No. 14-5249

In the
United States Court of Appeals
for the District of Columbia Circuit

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 Citizens United, Citizens United Foundation, U.S. Justice Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, and Conservative Legal Defense and Education Fund in Support of Appellant and Reversal

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

Except for the following, all parties, intervenors, and *amici curiae* appearing before the district court below and this Court are listed in the Brief for Appellant: *amici* Citizens United, Citizens United Foundation, U.S. Justice Foundation, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., and Conservative Legal Defense and Education Fund.

Ruling under Review

References to the ruling at issue appear in the Brief for Appellant.

Related Cases

To the best of counsel's knowledge, this case has not been previously before this Court or any court other than the district court below. Counsel are unaware of any related cases currently pending in this Court or any other court.

Statutes and Regulations

All applicable constitutional provisions, statutes, and regulations are set forth in the Addendum to the Brief for Appellant.

CORPORATE DISCLOSURE STATEMENT

The *amici curiae* herein, Citizens United, Citizens United Foundation, U.S. Justice Foundation, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Corporate Disclosure Statement pursuant to Rules 26.1(b) and 29(c) of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

These *amici curiae* are represented herein by Herbert W. Titus, counsel of record, William J. Olson, John S. Miles, Jeremiah L. Morgan, and Robert J. Olson of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. Michael Connelly, U.S. Justice Foundation, 932 D Street, Suite 2 Ramona, California 92065 is co-counsel for *Amicus Curiae* U.S. Justice Foundation. Mark B. Weinberg of Weinberg, Jacobs & Tolani, LLP, 10411

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/s/ Herbert W. Titus
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* Authorities chiefly relied upon.

GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act of 2002
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971

INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code, and each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. These *amici* have filed *amicus curiae* briefs in several cases involving the Federal Election Campaign Act and the Bipartisan Campaign Reform Act, including an *amicus curiae* brief in the first appeal of Center for Individual Freedom v. Van Hollen before this Court in 2012.[2]

SUMMARY OF ARGUMENT

This case challenges a statute cleverly crafted by incumbent Congressmen to discourage nonprofit organizations from communicating with their constituencies about those representatives' activities in Washington, D.C., including important legislation coming before Congress of the sort involved in this case. Rather than impose an obviously unconstitutional ban on constituent communications, the Bipartisan Campaign Reform Act of 2002 ("BCRA")

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] *See* http://www.lawandfreedom.com/site/election/VanHollen_Amicus.pdf.

compels nonprofit organizations to violate their fundamental constitutional right to exercise their freedom of the press anonymously, so that powerful members of Congress can have a complete list of the names and address of those relatively wealthy persons who would dare to meddle in their Districts. Members of Congress have one overriding objective: re-election. They have designed campaign finance law to favor 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 (Hoover Institution Press, 1999), pp. 89, 127-29.

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." 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 subterfuge. Just as King George wanted to know 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.

When incumbent Congressmen establish rules by which the American people can communicate about their behaviors, the courts owe Congress no deference. Rather, courts have a duty to the Constitution to strike down such laws which punish legitimate political discourse. The district court below wholly ignored these free press principles set out in McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995).

Knowing that the courts would see through a statute that required disclosure of financial sources of the print media, the statute was limited to broadcast media only (arguably the most effective way to reach the people), and was limited to the time immediately prior to elections (when Congress often attempts to slip through unpopular legislation). As this case demonstrates, the Bipartisan Campaign Reform Act requires the disclosure of certain donors to an organization that makes an "electioneering communication," regardless of whether that communication actually includes any real electioneering.

In BCRA, Congress has given to each member a form of copyright protection over the use of his name. Whenever a speaker has the temerity to

name the name of an incumbent Congressman who will be on the ballot in the next election, the law is triggered. When members of Congress learn that a person gives money to fund an effort to pressure them, they have many means at their disposal to leverage the power of government to bring pressure on those individuals and companies. Of course, compelled public disclosure chills free expression of ideas, and therefore the very existence of the law achieves most of the objective desired, without the need for Congressmen to need to explain to the donors how their particular businesses may be vulnerable to government policies.

