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* SENATE MAJORITY LEADER MITCH MCCONNELL IN SUPPORT OF PROBABLE JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes and Legislative Material

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Senator Mitch McConnell is the Majority Leader of the United States Senate and the senior United States Senator from the Commonwealth of Kentucky. He is the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Senator McConnell is a respected senior statesman and is recognized as the Senate's most passionate defender of the First Amendment guarantee of unrestricted political speech. He has acquired considerable experience over the last three decades complying with federal and state campaign finance restrictions and legislating on campaign finance issues. For many years, Senator McConnell has participated in litigation challenging restrictions on political speech. For example, he was the lead plaintiff challenging the Bipartisan Campaign Reform Act ("BCRA") in *McConnell v. FEC,* 540 U.S. 93 (2003). In addition, he participated as *amicus* by brief and oral argument in both *Citizens United v. FEC,* 558 U.S. 310 (2010), which overruled *McConnell v. FEC* in part, and in *McCutcheon v. FEC*, 134 S.Ct. 1434

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[1] This brief is filed with the consent of all parties and all parties received timely notice of the filing pursuant to United States Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, Senator McConnell states that no party or person other than Senator McConnell and his counsel participated in or contributed money for the drafting of this brief.

(2014). Senator McConnell submits this brief in support of Probable Jurisdiction.

INTRODUCTION

The precise and highly important issue in this case is whether the First Amendment forbids application of donor disclosure requirements to non-campaign-related issue speech by the Independence Institute merely because the speech mentions a candidate for federal office in his home state during the time before a federal election. The donors to the Institute desire to remain anonymous and will not fund the speech if their identities are disclosed. Thus, the threat of government-mandated donor disclosure is actually suppressing the Institute's speech.

The three-judge district court interpreted this Court's decision in *Citizens United* to allow application of the disclosure regime to any broadcast message that meets the definition of "electioneering communication" in the Bipartisan Campaign Reform Act. In the district court's reading, disclosure applies regardless whether the message is "campaign-related," as it was in *Citizens United*, or non-campaign-related, as is the Institute's message. So interpreted, *Citizens United* is in direct conflict with *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), which recognized and applied the critical distinction between campaign speech, for which the government may compel disclosure, and non-campaign issue speech, for which it may not.

Senator McConnell submits that this case provides the Court a critical opportunity to reconcile the tension between *Citizens United* and *Buckley*. That

tension may be resolved by making clear that any government interest in publicly identifying persons engaged in *campaign-related speech* does not correlate to or outweigh the right to anonymity of a speaker engaged in *non-campaign-related issue speech*. This distinction would effectuate the legislative intent behind the disclosure provisions. Accordingly, as applied to the Institute's speech, any interest in disclosure does not outweigh the core First Amendment right of the Institute's donors to remain anonymous in their discussion of issues.

BACKGROUND

The Independence Institute is a nonprofit organization recognized as tax-exempt under section 501(c)(3) of the Internal Revenue Code. It conducts research and seeks to educate the public about a range of issues, including criminal justice.

In 2014, the Institute desired to air a radio advertisement advocating passage of Senate Bill No. 619, the Justice Safety Valve Act. The text of the advertisement would have stated:

> Let the punishment fit the crime.
>
> But for many federal crimes, that's no longer true.
>
> Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.
>
> And for what purpose?
>
> Studies show that these laws don't cut crime.

> In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.
>
> Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S.619.
>
> It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.
>
> Call Senators Michael Bennett and Mark Udall at 202-224-3121. Tell them to support S.619, the Justice Safety Valve Act.
>
> Tell them it's time to let the punishment fit the crime.
>
> Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

App. 7–8. The Institute intended to air the advertisement on radio in Colorado, to the constituents of Senators Udall and Bennett, during the period before the 2014 election when citizens are most closely following public policy debate. Because Senator Udall was running for reelection, under section 201(a) of the Bipartisan Campaign Reform Act, 52 U.S.C. § 30104(f)(3), the advertisement met the definition of an "electioneering communication," and the Institute would have been required to file reports with the Federal Election Commission ("FEC") and identify the donors funding the advertisement within 24 hours of airing it. 52 U.S.C. § 30104(f)(1).

