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 INSTITUTE FOR JUSTICE AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit public-interest law firm dedicated to defending the foundations of a free society, including the right to speak out on elections and other matters of public import. IJ litigates First Amendment cases that challenge mandatory disclosure and files *amicus curiae* briefs in important campaign-finance cases. IJ has also published empirical studies that measure the burdens of campaign-finance disclosure requirements. Its perspective, experience, and research will provide valuable insights into the costs and burdens associated with mandatory-disclosure laws like the one at issue in this case.

The Cato Institute (Cato) is a nonpartisan public-policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies, established in 1989, helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because private association is an essential right that must be protected against governmental intrusion.

[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 *amici curiae*, their members, or their counsel, made a monetary contribution to fund this brief's preparation or submission. Upon timely receipt of notice of *amicus* IJ's intent to file this brief, Appellant and Appellee consented to its filing.

SUMMARY OF ARGUMENT

Under the federal electioneering-communication law, a citizen who helps pay for a message about public affairs may see her name and mailing address publicized on an easily searchable government database. 52 U.S.C. § 30104(f)(2)(F). Whether her name and address are disclosed depends entirely on the content of the message she supported. In any other context, this would be an easy case: The electioneering-communication law burdens freedom of speech and association on content-based lines and may be upheld only if it meets strict scrutiny.

Since 1976, however, this Court has declined to judge campaign-finance disclosure laws by ordinary First Amendment standards. Instead, the Court uses "exacting" scrutiny, a more complaisant form of review. The result is that mandatory-disclosure laws have proliferated to the point where, in this case, the government claims that it may compel disclosure of the supporters of an ad that advocates for no candidate, mentions no election, and takes no position on anyone's fitness for office. This presents a substantial question of federal law and an opportunity for the Court to align its campaign-finance precedent with constitutional first principles.

I. If any law should trigger searching review, it is this one. The electioneering-communication law regulates speech and "singles out specific subject matter for differential treatment," making it facially content-based. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2230

(2015). Legislators have even heralded the system's deterrent effect on unwelcome speech.

The resulting burdens are profound. First, forcing people to divulge their names, addresses, and political leanings exposes them to reprisals. Every election cycle brings fresh evidence of this phenomenon; even the most basic acts of civic engagement can trigger threats of violence, lawsuits, and career-ending social-media crusades. In the past, the Court has discounted this speech-deterrent consequence, reasoning that only actual targets of harassment are chilled from speaking. But in the Information Age, it is often impossible to predict what viewpoints may provoke retaliation, much less prove it in court.

Second, mandatory-disclosure laws chill speech by forcing people to surrender their "privacy interest in keeping personal facts away from the public eye." *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 769 (1989). Outside the First Amendment context—in Freedom of Information Act cases, for instance—the Court gives great weight to "the individual's control of information concerning his or her person." *Id.* at 763. That same solicitude should extend to citizens who do not wish to give up their personal information as the cost of engaging in advocacy or protest.

II. Given its content-based structure and speech-chilling burdens, the electioneering-communication law is a leading candidate for strict scrutiny. What the courts apply instead, however, is an "exacting"

standard that raises grave questions under the First Amendment. Under exacting scrutiny, mandatory-disclosure laws are alleged to serve a substantial interest because they allow the government to "help" listeners "react" to speech in "a proper way." *See Citizens United* v. *FEC*, 558 U.S. 310, 367, 371 (2010). Through no other First Amendment lens would that interest appear substantial, or even legitimate.

Even if the informational interest were well-founded, the government has never shown that systems like the electioneering-communication law materially further this interest. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), the Court devoted little more than a sentence to the issue, *id.* at 68; *see also id.* at 81-82. Since then, the Court has taken *Buckley*'s conclusion on faith, without ever requiring the government to show why publicizing a citizen's personal data provides more than "the most limited incremental support for the interest asserted." *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). This case shows how far afield the government has strayed: Appellant would be required to report the names and addresses of people who support a message that is independent of any candidate, advocates for no one's election, and does not even approach a stance on any candidate's merits. Under no meaningful scrutiny would applying the electioneering-communication law advance the government's informational interest here (much less combat the sort of corruption that has historically been viewed as the main target of campaign-finance laws).

