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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether Congress may require organizations engaged in the genuine discussion of policy issues, unconnected to any campaign for office, to report to the Federal Election Commission, and publicly disclose their donors, pursuant to the Bipartisan Campaign Reform Act of 2002.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. This includes the principle that republican government requires robust protection of the right of petition and political speech. These rights find express protection in the First Amendment, but they are also inherent rights of the people as sovereigns in our constitutional system. The Center has participated as amicus in a number of cases before this Court that raised issues concerning election speech, including *Harris v. Quinn*, 134 S.Ct. 2618 (2014); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277 (2012); *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010); and *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

SUMMARY OF ARGUMENT

The Court should grant review to settle an area of law that is now the subject of substantial confusion.

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[1] Pursuant to this Court's Rule 37.2(a), Amicus Curiae gave all parties notice of amicus's intent to file at least 10 days prior to the filing of this brief. Counsel for all parties consented to this brief and Amicus lodged copies of the letters evidencing that consent with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Speech about political issues is at the core of the Freedom of Speech protected by the First Amendment. Further, the right of petitioning government for redress of grievances is both inherent in our republican form of government and expressly protected by the First Amendment. Yet, the decisions of this Court seem to treat political speech differently than other forms of speech, with speech concerning an election receiving less protection than a directional sign message, flag burning, or nude dancing. It is not just that results differ in different cases. This Court applies different tests to the regulation of speech in order to permit *greater* regulation of that which the First Amendment was enacted to protect. Regulation of core First Amendment Speech is now treated on par with commercial speech, while other speech regulation is subject to strict scrutiny. Review should be granted to resolve the confusion and to return to a jurisprudence that protects core First Amendment values.

REASONS FOR GRANTING REVIEW

I. The Court Should Grant Review to Resolve the Growing Confusion Over the Scrutiny to Apply to Government Regulation of Political Speech

The statute in question requires disclosure of donors who contribute $1,000 or more for issues ads that mention the name of a candidate for office – in this case a serving United States Senator. This Court has recognized on numerous occasions that disclosure requirements chill speech. *See*, *e.g.*, *Buckley v. Amer. Constitutional Law Found., Inc.*, 525 U.S. 182, 198 (1999); *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 461 (1958). Yet the court below applied what it

termed "exacting scrutiny" to the regulation as the test applicable to all "campaign-related speech." *Independence Institute v. Federal Election Comm'n*, Jurisdictional Statement at App. 30 (U.S. Dist. Court, D. D.C. 2016). This scrutiny requires the regulation to have a "substantial relation" to a "sufficiently important government interest." *Id.* The test is roughly the same scrutiny the Court requires for regulation of commercial speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571-72 (2011) (To sustain the targeted, content-based burden … on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.").

As noted in Section II, *infra*, protection of political speech and petition of government officials are at the core of rights protected by the First Amendment. As a general matter, this Court has tested regulation of these core interests by the strict scrutiny test. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1999); *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *Brown v. Hartlage*, 456 U.S. 45, 52-54 (1982); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). As Justice Thomas has noted, however, the Court's approach to election laws that burden "voting and associational interests" are much harder to predict. *Buckley*, 525 U.S. at 208 (Thomas, J., concurring in the judgment).

This confusion is puzzling given the general protection of Freedom of Speech. For instance, this Court has ruled that content-based regulations on the size and number of temporary signs directing people to church services must satisfy strict scrutiny. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2224 (2015). Yet the

court below applied a lower level of scrutiny to the law here that singles out messages based on their content (the mention of the name of sitting government officials) for disfavored treatment. The confusion in this Court's precedents is evidenced by the fact that regulation of directional signs receive a greater level of scrutiny than speech that is at the core of the interests protected by the First Amendment.

Strict scrutiny has generally been the test for regulation of speech rights. Laws that compel contributions of money for political activities are tested under strict scrutiny. *Harris*, 134 S.Ct. at 2639. The same is true of laws that require disclosure of the identity of the proponent of a political leaflet or identification of the individual soliciting signatures on a petition. *McIntyre*, 514 U.S. at 357; *Talley v. California*, 362 U.S. 60, 64 (1960); *Buckley*, 525 U.S. at 200. This case presents the issue of whether the right to petition government officials is entitled to the same protection.