Because the Institute's donors desire anonymity, they decline to fund the advertisement if their identities will be disclosed. Accordingly, the Institute sought a declaratory judgment that the advertisement is protected from the donor disclosure requirements by the First Amendment. After the district court initially refused to convene a three-judge court, the D.C. Circuit reversed and remanded, and the case was submitted to a three-judge district court as required by section 403 of BCRA, Pub. L. No. 107-155 (2002) (codified at 52 U.S.C. § 30110 (note)).

The district court granted the FEC's motion for summary judgment, and denied the Institute's motion. The court held that the advertisement is an "electioneering communication" subject to the disclosure requirements in BCRA. App. 35. The advertisement, it said, "'falls within the constitutional bounds of the donor-disclosure rule *precisely because* that advocacy *points a finger at an electoral candidate*.' *See Citizens United*, 558 U.S. at 369." App. 23 (emphasis added).

The district court gave three reasons for its decision. First, it believed this Court's decisions in *McConnell v. FEC* and *Citizens United v. FEC* had deemed the mere mention of a candidate in an advertisement during the run up to an election sufficient to overcome the speaker's First Amendment interests in anonymity. App. 22–24. Second, it viewed the distinction between campaign-related advertising and "'genuine' issue advocacy" as "entirely unworkable as a constitutional rule." App. 24–27. Finally, using exacting scrutiny, it held that the government's interests in providing the electorate with information,

deterring actual and apparent corruption, and gathering data necessary to enforce the campaign finance laws outweighed the Institute's interest in donor anonymity. App. 29–32.

The Institute is pursuing a timely appeal directly to this Court. Pub. L. No. 107-155 §403(a)(3) (2002) (codified at 52 U.S.C. § 30110 (note)).

SUMMARY OF ARGUMENT

This case brings into sharp relief two competing interests in the Court's First Amendment jurisprudence. On the one hand is the established First Amendment right of a speaker, author, pamphleteer, or benefactor of non-campaign-related speech to remain anonymous. This Court has repeatedly emphasized the importance of anonymous speech in American history. Anonymity may be important to individuals for many weighty reasons including fear of reprisal, a desire for privacy, or a concern that identification of a message with a controversial speaker could detract from or overshadow the message. This Court has recognized that anonymity can be as important to the content of the speech as any other editorial judgment. As this case shows, government disclosure statutes and regulations can and do suppress speech.

Competing with this right of anonymity is the "extra-constitutional value" of transparency, or disclosure. *See Van Hollen, Jr. v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016). In the context of campaign-related speech, this Court has held that the potential for suppression is outweighed by the benefits of disclosure. But none of the interests that might justify

disclosure of campaign-related speech carry weight in the context of a pure issue advertisement that has no electoral message but simply calls on members of the public to register their views on pending legislation with two incumbent Senators, only one of whom is at present a candidate.

Buckley recognized and heeded this critical distinction between campaign-related speech and non-campaign-related speech in the context of the disclosure regime of the Federal Election Campaign Act ("FECA"). Likewise, in BCRA, Congress also focused on disclosing campaign-related information. Because the messages in *Citizens United* were plainly campaign-oriented, the Court had no reason to address or apply that distinction, much less (as the district court assumed) tacitly to overrule *Buckley* and abandon it. This case provides an opportunity for the Court to reconfirm the constitutionally-critical distinction between campaign-related and issue speech.

The government interests identified by the district court do not correlate with this particular advertisement. The electorate's need for information about supporters of candidates is not fulfilled by compelling disclosure of funding information for a non-campaign related advertisement. As an independent advertisement, it raises no concerns about corruption or the appearance of corruption. And disclosure of the funding sources for this non-campaign message will not advance the effort to enforce the campaign finance laws.