Justice Black opined in Talley v. California, 362 U.S. 60 (1960), that the constitutional right to communicate anonymously is rooted, firstly, in the no licensing/no censorship principle of the freedom of the press, and only secondarily in the privacy protection afforded by the guarantee of freedom of assembly. *See id.* at 62-65. Although a handful of court decisions have made the mistake of deferring to Congress in such matters, the fixed rule remains — the author and publisher have the editorial right to determine whether to disclose their own identity. The district court decision below ignored that fundamental editorial right and, in doing so, erroneously concluded that there was no need for a three-judge court, there being no substantial Constitutional question.

INTRODUCTION

This appeal concerns the constitutionality of the compulsory disclosure provision of the Bipartisan Campaign Reform Act, as applied to the radio broadcast of an issue ad by the Independence Institute (a nonprofit corporation exempt from federal income taxation under Internal Revenue Code section 501(c)(3). The ad in question was written to encourage the people of Colorado to exercise their right to petition government to urge their two sitting United States Senators to vote in favor of a bill then pending in Congress — the Justice Safety Valve Act.

The Federal Election Commission ("FEC") has taken the position that this issue ad is an electioneering communication because it meets all four criteria in its regulation. First, incumbent Senator Mark Udall, one of those referred to in the ad, was a candidate for reelection. 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. *See* 52 U.S.C. § 30104(f)(3) (formerly 2 U.S.C. § 434(f)(3)); 11 C.F.R. § 100.29. Therefore, the FEC believes the ad qualified under BCRA as an electioneering communication, making it subject to the BCRA disclosure rules. These

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

On September 2, 2014, Independence Institute filed suit in the U.S. District Court for the District of Columbia seeking a ruling that, as applied to its issue ad, the BCRA disclosure requirement unconstitutionally abridged its freedom of speech. Pursuant to BCRA, 52 U.S.C. § 30110 note, the Institute filed an application for a three-judge court. The district court denied the Institute's application on the sole ground that the U.S. Supreme Court had decided, in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), that the BCRA mandatory disclosure provision applied to all electioneering communications as defined by federal law, irrespective of whether the reference to a candidate expressly advocated his election or defeat, or was the functional equivalent of express advocacy. Pointedly, the district court concluded that the Institute was not entitled to a hearing before a three-judge court and dismissed its complaint because its "claim is squarely foreclosed by *Citizens United*." Opening Brief for Plaintiff-Appellant ("Inst. Br.") at 9.

On appeal, the Institute vigorously contests the district court's reading of Citizens United. It urges this Court to limit the Citizens United mandatory disclosure ruling to its facts. Pointing out that whereas the electioneering communication involved in Citizens United was "unambiguously campaign related," the Institute's communication was a genuine issue ad — urging Colorado's two Senators to support a specific bill. Only by happenstance was one of the two U.S. Senators from Colorado then a candidate for reelection. Inst. Br. at 9-11.

Under Buckley v. Valeo, 424 U.S. 1 (1976), the Institute claims, "the government may only regulate speech that is 'unambiguously campaign related,' thereby strictly protecting genuine issue speech." *Id.* at 26. Otherwise, the Institute asserts, the disclosure mandate of the names and addresses of donors supporting genuine issue ads would transgress upon "an unbroken, 60-year line of jurisprudence … acknowledg[ing] that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Id.* at 27.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DECIDING THE MERITS RATHER THAN CONVENING A THREE-JUDGE COURT AS REQUIRED BY THE BIPARTISAN CAMPAIGN REFORM ACT.

A. The District Court's Reading of Citizens United v. Federal Election Commission Collides with McIntyre v. Ohio Election Commission.

In addition to failing to acknowledge the threat to the freedom of association posed by its broad reading of the BCRA disclosure mandate, an issue briefed by the Institute (*see, e.g.,* Inst. Br. at 28, 52), the district court below completely overlooked the impact that such a reading will have on the First Amendment anonymity principle[3] articulated and applied by the Supreme Court in McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995).[4]

In McIntyre, the Supreme Court struck down an Ohio law that required public disclosure of the "name and residence" of any "person" responsible for "any other form of general publication which is designed to promote … the

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[3] *See* Talley v. California, 362 U.S. 60 (1960).