None of this gave the district court pause, which spotlights why this Court's intervention is needed. For defenders of mandatory-disclosure laws—and for courts upholding them—the First Amendment analysis too often reduces to the aphorism that "[s]unlight is said to be the best of disinfectants." *Buckley*, 424 U.S. at 67 (quoting Louis Brandeis, Other People's Money 62 (1933)). Yet a later Brandeis maxim better captures the scrutiny these laws merit: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967). Whatever Congress's purposes, the electioneering-communication law is content-based, intrudes on speech and association, and has not been shown to serve a legitimate governmental interest. The law's constitutionality presents a substantial question that warrants review.

ARGUMENT

I. The electioneering-communication law is a content-based restriction on speech.

By requiring speakers to publicly disclose their allies when they mention federal candidates, the electioneering-communication law imposes a content-based burden that calls for strict scrutiny. Because the law applies only to broadcast speech that "refers to a clearly identified candidate for Federal office," 52

U.S.C. § 30104(f)(3)(A)(i)(I), it embodies an "obvious" content-based distinction. *See Reed*, 135 S. Ct. at 2227. The accompanying burdens can hardly be overstated: Conditioning First Amendment rights on publicizing personal data invites reasonable fears of reprisal and dissuades citizens and groups from participating in advocacy and protest.

A. The electioneering-communication law draws distinctions based on content.

If a speaker conveys a broadcast message in the months leading up to a federal election, that message is regulated as an electioneering communication only if it refers to a federal candidate (and meets other criteria). Thus, a message with a candidate's "name, nickname, photograph, or drawing" or other "unambiguous reference" may be an electioneering communication. 11 C.F.R. § 100.17. Any other message is not. Whether the law applies "thus depend[s] entirely on the communicative content of the [message]." *Reed*, 135 S. Ct. at 2227.

The advertisement Appellant wishes to run illustrates the point. But for the electioneering-communication law, Appellant would have placed a radio ad in 2014 "urg[ing] Coloradoans to call Senator Udall, as well as Senator Michael Bennet, to express support for the Justice Safety Valve Act." Jurisdictional Statement App. 7. Senator Bennet was not campaigning for reelection in 2014, so saying "Senator Bennet" would not have implicated the electioneering-communication

law. Senator Udall, by contrast, was an active candidate, so saying "Senator Udall" would have triggered the law.

A law that applies in this way is paradigmatically content-based. In *Reed*, for example, the Court remarked that "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Reed*, 135 S. Ct. at 2230. The electioneering-communication law draws just such a distinction. As Appellant's case shows, the law regulates not just "political" speech, but *any* qualifying message so long as it refers to a federal candidate. Put differently, the law "expressly draws distinctions based on the [message's] communicative content," *id.* at 2228, because the government can determine whether the law applies only by "examin[ing] the content of the message that is conveyed," *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2531 (2014) (citation omitted).

Further—and as the Court restated two Terms ago—it is no answer to say that the law is content-neutral because Congress acted with "benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (citation omitted). Foremost, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id*. Moreover, Congress gave plenty of reasons to believe that the electioneering-communication law was enacted with an eye toward muting criticism. In 2001, a leading

sponsor of the Bipartisan Campaign Reform Act promised that "[i]f you demand full disclosure for those that pay for those ads, you're going to see a lot less ['attack' advertising]." 147 Cong. Rec. S3116 (Mar. 29, 2001) (Sen. McCain). Introducing a more recent bill to expand the electioneering-communication law, another Senator remarked that "[t]he deterrent effect should not be underestimated." Transcript, *Sen. Charles E. Schumer, D-NY, and Rep. Christopher Van Hollen, D-MD., Hold a News Conference on Citizens United v. FEC Ruling*, 2010 WL 465697, Roll Call (Feb. 11, 2010). The legislative record thus signals that, like many content-based laws, the electioneering-communication law was created with speech-deterrence in mind. *Cf. Reed*, 135 S. Ct. at 2233 (Alito, J., concurring) ("Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo.").