ARGUMENT

I. *BUCKLEY* RECOGNIZED A MATERIAL DISTINCTION BETWEEN CAMPAIGN-RELATED SPEECH AND ISSUE SPEECH.

In *Buckley*, the Court devoted 25 pages to the disclosure issues raised by FECA. 424 U.S. at 60–84. In the six-page discussion of disclosure in *Citizens United*, 558 U.S. at 366–71, the Court relied heavily on *Buckley*, citing it six times, and never once questioned the essential precepts it established. Yet, as shown below, the district court's interpretation of *Citizens United* would disregard one of the central tenets of *Buckley*—the importance of construing campaign finance disclosure statutes to avoid sweeping in non-campaign issue speech. This result was not contemplated in *Citizens United*, nor by Congress in passing the electioneering communication disclosure provisions in BCRA.

A. *Buckley* Construed FECA To Avoid Imposing Disclosure Obligations on Non-Campaign-Related Issue Speech.

Buckley addressed FECA's disclosure requirements extensively, especially in connection with its requirements to make disclosures about "contributions" and "expenditures," and its imposition of disclosure requirements on "political committees." It began its analysis by recognizing the First Amendment protections against compelled disclosure, which "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. The "significant encroachments on First Amendment rights" imposed by compelled disclosure,

the Court wrote, "must survive exacting scrutiny." This is a "strict test." *Id.* at 64, 66.

Applying "exacting scrutiny," the Court "insisted that there be a 'relevant correlation' or a 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 64. Appropriate disclosure provides information to voters "'as to where political campaign money comes from and how it is spent by the candidate,'" *id.* at 66 (quoting H.R. Rep. No. 92-564, p. 4 (1971)), and "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures," thus arming the public "with information about a candidate's most generous supporters," 424 U.S. at 67.

Of greatest import here is *Buckley's* discussion of the reporting requirements imposed on "political committees" in section 434(3) of FECA. *See* 424 U.S. at 74–82. The Court expressed concern that the disclosure requirements for political committees "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. To avoid this result, the Court construed the term "political committee" to include, and imposed reporting requirements on, only those "organizations that are *under the control of a candidate or the major purpose* of which is the nomination or election of a candidate." *Id.* at 79 (emphasis added). "[S]o construed," the Court concluded, disclosure would apply only to contributions and expenditures "assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*." *Id.* (emphasis added).

Further, the Court construed the term "expenditure" as applied to the political committee disclosure provision, as "directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*." *Id.* at 80 (emphasis added). The Court expressed no concern about the "workability" of enforcing this critical distinction between campaign speech and issue speech.

Under this reasoning, the First Amendment forbids application of the disclosure regime to groups like the Independence Institute "engaged purely in issue discussion." *Id.* at 79.

B. *Citizens United* Did Not Overrule *Buckley's* Holdings on Disclosure.

The district court deemed *Citizens United* controlling on the donor disclosure issue, holding that disclosure was triggered merely because the Institute's advertisement "points a finger at an electoral candidate." App 23. The district court failed to take into account the critical distinction drawn in *Buckley* between campaign-related speech and issue speech, apparently assuming that *Citizens United* had tacitly abandoned that distinction.

The district court misread *Citizens United*. It would be inappropriate to conclude that this Court has overruled a precedent, particularly a key holding of a landmark precedent like *Buckley*, without explicitly saying so. Indeed, "[t]his Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

More fundamentally, *Citizens United* involved "Hillary: The Movie" and three advertisements promoting that movie. "The movie, in essence, is a feature- length negative advertisement that urges viewers to vote against Senator Clinton for President." *Citizens United*, 558 U.S. at 325. *Citizens United* allowed application of the disclosure requirements to the movie and three advertisements on the ground that "the public has an interest in knowing who is speaking about a candidate shortly before an election," "[e]ven if the ads only pertain to a commercial transaction." *Id.* at 369.

But context matters. The messages at issue in *Citizens United* fell directly into the ambit of campaign-related speech. Not only was the speech at issue in *Citizens United* the very speech Congress was attempting to address with section 203 of BCRA (see Part I.C. below), it was the very campaign-related speech that *Buckley* held could be subject to compelled disclosure consistent with the First Amendment. The fact that the advertisements for the movie "pertain[ed] to a commercial transaction" did not make them any less campaign-related: an advertisement selling "Defeat Smith" t-shirts is as campaign-related as a "Defeat Smith" advertisement selling nothing. The commercial context makes no material difference if the message is plainly campaign-related.