[4] As acknowledged in Citizens United, the McIntyre principle is not limited to those "forms of communication" of which our founders were aware; rather, today's "speakers and media are entitled to [no] less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted." *Id.* at 353-54.

adoption or defeat of an **issue** … or to … make any **expenditure** for the purpose of financing political communications…." *Id.* at 338 (emphasis added). Although the Court specified that its ruling "discusses only written communications," and not radio or television broadcasts, its reasoning was not so confined. *Id.*[5] Rather, the Court simply noted that "[n]o question concerning [broadcasts] is raised in this case." *Id.* In further clarification of this point, the Court explained that, although the "special physical characteristics of broadcast transmission" may give rise to limited First Amendment accommodations, "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media." Turner Broadcasting System v. FCC, 512 U.S. 622, 640 (1994).

The BCRA mandatory disclosure provision fares no better than the disclosure requirement in McIntyre. Enacted into law to correct what Congress

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[5] Indeed, as stated in Citizens United, "television … owned by media corporations have become the most important means of mass communication in modern times." 558 U.S. at 353. Continuing, the Court asserted that "[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media…. At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge." *Id.*

believed to be a loophole that permitted sham issue ads that functioned as express advocacy for the election or defeat of a candidate for federal office, the BCRA mandate decidedly was not the product of "the inherent physical limitation on the number of speakers who may use the broadcast medium[,] … permit[ting] the Government to place limited content restraints, and impos[ing] certain affirmative obligations, on broadcast licensees." *See* Turner at 638. Instead, the BCRA disclosure mandate is an effort to exercise direct editorial control over communications, requiring the user of broadcast media to disclose the identity of the "true" publisher. By forcing the user to make known who is financially behind the ad, the BCRA mandate purportedly was designed to achieve a better informed public.[6]

That policy rationale was precisely the one put forward by the State of Ohio to support its prosecution of Mrs. McIntyre for failure to disclose her name and address on the "leaflets" that were being circulated in opposition to a proposed school tax levy. *See* McIntyre at 338-40. In response, the Supreme Court stated unequivocally that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication,

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[6] Of course, in addition to the public learning who funds such communications, the Members of Congress learn this as well.

is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. Indeed, the Court "recalled [that] England's abusive press licensing laws and seditious libel prosecutions" oppressed the marketplace of ideas such that "'persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.'" *Id.*

Although the Court opined that the identity of a speaker, if withheld, might make his message less effective, the First Amendment committed that decision to the speaker, not to the government. Indeed:

> quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby 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. [*Id.*]

This same First Amendment principle applies to those who financially support the actual communication. By choosing not to disclose the identity of an ad's financial supporters, a broadcast media user is exercising editorial control that the First Amendment exclusively vests in the broadcaster.

In McIntyre, Ohio attempted to evade this anonymity principle by urging the Supreme Court to adopt an exception for communications "intended to

influence the electoral process." *See id.* at 344. The McIntyre Court rejected that effort, relying on its long-standing precedents that such "core political speech" included Mrs. McIntyre's "handing out leaflets in the advocacy of a politically controversial viewpoint … the essence of First Amendment expression." *Id.* at 347.

Further, the McIntyre Court rejected Ohio's contention that her freedom of speech should be subject to the state's interest in an informed electorate:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think 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.… The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.… Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement. [*Id.* at 348-49.]

Undeterred, Ohio pressed forward with yet an additional argument — that its forced identity policy was designed to curb fraud and libel. The McIntyre Court, however, found the statute overly broad, sweeping into its prohibitive path all sorts of communications, not just those that create greater risks of fraud or libel. *Id.* at 351-53. In contrast with Ohio's broad-based statute, the Court cited the Federal Election Campaign Act of 1971 ("FECA"), which

differentiated between direct contributions to candidates and independent expenditures, the latter being sufficiently circumscribed so as to "alleviate[] the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 353.