The Court has acknowledged that political speech that seeks to engage others for political change is "core political speech" where First Amendment protection should be "at its zenith." *Buckley*, 525 U.S. at 186-87. Yet far from granting political speech this level of protection, the Court's opinion in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), generates uncertainty that leads to much less scrutiny. *Buckley*, 525 U.S. at 208 (Thomas, J., concurring in the judgment). That which should be most protected now receives, at best, uncertain protection. This Court should grant review in this case to clarify that political speech is at the core of the First Amendment and that government regulation that chills that speech

must be justified by a compelling governmental interest.

II. Political Speech and Petitioning Government Officials Are at the Heart of the Interests Protected by the First Amendment.

This Court has long recognized that our very form of government implies a right to petition government and engage in political speech. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875). This right lies at the core of the liberties protected by the First Amendment. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985); *United Mine Workers of Am., Dist 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The significance of the form of government established our Constitution cannot be overstated. The right of petition is not a mere indulgence to seek favor from the sovereign. *See* St. George Tucker, Blackstone's Commentaries 1:App. 299-300 (1803) reprinted in 5 Phillip B. Kurland and Ralph Lerner, eds., THE FOUNDERS' CONSTITUTION 207 (1987). Instead, political sovereignty lies in the people themselves. Incident to this sovereignty, the people have an inherent right to instruct their representatives and converse with each other on political manners, even in the absence of an express declaration of right. James Wilson, Remarks in the Pennsylvania Convention to Ratify the Constitution, 1787, reprinted in 1 Kermit L. Hall, Mark David Hall, eds., COLLECTED WORKS OF JAMES WILSON 194-95 (2007); Joseph Story, Commentaries on the Constitution 3:§1887, reprinted in 5 THE FOUNDERS' CONSTITUTION, 207; A. Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26

(Harper Brothers 1948); Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U.L. Rev. 739 (1999).

Although the rights of petition and speech were assumed to be part of the new governments, most of the state constitutions had express protections for speech, petition, and assembly. *See*, *e.g.*, Constitution of Maryland, Declaration of Rights (1776) Art. XI, reprinted in 3 Francis Thorpe, ed., THE FEDERAL AND STATE CONSTITUTIONS 1687 (1993); Constitution of North Carolina, Declaration of Rights (1776) Art. XVIII, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS 2788; Constitution of Pennsylvania, Declaration of Rights (1776) Art. XVI, 5 THE FEDERAL AND STATE CONSTITUTIONS 3084; Constitution of Vermont, Declaration of Rights (1777) Art. XVIII, 6 THE FEDERAL AND STATE CONSTITUTIONS 3741-42; Massachusetts Constitution of 1780, Pt. 1, Art. XIX, 3 THE FEDERAL AND STATE CONSTITUTIONS 1892. The founding generation was leery of the new federal government, seemingly further removed from direct electoral control. Significant objections were raised during the ratification debates that the new federal charter lacked a declaration of rights protecting speech, press, petition, and assembly. *See*, *e.g.*, Richard Henry Lee, Proposed Amendments, reprinted in 8 John P. Kaminski et al., eds., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 65 (2009); George Mason's Objections to the Constitution of Government Formed by the Convention, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 43; Samuel, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 678; Cincinnatus I: To James Wilson, New York Journal, November 1, 1787,

reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 163-34; One of the Common People, Boston Gazette, reprinted in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 368.

There was no debate about the right of petition at the time the Bill of Rights was proposed. That comes as no surprise. The power of the people to petition government is inherent in their sovereignty. The purpose of the amendment was to add an additional measure of security against government action that would limit the right.

Although the statute at issue is framed as an election regulation, there is no election advocacy involved in the speech that will be regulated. The proposed communication is pure issue advocacy. It asks citizens to contact their Senator about a piece of pending legislation. The statute regulates the communication here only because it mentions the name of the Senator 60 days before his name appears on the ballot. However, the communication advocates neither for nor against the Senator. It merely urges citizens to exercise their inherent right as sovereigns to petition their Senator on a piece of pending legislation. This is a right that lies at the core of the First Amendment.

III. The Disclosure Requirements at Issue Chill Speech and Petition Rights.

In *NAACP v. Alabama, ex rel. Patterson*, this Court considered a discovery ruling by Alabama state courts requiring the NAACP turn over to the state the names and addresses of members living in Alabama.