Nor does the statement in *Citizens United* rejecting the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy," 558 U.S. at 369, dictate the result here. In that passage, the Court

relied on Buckley's ruling upholding disclosure requirements for independent expenditures, which *Buckley* construed as applicable only to advertisements *containing express advocacy*. 424 U.S. at 80.[2] *Citizens United* gave no reason for departing from *Buckley's* careful analysis, and should not be read as casting aside *Buckley's* protection of issue speech.

C. Congress Asserted a Disclosure Interest Only in "Sham Issue Ads."

The legislative history of the disclosure provisions shows that Congress was aiming them at so-called "sham issue ads." Those "sham issue advertisements" were, Congress believed, "campaign-related" but carefully worded to avoid use of words such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Buckley*, 424 U.S. at 44 n.52. Senator Russ

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[2] *Citizens United* also noted that "three Justices [in *McConnell*] who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements." 558 U.S. at 369. *McConnell* was a facial challenge, and the Court upheld the electioneering communications provision because it was directed at "sham issue ads." *See McConnell*, 540 U.S. at 193 ("Not only can advertisers easily evade the [express advocacy] line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. . . . [T]he resulting advertisements . . . are no less clearly intended to influence the election."). The three dissenting justices would have upheld the disclosure provision in section 201 because it "substantially relate[s] to the other interest the majority details," and "[t]his assures its constitutionality." *Id*. at 321 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting in part).

Feingold, co-sponsor of BCRA in the Senate, said the "net result" of the disclosure provisions "will be that the public will learn through this amendment who the people are who are giving large contributions to groups *to try to influence elections*." 147 Cong. Rec. S3070-01, S3072, 2001 WL 303410 (Mar. 29, 2001) (emphasis added). Senator James Jeffords emphasized that "Corruption will be deterred when the public and the media are able to see clearly who is *trying to influence the election*." 147 Cong. Rec. S3034 (daily ed. Mar. 28, 2001) (emphasis added), *quoted in McConnell v. FEC*, 251 F.Supp. 2d 176, 243 n.75 (D.D.C. 2003) (opinion of Henderson, J.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003). Representative Sander Levin argued that the disclosure provisions were aimed at political advertisements that fell outside the existing disclosure regime, and that the new disclosure provisions would apply to "ads that are *clearly campaign ads*." 144 Cong. Rec. H4866 (daily ed. June 19, 1998) (emphasis added), *quoted in McConnell*, 251 F. Supp. 2d at 243 n.75. Senator Olympia Snowe decried "stealth advocacy" and the increasing amounts of money "spent on so-called sham ads in the election of 2000 . . . to skirt the disclosure laws because they do not use the magic words 'vote for or against. . ." Statement of Senator Olympia Snowe, 147 Cong. Rec. S3070-01, 3074, 2001 WL 303410 (Mar. 29, 2001) (emphasis added).

To avoid the constitutional issue, yet still achieve the congressional intent, and to reconcile *Citizens United* with *Buckley*, the Court could construe the disclosure regime as applicable only to campaign-related advertisements that meet the statutory defi-

nition of "electioneering communications." *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the [Supreme] Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citation omitted). The Institute's advertisement would not fall within a disclosure regime so limited.

II. THE INSTITUTE'S ADVERTISEMENT IS NON-CAMPAIGN ISSUE SPEECH AT THE CORE OF THE FIRST AMENDMENT.

The Institute's advertisement advocates passage of a pending bill, the Justice Safety Valve Act, Senate Bill No. 619. Discussion of such an issue of public import is at the very heart of the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 17 (citation omitted).

A. The Institute's Advertisement Is Issue Speech, Not Campaign Advocacy.

The advertisement at issue here is striking for its similarity to the advertisement before the Court in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"). In *WRTL II*, this Court upheld an as applied challenge to the prohibition of corporate-funded advertisements in BCRA section 203. Each of the three advertisements met the definition of "electioneering communication" in section 201(a) of

BCRA, now codified at 52 U.S.C. § 30104(f)(3)—each mentioned an officeholder who was currently a federal candidate and one who was not, was targeted to that candidate's relevant electorate, and would be aired within the "blackout periods" specified in the definition. Nevertheless, the Court recognized that the government interest in regulating such speech arose only in the context of campaign-related speech -- that is, express advocacy or the functional equivalent of express advocacy. *WRTL II*, 551 U.S. at 465 (opinion of Roberts, C.J.)

