experience with freedom of the press, the 1735 Zenger trial, [noting that it] centered around anonymous political pamphlets." *Id.* at 361. As Justice Thomas retold the

story, the seditious libel charge against Zenger, a printer, was that he "refused to reveal the anonymous authors of published attacks on the Crown Governor of New York." *Id.* The jury refused to convict, "set[ting] the colonies afire" and "signif[ying] at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind." *Id.* at 361.

The American jury's mind undoubtedly was shaped by events in England in the 1600s. As chronicled by Sir William Blackstone in the fourth volume of his Commentaries on the Laws of England published in 1769, "[t]he art of printing, soon after it's [sic] introduction, was looked upon ... as merely a matter of state, and subject to the coercion of the crown" (*id.* at 152, n.a):

> It was therefore regulated ... by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. [*Id.*]

By the time that Blackstone published the last volume of his Commentaries, he wrote without reservation that "[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications...." *Id.* at 151. The essence of the liberty, Blackstone continued, was that "[e]very freeman has an

undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *Id.* at 151-52. Thus, he concluded: "To subject the press to the restrictive power of a licenser ... is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." *Id.* at 152.

Although Blackstone did not specifically identify the anonymity principle, there can be no doubt that a law requiring the disclosure of (i) the identity of an author of a book, or (ii) the publisher of a political pamphlet, or (iii) the financial sponsor of a radio ad as a precondition of circulating the book, handing out of the leaflet, the running of a radio ad would run afoul of the no-licensing principle undergirding the freedom of the press. Yet, that is what the Ohio law did in McIntyre, and what BCRA does here. Indeed, BCRA authorizes the FEC to review the Independence Institute's radio ad to ascertain whether it is a genuine issue ad, or a subterfuge electioneering communication subject to the FEC's jurisdiction and, hence, subject to its disclosure mandate. That is raw censorship. Like the Star Chamber before it, the FEC functions as a licenser of the press, requiring those who use the broadcast media either to comply voluntarily with FEC regulations, or to risk civil sanction or criminal prosecution for violation of the FEC's rules. *See* Philip Hamburger, Is Administrative Law Unlawful? at 258 (Univ. Chi. Press: 2014).

IV. The True Purpose for Banning or Restricting Electioneering Communications Is Not the Public's Informational Interest, But Rather the Congressional Self-Interest in Incumbent Protection.

This case challenges a statute cleverly crafted by incumbent members of Congress to discourage the public from communicating with their constituencies about their official acts, political positions, and votes in Congress. In this case, the communications Congress seeks to severely limit contained relevant information about an important policy issue and related legislation before it. Unable to impose an obviously unconstitutional complete ban on communications which would rile up their constituents, BCRA invented a category of communications that incumbents find particularly meddlesome, labeling them as "electioneering communications," and then regulating those communications to the point that few would dare venture into that minefield.

Compliance with FEC rules requires a detailed understanding of obscure and complex statutory and regulatory terms which often have counter-intuitive definitions, including "clearly identified candidate," "publicly distributed shortly before election," "targeted to the relevant electorate," "exemptions," as well as rules on "when to file," "disclosure date," "where to file," and "content of disclosure."[8] Among the

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[8] *See* FEC Brochure, "Electioneering Communications," http://www.fec.gov/pages/brochures/electioneering.shtml (updated

exemptions from these rules are "[e]xpenditures or independent expenditures that must otherwise be reported to the Commission..." *Id*. Therefore, it is important to note that this statute and these rules were extended to control organizations which are not political committees, and therefore, which are unfamiliar with even the basics of FEC recordkeeping and reporting. They are a trap for the unwary. The Jurisdictional Statement rightfully focuses on "burdening core First Amendment activity" for compliance with the electioneering communication restrictions.[9] But the problem is even more serious than that.

First, the regulatory scheme that Congress has employed protects incumbents, not challengers. It is true that the first ingredient of an electioneering communication is communication "that 'refers to a clearly identified candidate for Federal office.'" *Id.* at 7. However, this does not mean that this law protects challengers and incumbents equally. It would be rare for an electioneering communication to ask the public to let their views about pending legislation be known to a challenger who has no vote to cast. Laws like BCRA are written by incumbents, not challengers, and this law, like all campaign finance laws, was written by incumbents for the benefit of incumbents.[10]

January 2010).

[9] *See, e.g.*, Jurisdictional Statement at 24.