B. Mandatory reporting systems like the electioneering-communication law burden citizens and groups in exercising their First Amendment rights.

That the electioneering-communication law mandates disclosure (rather than banning speech outright) does not make it any less content-based. "[T]he 'distinction between laws burdening and laws banning speech is but a matter of degree,'" so "[t]he 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'" *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 565-66 (2011) (citation omitted); *see also Free Speech Coal.* v. *Att'y Gen.*, 825

F.3d 149, 159-64 (3d Cir. 2016) (holding that strict scrutiny attaches to recordkeeping statute governing depictions of sexually explicit conduct). And mandatory-disclosure laws burden speech and association in at least two ways. First, they make speakers and their supporters vulnerable to retaliation based on their political views. Second, the laws abridge speech and association by infringing people's privacy interests in, for example, their addresses, occupations, and political sympathies.

1. By forcing people to divulge sensitive information, mandatory-disclosure laws expose them to reprisals that government actors are deliberately shielded from.

a. Mandatory-disclosure laws carry with them the reasonable fear of exposure to retaliation. With personal data available at the click of a button, "disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Del. Strong Families* v. *Denn*, 136 S. Ct. 2376, 2377 (2016) (Thomas, J., dissenting from denial of certiorari) (quoting *Citizens United*, 558 U.S. at 483 (Thomas, J., concurring in part and dissenting in part)). In part for this reason, the Court has long acknowledged that "public disclosure . . . will deter some individuals who otherwise might contribute" to political causes. *Buckley*, 424 U.S. at 68.

In the Information Age, the prospect of retaliation has only intensified; it is an unavoidable consideration for anyone whose views are publicized on virtually any topic of public note. As an extreme example, consider Gigi Brienza, who made a $500 contribution to a presidential campaign. Because she gave more than $200, her name, address, and employer were disclosed on the campaign's FEC reports. 52 U.S.C. § 30104(b)(3)(A). That put her in the crosshairs of Stop Huntingdon Animal Cruelty (SHAC), a "radical animal rights organization that relie[d] on crimes of violence and a campaign of fear." *Eco-Terrorism Specifically Examining Stop Huntingdon Animal Cruelty ("SHAC") Before the S. Comm. on Env't & Pub. Works*, 109th Cong. (2005) (Sen. Inhofe). Two years after making the contribution, Brienza learned that SHAC had "culled [her] information from campaign contribution records," determined that she worked for a company they disliked, then publicized her name and home address on a list of "targets," declaring "Now you know where to find them." Going forward, Brienza wrote, "I will limit my contribution to $199.99: the price of privacy in an age of voyeurism and the cost of security in an age of domestic terrorism." Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared*, Wash. Post, July 1, 2007.

Brienza's story illustrates that the modern risks created by mandatory disclosure may have nothing to do with the political positions of the donor herself; Brienza was targeted because of the company she worked for, not because of her political views. At the same time, there are unmistakable signs of a "cottage industry

that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights" by punishing those who support disfavored candidates or measures. *Citizens United*, 558 U.S. at 482 (Thomas, J., concurring in part and dissenting in part). The speech-retaliatory aftermath of California's Proposition 8, in 2008, is well-documented. *Id.* Even six years later, "intense pressure from the press and social media" drove a business executive to resign based on a contribution he made during that campaign. The Mozilla Blog, *FAQ on CEO Resignation* (Apr. 5, 2014), https://goo.gl/MVG0Fg; *see also* Ilya Shapiro, *Mozilla's CEO Showed The Cost Of Disclosure Laws By Crossing The Satan-Scherbatsky Line*, Forbes (Apr. 6, 2014), https://goo.gl/0e1hcd.