Announcing the judgment of the Court, the Chief Justice concluded that the advertisements were "plainly not the functional equivalent of express advocacy" for two reasons:

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 470. The advertisement in this case follows the format of the *WRTL II* advertisements very closely. As with the *WRTL II* advertisements, "one would not even know from the ads whether [either named Sen-

ator] supported or opposed" the Justice Safety Valve Act. *Id.* at 471 n.6. As the Chief Justice wrote in *WRTL II*: "This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *Id.* at 476.

Like the advertisements addressed in *WRTL II*, the Institute's advertisement is pure issue speech. The Congressional definition of "electioneering communication" creates, in both instances, a misnomer: The advertisements here and in *WRTL II* have nothing to do with "electioneering." This is because "[i]ssue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.* at 470. And just as in *WRTL II*, the government may not regulate the Institute's advertisement, and suppress its speech, even if the suppression is accomplished by requiring disclosure of the Institute's donors.

B. The First Amendment Places a High Value on Anonymous Issue Speech.

This Court has recognized the critical value and this Nation's great historical tradition of anonymous speech. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court held that an Ohio statute could not, consistent with the Free Speech Clause, require Ms. McIntyre to disclose herself as the publisher of anonymous leaflets. As here, Ms. McIntyre was independently addressing an issue rather than advocating a specific candidate. The Court

distinguished "candidate elections," in which "the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures." *Id.* at 356. It ruled, however, that disclosures of candidate financial support "are supported by an interest in avoiding the appearance of corruption *that has no application to this case*." *Id.* at 354 (emphasis added).

The *McIntyre* Court noted that speakers may require anonymity for many reasons. Among those reasons were, of course, "fear of economic or official retaliation, . . . concern about social ostracism, or merely . . . a desire to preserve as much of one's privacy as possible." 514 U.S. at 341–42. Quite apart from any threat of reprisal, a "personally unpopular" speaker may believe her ideas will be more persuasive if her readers are unaware of her identity. *Id.* at 342. In this last situation, a requirement to prove fear of retaliation is irrelevant. Anonymity is essential to the message; it is part of the content. *See id.* at 342 ("an 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.").

Concurring, Justice Thomas carefully recounted the great American tradition of anonymous speech, from the 1735 trial of John Peter Zenger to extensive anonymous speech during the Revolutionary and Ratification periods. 514 U.S. at 360–67 (Thomas, J., concurring). This careful review led Justice Thomas to the conclusion that "the Framers

understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion." *Id*. at 371.

McIntyre, in turn, relied on *Talley v. California*, 362 U.S. 60 (1960), in which the Court struck down Los Angeles City ordinances that required any handbill to contain the name and address of the author. The Court analogized the *disclosure* requirement in *Talley* to a handbill *licensing* requirement struck down in *Lovell v. Griffin*, 303 U.S. 444 (1938). *See* 362 U.S. at 64. This recognition that disclosure of authorship can suppress speech just as effectively as a licensure requirement supports the analogy between the compelled disclosure at issue in this case and the outright prohibition of the advertisements in *WRTL II*. *See also Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150, 166 (2002) (local canvassing ordinance was facially invalid because, among other reasons, it impinged on the ability of canvassers to operate anonymously); *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182, 200 (1999) (requirement that petition circulators wear an identification badge was invalid because it "discourages participation in the petition circulation process by forcing name identification without sufficient cause"). The value of anonymous speech in the advocacy of issues cannot be gainsaid.[3]

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[3] This Court has referred to the "right to remain anonymous." *McIntyre*, 514 U.S. at 357; *McConnell v. FEC*, 540 US 93, 276 (2003) (Thomas, J., dissenting) (referring to "right to anony-

III. NEITHER CONGRESS NOR THE FEC HAS IDENTIFIED A SUFFICIENT INTEREST TO OVERRIDE THE FIRST AMENDMENT PROTECTION OF THE INSTITUTE'S DONORS.