Applying the McIntyre reasoning to BCRA's mandatory disclosure provision here, it is one thing to require the names and addresses of donors whose contributions are made to support express advocacy, or its functional equivalent. It is quite another to require disclosure of the names and addresses of donors whose contributions, as here, are made to support genuine issue ads that just happen to refer to a government official who is currently engaged in a campaign. As the McIntyre Court observed, FECA:

> regulates only candidate elections, not referenda or other issue-based ballot measures.... In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized ... by the public for just this sort of abuse. [*Id.* at 356]

Even further, Independence Institute has ably argued in its brief that the district court's decision below would put a more expansive disclosure

requirement upon genuine issue ads than would be imposed upon express advocacy or its functional equivalent. *See* Inst. Br. at 5-6, 11-12, 47-51. By overbroadly construing a single statement in Citizens United, the district court below, like the State of Ohio in McIntyre, took a "blunderbuss approach"[7] to the Institute's First Amendment claims, shooting them down as if they were clearly foreclosed by Supreme Court precedent. Under McIntyre, Supreme Court precedent is to the contrary.

B. The Institute Is Entitled to a Three-Judge Court.

On October 6, 2014, the district court below denied the Institute's request for a three-judge court. At the time of this decision, as the Institute points out in its brief, "the FEC [had] promulgated 11 C.F.R. § 120(c)(9), which imposed an earmarking limitation on BCRA's electioneering communication disclosure requirements." Inst. Br. at 5. According to that rule, corporations making electioneering communications would be required to disclose only those donors whose contributions were made *"for the purpose of furthering electioneering communications*." Inst. Br. at 48. Designed by the FEC to conform the BCRA disclosure mandate with the disclosure mandate governing independent

[7] McIntyre at 357.

expenditures under Buckley, the rule similarly would protect corporations engaging in electioneering communications: only the identities of those donors whose contributions were intended to promote the BCRA-defined communications would be disclosed. *See id.*

On November 5, 2014, one month after the district court below denied the Institute's request for a three-judge court, U.S. District Court Judge Amy Jackson struck down the FEC disclosure rule as "arbitrary, capricious, and contrary to law[,] an unreasonable interpretation of … BCRA." Van Hollen v. FEC, 2014 U.S.Dist. LEXIS 164833, *3 (D.D.C. Nov. 25, 2014). As the Institute's brief points out, this new ruling, if reversed on appeal, would mean that "only the donors who specifically gave money for" an ad expressly advocating the reelection of Senator Udall would be required to be disclosed. Inst. Br. at 51. However, if Van Hollen is affirmed, and "if the Independence Institute runs the ad as proposed in this case — without any candidate advocacy, express or implied — then *all* of the nonprofit's donors are subject to disclosure." *Id.*

In her 2014 Van Hollen decision, Judge Jackson explains that her 2012 opinion had previously found that the FEC had exceeded its authority in

promulgating the BCRA disclosure rule "because the problem it was trying to remedy was not — even as the agency characterized its task — to interpret an ambiguity in the statute, but rather, to address a problem not contemplated by the statute that was ostensibly created by the Supreme Court's decisions in *FEC v. Wisconsin Right to Life, Inc.* … and *Citizens United.*" Van Hollen at *2. However, in the first appeal, the Court of Appeals in the Van Hollen matter reversed, concluding that BCRA's forced-disclosure statute is "anything but clear, especially when viewed in the light of the Supreme Court's decisions in *Citizens United* … and … *Wis. Right to Life, Inc.*" *See* Center for Individual Freedom v. Van Hollen, 694 F.3d 108, 110 (D.C. Cir. 2012).

Notwithstanding this constantly changing legal landscape, the court below based its decision rejecting the three-judge court exclusively on the proposition that Citizens United clearly resolved the scope of BCRA's disclosure requirement. One would think that this constitutional conundrum alone would be sufficient to have convinced the district judge below to grant the Institute's motion to convene a three-judge court. Surprisingly, entirely missing from the opinion of the district court below is any reference to the Van Hollen litigation, even though it was initiated in 2011, and was addressed by the Court of Appeals

on September 18, 2012, over two years before the district court denied the Institute's request for a three-judge court. In light of the implications of the Van Hollen litigation alone, the Institute has presented a "substantial" constitutional claim.

CONCLUSION

The district court's denial of the Independence Institute's request for a three-judge court was erroneous and should be reversed.

Respectfully submitted,

/s/ Herbert W. Titus

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Citizens United, *et al.*, in Support of Appellant complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 3,410 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point CG Times.

/s/ Herbert W. Titus

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Dated: April 15, 2015

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Citizens United, *et al.*, in Support of Appellant and Reversal, was made, this 15th day of April 2015, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

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