There are other examples. In 2010, a research-and-information center outlined plans to "systematically review the independent expenditure reports provided to the FEC" and use the data to "aggressively attack" disfavored speakers and "provoke backlashes among companies' shareholders, employees, and customers, and the public-at-large." Media Matters Action Network, *2012: A Three-Year Campaign* 82-83, https://goo.gl/71M3PH. "Over time," the center stated, "we believe these efforts will dissuade corporations from interfering in our democracy." *Id.* 83.

In similar vein, in 2013, U.S. Senator Durbin contacted organizations that he believed were associated with the American Legislative Exchange Council (ALEC). "Although ALEC does not maintain a public list of corporate members or donors," Senator Durbin

informed them, "other public documents indicate that your company funded ALEC" in recent years. In his capacity as a federal lawmaker, Senator Durbin then asked each recipient to state its position on ALEC's model "stand your ground" legislation. *Durbin Wants a List*, Wall St. J., Aug. 7, 2013. *Amicus* Cato Institute—one of the targeted organizations—responded that the letter was "an obvious effort to intimidate" and amounted to "a subtle but powerful form of government coercion." Letter from J. Allison to R. Durbin (Aug. 8, 2013), https://goo.gl/fL5CrA.

Or take Frank VanderSloot, an Idahoan whose business contributed to a group advocating for a Republican presidential candidate in 2011. The Democratic presidential campaign singled out VanderSloot on its website, and within three months a private investigator had sought court documents dealing with VanderSloot's divorce, the IRS had opened an examination into his taxes, and the Department of Labor had notified him that it would be auditing his employees. Kimberley A. Strassel, *Trolling for Dirt on the President's List*, Wall St. J., May 10, 2012; Kimberley A. Strassel, *Obama's Enemies List—Part II*, Wall St. J., July 19, 2012.

At the state level, campaign-finance reports in Colorado fuel an enforcement system that runs almost entirely on speech-retaliation. Unlike most states, Colorado outsources its campaign-finance enforcement to "[a]ny person," Colo. Const. art. XXVIII, § 9(2)(a), and viewpoint-discriminatory lawsuits are regularly prosecuted using data collected from campaign-finance

reports. One complainant—responsible for filing more than 60 such cases in recent years—champions the system as a way to wage "political guerilla legal warfare" against disfavored viewpoints. Matt Arnold, *Turning the Tables: Fighting Back against the Left's Lawfare in Colorado*, Common Sense News (Feb. 2014) B-7, https://goo.gl/yOMlRH; *see also* Decision at 2, *Campaign Integrity Watchdog* v. *Colo. Republican Party PAC*, OS2016-0002 (Colo. Office of Admin. Cts. 2016) (noting that complaint demanded $36,000 penalty for reporting errors involving two $3 contributions), http://goo.gl/2jKTl5.

Examples from outside the campaign-finance context further illustrate the risk of reprisals; even the most basic acts of civic engagement can have harrowing, unpredictable consequences. In 2015, for instance, a college student challenged a presidential candidate about his stance on women's rights. After the candidate characterized her as "arrogant" and her statement as "nasty," the student weathered an unremitting campaign of harassment. Jenna Johnson, *This is what happens when Donald Trump attacks a private citizen on Twitter*, Wash. Post, Dec. 8, 2016. "I think the worst day," she recounted, "was when someone said my address and they said they were coming and they were going to rape me." Christina Manduley, *Woman bullied after Trump tweet: I was threatened with rape*, CNN.com (Dec. 9, 2016), https://goo.gl/nWOu7v.