This case does not challenge the validity of disclosure requirements addressed to contributions or expenditures "for the purpose of influencing" a federal election. *See Buckley*, 424 U.S. at 60–84. Rather, this case involves disclosure of something materially different: issue speech that is not the functional equivalent of express advocacy or campaign-related. Compelling disclosure in this situation does not survive First Amendment scrutiny.

A. This Court's Precedents Do Not Foreclose the Institute's Argument.

The district court believed this Court's prior rulings in *McConnell*, *WRTL II,* and *Citizens United* foreclose the Institute's argument. To the contrary, *McConnell* was a facial challenge to the electioneering communications provision, but as this Court has unanimously held, *McConnell* left open the possibility of as applied challenges like this one. *See Wisconsin Right to Life v. FEC*, 546 U.S. 410, 412 (2006) (per curiam) ("*WRTL I*") ("In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges."). And, indeed, *WRTL II* upheld an as-applied challenge to the prohibition of advertising in the electioneering communications

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mous speech"). *See also Van Hollen Jr.*, 811 F.3d at 499–500 (referring to "right to anonymity").

provisions; *WRTL II* did not, however, address the applicability of the disclosure provisions. 551 U.S. at 482. Neither decision addressed the issue here.

As previously discussed (Part I.B above), *Citizens United* did not overrule the protections for non-campaign issue speech set forth in *Buckley*.

B. None of the Interests Identified by the Government Are Correlated to Compelled Disclosure of Donors Supporting Non-Campaign Issue Speech.

Even if the "exacting scrutiny" test used in *Citizens United* and other disclosure cases is applied,[4] the First Amendment forbids application of the restrictions to the Institute's advertisement. Exacting scrutiny is a "strict test." *Buckley*, 424 U.S. at 66. The government must prove a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest. *Citizens United*, 558 U.S. at 366. None of the interests identified by

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[4] The Court might also consider whether disclosure provisions that have the actual effect of suppressing issue speech should be evaluated under strict scrutiny, as was the prohibition in *WRTL II*. *WRTL II*, 551 U.S. at 464 (opinion of Roberts, C.J.). If a donor is committed to anonymity, the statute bars any speech that qualifies as an "electioneering communication." The loss of speech harms both the speaker and the listeners deprived of the speech. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) ("The Court has declared . . . that 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'") (citation omitted).

the district court are correlated with the Institute's non-campaign-related issue advertisement.

Apart from its mistaken view that the Institute's arguments are foreclosed by this Court's precedent, the district court identified two other reasons for denying First Amendment protection. First, it held that distinguishing between campaign-related electioneering communications and genuine issue advertisements "is entirely unworkable." App. 24. As shown, *Buckley* made no mention of this concern when it held non-campaign-related issue speech protected forty years ago. (*See* Part I.A. above). Further, the Court flatly rejected this argument in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002): "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." Or, as the Chief Justice put it in *WRTL II*, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." 551 U.S. at 474 (opinion of Roberts, C.J.) Protected speech may not be regulated as a mere convenience to assist with the regulation of unprotected speech.

Next, the court identified three government interests that, it believed, would outweigh the Institute's First Amendment right. Those interests were "'providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.'" App. 30 (quoting *McConnell*, 540 U.S. at 196). These in-

terests, identified in *McConnell* as sufficient to justify regulating "sham issue ads," do not correlate at all to the Institute's non-campaign-related issue advertisement.

The informational interest is not sufficiently weighty, standing alone, to justify suppression of speech. The Court in *McIntyre* addressed this very point: "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." *McIntyre*, 514 U.S. at 348.[5]

Buckley found the informational interest sufficient to justify disclosure only for those expenditures that are "unambiguously campaign related but would not otherwise be reported because [they take] the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors." 424 U.S. at 81. Such disclosure "helps voters to define more of the candidates' constituencies." *Id.*

The district court broadened this informational interest to encompass any message to constituents during election season that "*points a finger at an elec-*

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[5] The Court quoted a New York decision striking down a similar statute: "'People are intelligent enough to evaluate the source of an anonymous writing . . . They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message.'" 514 U.S. at 348 n.11 (quoting *New York v. Duryea*,351 N.Y.S.2d 978, 996 (1974)).

toral candidate." App. 23 (emphasis added). The mere description of the interest is chilling. Like the antiquated crime of *lèse-majesté*, speaking ill of the King,[6] the requirement that anyone who deigns to mention a federal candidate in a paid broadcast during an election season must step forward and identify himself suppresses public policy discussion but advances no legitimate government interest.