The Court acknowledged, "that that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty'." *NAACP*, 357 U.S. at 460. Thus, any state action that curtailed this freedom was subject to the "closest scrutiny." *Id*.

The Court concluded that the membership disclosure order was an action that curtailed the freedom of association and speech. That the state of Alabama had taken no action to restrict speech of NAACP members was not a factor in the Court's analysis. As the Court noted, even an unintended chilling of speech triggers strict scrutiny. *Id*., at 461.

One of the more storied traditions within the realm of public political discourse in the United States is the practice of anonymous pamphleteering. In the face of concerns for transparency, anonymous pamphleteering has been seen, not as a hindrance to the continued development of society and the United States as a republic, but as a helpful tool in that effort. This Court has recognized that "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley*, 362 U.S. at 64.

These tools of free speech "indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *see* Willard Grosvenor Bleyer, *Main Currents in the History of American Journalism* 90-93 (1927). However, the tradition of anonymous political speech is most famously embodied in *The Federalist Papers*, authored by James Madison, Alexander Ham-

ilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also published under pseudonyms: prominent among them were "Cato," "Centinel," "The Federal Farmer," and "Brutus." Anonymous and pseudonymous publication protects the author from retribution. It also allows the author to have the work considered on its own merits – free from any preconceptions the reader may have about the author and his motives.

A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery. *See* ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA 220 (John Mack Faragher ed., 1990) (positing that "Junius" may have been Sir Phillip Francis). The "Letters of Junius" were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell v. McCormack*, 395 U.S. 486, 531 n.60 (1969).

Anonymous political speech allows publication without fear of economic or official retaliation, concern about social ostracism, or merely a desire to preserve as much of one's privacy as possible. *McIntyre*, 514 U.S. at 341-42. Further, anonymous publication allows the argument to be considered on its own merits. Too often, political positions are dismissed based on the affiliation of the author, without any serious consideration given to the merits of the argument. "Whatever the motivation may be," the interest in continued unfettered political discourse "unquestionably outweighs any public interest in requiring disclosure as a condition of entry." *Id.* at 342. Indeed, anonymous publication permits the ideas expressed to stand

on their own merit, apart from any prejudice against the author. *Id.*

These principles are evidenced upon a review of this nation's history where persecuted groups and minority sects have been able to choose how to criticize oppressive practices. *Talley*, 362 U.S. at 64. This Court has recognized that, without anonymity, the fear of retribution would chill important speech and political participation. *Id.* at 65.

This historical evidence clearly reveals a "respected tradition of anonymity in the advocacy of political causes." *McIntyre*, 514 U.S. at 343. For, under our Constitution, "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *Id.* at 357. The right to anonymous political speech represents the choice made in the First Amendment to protect a robust political participation, without fear of reprisal. As Justice Stevens noted:

> It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357. It is in balancing the right of anonymous political speech against public concerns for transparency that society's interest in free speech prevails.

This Court has upheld disclosure requirements related to contributions to a candidate for public office. This disclosure is said to be supported by a compelling interest in preventing *quid pro quo* corruption. *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007). That interest is not present when the disclosure focusses on contributions toward issue advertisements. *Id.* There is no interest in disclosure of donors behind issue ads to provide more information to voters, since the communication is not geared toward influencing votes. *Cf. Citizens United*, 558 U.S. at 366. This ad had nothing to do with an election. In any event, this Court has rejected the idea that providing more information alone is sufficient to compel disclosure that will chill speech and petition activity. *McIntyre*, 514 U.S. at 348.

This Court should grant review in this case to decide whether a mere interest in additional information is sufficient to overcome core First Amendment liberties. *See Delaware Strong Families v. Denn*, 136 S.Ct. 2376 (2016) (Thomas, J., dissenting from denial of certiorari)

CONCLUSION

This Court has found that disclosure laws fulfill a compelling governmental interest in combatting *quid pro quo* corruption. The issue ads at issue in this case, however, do not involve an election. Thus, there is no anti-corruption purpose to the regulation. The disclosure law at issue is then a solution in search of

a problem. This Court should grant review in order to address the confusion in its First Amendment Jurisprudence, and to return that jurisprudence to protection of the interests at the core of the First Amendment.

DATED: January, 2017.

Respectfully submitted,

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