Employees at an Arizona newspaper faced similar repercussions when their paper endorsed last year's Democratic presidential nominee. "[T]he reaction

started pouring in," reported the paper's president; "Threats against our business. Threats against our people." Mi-Ai Parrish, *How do we respond to threats after our endorsement? This is how*, Ariz. Republic, Oct. 15, 2016. Subscription-sellers were "spit on, threatened with violence, screamed at and bullied." *Id.* Understandably, most of these lower-level personnel "were too frightened to share even their first names" in a piece reiterating their employer's commitment to free speech. *Id.*

And reprisals are not unique to nationwide elections and hot-button issues. In 2013, for instance, Hawaii police responded to "threats made against government officials and private property owners" following debate over a local law concerning pesticides. *Mayor threatened, harassed, police investigate*, The Garden Island, Nov. 1, 2013. During a Colorado school-board election, police "investigated incidents of death threats against children of board members and . . . against recall supporters." Yesenia Robles, *Death threats, big money become part of Jeffco school board race*, Denver Post, Oct. 29, 2015.

None of this is to say, of course, that people who *choose* to publicize their views should enjoy immunity from criticism. Yet the Court should not ignore the chilling effect of *requiring* someone to publicize his or her personal information as the price of exercising constitutional rights. For many people—without tenure, without salary protection, and without security details—government-mandated disclosure of their political leanings and personal data is a real barrier.

b. The federal courts have given uniquely short shrift to how the prospect of harassment chills political engagement. Since *Buckley*, this Court has acknowledged that "disclosure may . . . expose contributors to harassment or retaliation." 424 U.S. at 68. But, also since *Buckley*, the Court has discounted this deterrent effect almost entirely. Only if a speaker can prove "a reasonable probability that [its] members would face threats, harassment, or reprisals if their names were disclosed" will courts grant a case-specific, as-applied exemption from mandatory-disclosure laws. *Citizens United*, 558 U.S. at 370.

This high bar mistakes the threat of harassment for a danger that affects only the rare "persecuted groups." *See Doe v. Reed*, 561 U.S. 186, 218 (2010) (Stevens, J., concurring in part and concurring in the judgment). Yet much has changed since the Court decided early cases about government harassment of fringe political parties. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). Today, "[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information." *Whalen* v. *Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring). And every prospective speaker (or supporter) knows that there is a real possibility that their campaign-finance reports will be used against them for speech-retaliatory reasons. At the same time, speakers rarely know up front whether they or their allies will be the ones to trigger reprisals. Nor can most prove the likelihood of harm with "the requisite specificity or severity" courts demand. *Citizens United* v.

Schneiderman, No. 14-cv-3703, 2016 WL 4521627, at *8 (S.D.N.Y. Aug. 29, 2016), *appeal docketed*, No. 16-3310 (2d Cir.).

The difficulty in meeting this standard for as-applied relief bespeaks a fundamental problem: In no other area of First Amendment law do we "ask[] citizens to put their livelihoods and reputations on the line before the judiciary will protect them." Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 Wyo. L. Rev. 253, 280 (2014). By crediting privacy concerns only when particular speakers somehow prove that they will face reprisals, this Court's precedent discounts the *inherent* prospect of harassment that attends mandatory-disclosure laws. As the examples above show, this deterrent effect is pervasive precisely because it is impossible to predict whether your viewpoint will trigger retaliation.

Elsewhere, the courts give full weight to this burden. In exempting the names and addresses of government personnel under the Freedom of Information Act (FOIA), the courts are dependably "sensitive to the dangers—including exposure to harassment, pressure, or threats—inherent in revealing workers' identities and addresses to potential adversaries." *Brown* v. *Perez*, 835 F.3d 1223, 1236 (10th Cir. 2016). This Court has found it "clear" that federal employees have a "nontrivial privacy interest in nondisclosure" of their home addresses. *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 501 (1994). The government—in

those cases, advocating for privacy—need offer no proof that divulging its employees' addresses will invite a "reasonable probability" of "threats, harassment, or reprisals." *Citizens United*, 558 U.S. at 370. It is enough that "[m]any people simply do not want to be disturbed at home by work-related matters" and that nondisclosure "can lessen the chance of such unwanted contacts" and "unsolicited, unwanted mail." *Fed. Labor Relations Auth.*, 510 U.S. at 501.