The anti-corruption interest asserted by the district court is also not correlated to the Institute's advertisement because the Institute will air its advertisement independently of any candidate. As the Court made clear in *Citizens United*, even expenditures that are the functional equivalent of express advocacy, and thus clearly campaign-related, pose no threat of corruption if aired independently. *Citizens United*, 558 U.S. at 356–57 ("[I]ndependent expenditures. . .do not give rise to corruption or the appearance of corruption."). *See also Buckley v. Valeo*, 424 U.S. at 45 (1976) ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the Federal Election Campaign Act's] ceiling on independent expenditures.").

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[6] *See* Ilya Shapiro, Trevor Burrus, Gabriel Latner, *Truthiness and the First Amendment*, 16 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 51, 53 (2014) (describing "a speech-crime known as *lèse-majesté*: any speech or action that insulted the monarchy or offended its dignity," which was considered by monarchs to be an act of treason).

The third purported interest, in enforcing existing law, cannot justify imposing restrictions on otherwise lawful conduct. The government cannot infringe on constitutionally-protected speech simply to help it enforce the campaign finance laws. "[S]uch a prophylaxis-upon-prophylaxis approach to regulating expression" is inconsistent with constitutional scrutiny. *WRTL II*, 551 U.S. at 479 (opinion of Roberts, C.J.); *see Ashcroft*, 535 U.S.at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech."). If a violation of an existing regulation occurs, the government can seek disclosure of donor names at that time. As the Court in *McIntyre* recognized, "the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code." *McIntyre*, 514 U.S. at 352–53.

Finally, even though disclosure may appear less restrictive than the outright prohibition at issue in *WRTL II*, App. 20–22, the effect here is the same. For their own good reasons, the donors to the Institute desire to remain anonymous; anonymity is a key substantive component of the message. *See McIntyre*, 514 U.S. at 342 ("decision to remain anonymous [is] like other decisions concerning omissions or additions to the content of a publication"). The speech will not occur under the burden of disclosure.

Buckley foresaw that an effort to regulate campaign speech could sweep in non-campaign issue speech, warning that "the distinction between discus-

sion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. For this reason, it allowed disclosure only with regard to campaign-related speech.

Recent events demonstrate the risks posed by the expansive application of disclosure based on merely "point[ing] a finger at an electoral candidate." App. 23. One of the most controversial issues for the past several years has been the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), popularly known as "ObamaCare." With a gap of only 60 days in June and July 2012, any nationwide advertisement using the term "ObamaCare" from December 4, 2011 (30 days before the Iowa caucuses) through November 6, 2012 (Election Day) would have triggered the disclosure regime for electioneering communications in at least one state, even if the advertisement did no more than offer a health insurance policy.[7] *See* FEC Advisory Op. No. 2012-19, at 3 (June 13, 2012), available at http://saos.fec.gov/aodocs/AO%202012-19.pdf (advertisement referring to "Obamacare" fit definition of electioneering communication).

This issue will again come into sharp relief in 2020 if Donald J. Trump seeks re-election. Not only

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[7] The only "open" period would have occurred after the final primaries on June 5, 2012, to August 4, 2013 (30 days before the Democratic National Convention began on September 4, 2012). The Convention ended on September 6, and the 60-day general election blackout period began on September 7.

will genuine issue advertisements supporting or opposing his actions as President fall within the disclosure regime, but so also might any commercial advertisement merely mentioning one of his varied business interests.

In short, the disclosure regime for electioneering communications sweeps too much speech, including core issue speech with no connection to a campaign, into a regime created to regulate so-called "sham issue ads." The First Amendment does not permit this overreach.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement of the Appellant Independence Institute, Senate Majority Leader Mitch McConnell respectfully urges this Court to note probable jurisdiction and set the case for briefing and argument.

Respectfully Submitted,

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