[10] Former Federal Trade Commission Chairman James C. Miller's book Monopoly Politics summarizes it this way: "More than two

Second, the electioneering communications rules were actually calculated to deter communications about issues presently before Congress. The issue advertisements which the law targets are generally designed to urge the public to contact incumbents and let them know how they feel about pending legislation or an important policy issue. Without receiving public pressure, incumbents decide how to vote based on their own independent political calculus, without any meddlesome input from the electorate to which they have no desire to be accountable. The electioneering communications law severely limits the use of an incumbent's name in broadcast ads during the time of year that most Americans are paying the most attention to the activities of their elected officials — the period before elections.

Third, for those who nevertheless decide to run advertisements, the rules on electioneering communications require nonprofit organizations to disclose the names of their major donors so that powerful members of Congress can have a complete list of the names and addresses of those relatively wealthy persons who would dare to meddle in their states and districts. Of course, since an overwhelming number of Senators and Representatives who seek re-election achieve that goal and will continue to wield governmental power, this discourages dissenting voices from expressing their opinions. Congressmen have one overriding objective: re-election. And they

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decades of research has concluded that the major effect of the 1974 reforms was to help incumbents ward off challengers." J. Miller, Monopoly Politics (Hoover Institution Press, 1999) at 89.

have one secondary goal: preventing their constituencies from pressuring them in how to vote, which causes at least some voters to be annoyed with them. The public rationale for laws like BCRA is always high-sounding — that "the people" might be better able to evaluate the message by knowing who is communicating — but this is unconstitutional subterfuge. *See* Miami Herald (rejecting government interest in free flow of information as rationale for imposing reply requirement on press). Just as King George wanted to know the name of the person identified as "An Englishman" who published Common Sense, Senators McCain and Feingold wanted to know who would dare to communicate with their constituents about their activities in Washington, D.C.

Fourth, the rules on electioneering communications are not campaign finance laws at all. Incumbents have designed campaign finance laws and the rules on electioneering communications to benefit incumbents and allow them to be able to vote and act as they please, with as little interference from their constituencies as possible. *See generally* J. Miller, Monopoly Politics at 89, 127-29. BCRA regulates issue ads with neither express advocacy, nor the functional equivalent of express advocacy. BCRA restricts grassroots lobbying which is not electioneering. BCRA regulates efforts by the public, including nonprofit organizations like the Independence Institute, to put pressure on congressmen to vote a particular way in their capacity as legislators. This supposed connection to elections is a fraudulent justification for the rules on independent expenditures, as those rules were

designed for a very different purpose than to fight *quid pro quo* corruption.

The Jurisdictional Statement of Independence Institute repeatedly invokes the term "informational interests" of the U.S. Government, arguing that the government's interests are not as compelling with respect to issue advocacy as they are with campaign spending. *See, e.g.,* Jurisdictional Statement at 10-11, 20-23. Certainly this is true. But these *amici* suggest that the interests that Congress was pursuing in the enactment of BCRA were not wholesome, not beneficial to the interests protected by the First Amendment, and actually were in pursuit of a wholly illegitimate interest of members of Congress — the desire to shield themselves from political criticism and pressure in their official votes. And, this has a secondary effect well known to members of Congress — if the public knew their views, then someone would disagree, and votes would be lost. Better for the incumbent that the grassroots lobbying never occur.

Congress would much prefer to vote on matters of controversy when the public is not watching, as revealed inadvertently in the government's defense of the facial challenge to BCRA leading to the Supreme Court's decision in McConnell v. FEC, 540 U.S. 93 (2003). There, the government's briefs before the three-judge court revealed that "the inducements of money" must be eliminated from the shaping of public policy so that the true "national interest" may be served. Brief of Defendants at 1. Without grassroots lobbying, members of Congress have greater latitude to determine exactly what that "national interest" is

without interference from the people. The right to criticize and petition government anonymously is not new — it is a right that traces its ancestry in the United States to the 1735 trial of printer and government critic John Peter Zenger, and to Thomas Paine's decision in 1775 to publish the pamphlet Common Sense under the pseudonym "An Englishman."

When incumbent congressmen establish rules governing how the American people can communicate about legislators' behavior, the courts owe Congress no deference. Rather, courts have a duty to the Constitution to strike down such laws which punish legitimate political discourse. When members of Congress enact legislation to immunize themselves from public criticism and input, they should be entitled to no deference whatsoever. As Justice Kennedy explained in his dissent in McConnell, "Our precedents teach, above all, that Government cannot be trusted to moderate its own rules for suppression of speech." McConnell at 288.

CONCLUSION

For the reasons set out above, the Court should note probable jurisdiction.

Respectfully submitted,

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