Some courts have extended this reasoning to names alone. The D.C. Circuit upheld nondisclosure of the names of FDA employees who worked on approval of an abortifacient, based on a general "danger of abortion-related violence." *Judicial Watch* v. *FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006). The Ninth Circuit affirmed that "the invasion of a personal privacy interest may be 'clearly unwarranted' even when the invasion of privacy is far from a certainty." *Prudential Locations LLC* v. *U.S. Dep't of Housing & Urban Dev.*, 739 F.3d 424, 432 (9th Cir. 2013) (citation omitted) (upholding nondisclosure of private complainants' names). And the Second Circuit approved nondisclosure of "the names and duty-station information of over 800,000 federal employees," citing exposure to terrorism-related harassment because the employees worked in "sensitive agencies" and "sensitive occupations." *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 188, 192 (2d Cir. 2012); *see also Judicial Watch* v. *United States*, 84 F. App'x 335, 339 (4th Cir. 2004) (unpublished) (affirming nondisclosure of names of IRS employees).

If the prospect of harassment carries "great weight" under FOIA, *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 177 (1991), it is of paramount importance under the First Amendment.[2] If any of the 800,000 employees in *Long* were to give $1,000 to support an ad like Appellant's, her name and mailing address would be published online automatically. 52 U.S.C. § 30104(f)(2)(F). Giving $200.01 for electoral advocacy would require publication of her occupation and employer as well. *Id.* §§ 30104(c)(2)(C), 30101(13)(A). This uneven regard for disclosure burdens presents serious questions; at minimum, the privacy interests of those who participate in protest or advocacy do not merit *less* attention than the privacy interests of government actors.

2. *Mandatory-disclosure laws infringe people's interest in controlling their personal information.*

Mandated disclosure also creates a more general disincentive to engage in political activity. Even if someone does not anticipate reprisals, conditioning their speech and association on public exposure has a chilling effect. In the context of ballot-measure campaigns, for example, one study contrasted individuals' opinions about mandatory-disclosure requirements in the abstract with their attitude about those same requirements when disclosure affected them personally. Dick M. Carpenter II, Institute for Justice, *Disclosure*

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[2] The plaintiffs in *Ray* sought information about government-interviewed deportees. 502 U.S. at 166.

Costs: Unintended Consequences of Campaign Finance Reform (2007). Although individuals generally claimed to support mandatory disclosure in the abstract, that support dropped off when they considered the personal costs:

> [S]upport for disclosure wanes considerably when the issue is personalized. . . . [M]ore than 56 percent disagreed or strongly disagreed that their identity should be disclosed, and the number grew to more than 71 percent when disclosure of their personal information included their employer's name.

Id. 7-8 (citation omitted). Further, three out of five people said they would think twice about donating to a ballot-measure campaign if it meant the government would disclose their names and addresses. *Id*. 7. "[E]ven those who strongly support forced disclosure laws," the study concluded, "will be less likely to contribute to an issue campaign if their contribution and personal information will be made public." *Id.* 8; *see also* Dick M. Carpenter II et al., *Disclosing Disclosure: Lessons from a "Failed" Field Experiment*, 12:2 The Forum 343, 343, 345 (2014) (noting that a vanishingly small percentage of federal candidates agreed to join an experiment whereby they would alert potential contributors "that their donations would be made available on the Internet, along with their address, employer, and other personal information").

Online dissemination only sharpens the deterrent effect. Under federal and state campaign-finance systems, data detailing names, political leanings,

addresses, employers, and occupations is easily searchable. Last election cycle, one Twitter account even publicized "Democratic presidential campaign contributions, one donor at a time," identifying each individual's name, contribution amount, state and town of residence, employer, and job position. @EveryDemDonor, https://twitter.com/everydemdonor. In 2010, *The Huffington Post* boasted a feature that "makes it easy to search by name or address to see which congressional candidates your friends, family, co-workers, and neighbors are contributing to." *2010 Political Donations: HuffPost's FundRace Lists Contributions*, The Huffington Post (Sept. 28, 2010), https://goo.gl/wJnEMz. And *Inbox Influence* "allows you to see the political contributions of the people and organizations that are mentioned in emails you receive." Nathan Yau, *Inbox Influence shows political contributions by the people in your email*, FlowingData, https://goo.gl/In6OJb. In short—and even if a citizen cannot prove that she will face violence or economic reprisals—the "invasion of privacy of belief" visited by mandatory-disclosure laws is a distinct burden on First Amendment rights. *Buckley*, 424 U.S. at 66.

Again, FOIA precedent drives home the point. In that context, the Court eschews a "cramped notion of personal privacy," instead embracing one that "encompass[es] the individual's control of information concerning his or her person." *Reporters Comm. for Freedom of Press*, 489 U.S. at 763 (applying Exemption 7(C)). Thus, in opposing disclosure of its employees' personal information, the government has argued that

divulging home addresses would infringe "one of the chief bastions of privacy." Pet'r's Br. 32, *Fed. Labor Relations Auth.*, 510 U.S. 487 (No. 92-1223). And, again in the FOIA sphere, this Court cites the risk of "embarrassment in . . . social and community relationships" as among the consequences of disclosure that "must be given great weight." *Ray*, 502 U.S. at 176-77 & n.12 (citation omitted) (applying Exemption 6).

These concerns are compounded in the mandatory-disclosure context because they translate directly into speech-deterrence. For obvious reasons, publishing someone's name and address online—linked with a specific political or ideological viewpoint—has the inherently chilling effect of stripping her of "the privacy interest in keeping personal facts away from the public eye." *Reporters Comm. for Freedom of Press*, 489 U.S. at 769. This Court has held the threat to privacy to be "implicit" even in the *non-public* "accumulation of vast amounts of personal information in computerized data banks or other massive government files." *Whalen*, 429 U.S. at 605. That threat is magnified where, as here, data banks are created with worldwide access in mind. Even if the potential for harm may be "impossible to measure," *Ray*, 502 U.S. at 176, for many ordinary citizens "privacy of belief" is sacred, *Buckley*, 424 U.S. at 66.

II. Whether the electioneering-communication law satisfies heightened First Amendment review is a substantial question.

Under any meaningful level of First Amendment scrutiny, it is far from clear that the electioneering-communication law comports with the Constitution. The government's claimed interest in regulating independent speech—providing voters with "information" about the speaker—cannot be squared with the First Amendment. Nor has the government shown that its reporting system materially advances that interest. Particularly as applied to independent, non-electoral speech like Appellant's, the law's constitutionality raises a substantial question.

A. The government's asserted informational interest breaks with First Amendment principles.

The government's "informational interest," the main interest it claimed below, cannot justify burdening independent speech. FEC Mem. in Supp. of Mot. for Summ. J. & Opp. to Pl.'s Mot. for Summ. J. 21-24, 14-cv-1500 (Dkt. No. 42).[3] Far from being substantial, this

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[3] The government also suggested—and the district court accepted—that the electioneering-communication law helps the FEC "ensure that foreign nationals or foreign governments do not seek to influence United States' elections." Jurisdictional Statement App. 32 (citing 52 U.S.C. § 30121(a)(1)(C)). But the ban on politicking by foreign nationals does not extend to speech, like Appellant's, "that does not expressly advocate the election or defeat of a specific candidate." *Bluman v. FEC*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); *see also* FEC Mot. to

interest parts ways with the First Amendment at a foundational level.

Even as described in opinions upholding it, the informational interest raises red flags. It originated in *Buckley*, where the Court ratified the government's interest in "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67 (footnote omitted). In *McConnell* v. *FEC*, the Court held more broadly that the government has an interest in helping "citizens seeking to make informed choices in the political marketplace." 540 U.S. 93, 197 (2003) (citation omitted), *overruled on other grounds by Citizens United*, 558 U.S. 310. Then, in *Citizens United*, the Court said that the public's "interest in knowing who is speaking about a candidate shortly before an election" is grounds enough for mandatory disclosure. 558 U.S. at 369. Mandatory disclosure, the Court reasoned, helps listeners "react" to speech in "a proper way," "make informed decisions," and give "proper weight to different speakers and messages." *Id.* at 371; *see also* Jurisdictional Statement

Dismiss or Affirm 21, *Bluman*, 132 S. Ct. 1087 (No. 11-275) (stating that foreign-national provision "does not limit any alien's ability to engage in issue advocacy"). The district court also volunteered that the law "deter[s] actual corruption and avoid[s] the appearance of corruption." Jurisdictional Statement App. 32 (quoting *Buckley*, 424 U.S. at 67). But electioneering communications "do not give rise to corruption or the appearance of corruption." *See Citizens United*, 558 U.S. at 357.

App. 31-32 (approving governmental interest in "monitoring" speech).

Nowhere else has this Court endorsed a governmental interest in "help[ing]" private audiences give "proper weight" to messages conveyed by private speakers on matters of public note. *See Citizens United*, 558 U.S. at 367, 371. Quite the opposite; "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); *see also id.* ("In this field, every person must be his own watchman for truth."); *cf. United States* v. *Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion). That is no less true when lawmakers opt to label speech "express advocacy," "electioneering communications," or anything else. That the Court has accepted the government's informational interest as not just legitimate but "substantial" only underscores how alien to the First Amendment the Court's mandatory-disclosure precedent has become.

B. The electioneering-communication law is not tailored to serve the informational interest.

Even if the government's informational interest were substantial, the electioneering-communication law still would be suspect. For *any* independent speech, it is far from clear why requiring supporters to divulge their names and addresses helps their fellow citizens

"make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197. Analogizing again to FOIA cases, the Court there maintains that disclosing government employees' addresses "would not appreciably further 'the citizens' right to be informed about what their government is up to' "; would "reveal little or nothing about the employing agencies or their activities"; and "would not in any meaningful way open agency action to the light of public scrutiny." *Fed. Labor Relations Auth.*, 510 U.S. at 497-98 (citations omitted). In short, the "FOIA-related public interest in disclosure" of this information is "virtually nonexistent." *Id.* at 500.

The Court's contrary approach when it comes to private speakers and their allies inverts the "special constitutional solicitude" that First Amendment rights enjoy. *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). A speech-burdening law that "provides only the most limited incremental support for the interest asserted" cannot withstand constitutional scrutiny. *Bolger*, 463 U.S. at 73. Yet four decades after enactment of the Federal Election Campaign Act, the government has yet to show how its mandatory-disclosure laws materially advance its informational interest.

Consider the leading cases. In *Buckley*, the government viewed "[t]he virtue of public disclosure in this area" as "too obvious to require extended discussion." FEC & Att'y Gen. Br. 29, *Buckley*, 424 U.S. 1 (No. 75-436). Having announced that the government's interests "must be weighed carefully" against the burdens of forced disclosure, the Court then signed off on the

mandatory-disclosure system with little more than a sentence: "In this process, we note and agree with appellants' concession that disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Buckley*, 424 U.S at 68; *see also id.* at 81-82. In *McConnell*, the Court said little more than that "*Buckley* amply supports application of . . . disclosure requirements to the entire range of 'electioneering communications.' " 540 U.S. at 196. In *Citizens United*, the Court did not consider tailoring at all. 558 U.S. at 367-71.

In any other First Amendment case, the Court would demand far more of the government. And as applied to speech like Appellant's, the government's means-end fit is at its weakest. Under the electioneering-communication law, Appellant must report the name and address of every person who gives $1,000 toward a radio ad that is independent of any candidate, that does not advocate for or against anyone, and that does not take a stance on anyone's campaign. Even if the ad contained explicit electoral advocacy, the government has not demonstrated why divulging supporters' names—much less their addresses—materially advances its informational interest. Appellant's ad is steps removed from any candidate and any election, making the electioneering-communication law especially suspect here. If anything, the law would seem to disserve the government's informational interest, since it would require Appellant to categorize its

non-electoral message, misleadingly, as "electioneering."

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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