No. 16-743

In the Supreme Court of the United States

INDEPENDENCE INSTITUTE,
a Colorado nonprofit corporation

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF CONSTITUTIONAL LAW, POLITICAL SCIENCE, AND ECONOMICS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF NOTING PROBABLE JURISDICTION

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written consent of all parties. Appellee was notified of *amici*'s intent to file this brief more than 10 days prior to its filing date.

LAW (2d ed. 2015) and UNDERSTANDING ELECTION LAW AND VOTING RIGHTS (2016).

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Amici are interested in this case because it concerns the protection of an intrinsic aspect of the freedoms of speech and of the press that has been receiving diminishing protection in the lower courts – anonymity. From a textual, historical, and practical perspective, anonymity is a significant right that was considered part of, and that remains important to, the expressive freedoms protected by the First Amendment.

SUMMARY OF ARGUMENT

This Court should note probable jurisdiction and direct full briefing and argument in this case. The question is of great importance because disclosure coupled with public harassment is increasingly used as a means of suppressing unpopular opinion. Kimberley Strassel, THE INTIMIDATION GAME (2016). Yet, as a distinguished lower court judge has commented, the tension between this Court's anonymity and disclosure precedents "makes it impossible" for lower courts to resolve these cases. *Majors v. Abell*, 361 F.3d 349, 355-58 (2004) (Easterbrook, J., *dubitante*). Perhaps most of all, this Court would benefit from serious briefing and argument regarding the role of anonymous and pseudonymous speech as part of the original understanding of the freedom of speech and of the press.

The right to speak and publish anonymously or pseudonymously can be conceived as either an intrinsic part of the freedom of speech and of the press (and of assembly/association as well), or as a necessary prophylactic principle to guard against the chilling effect on unpopular speech of public exposure and possible reprisal.

If the right is intrinsic, then it follows that there can be no public right in the informational benefit of disclosure. Any disclosure must require specific regulatory justification unrelated to the communicative effects of disclosure. (Prevention of corruption or identification of criminal wrongdoing are plausible legitimate interests that might support compelling disclosure under limited circumstances.) These *amici* believe a strong case can be made that the freedoms of speech, press, and association/assembly, as understood at the Founding, included anonymity.

Even if anonymity is understood only as a prophylactic protecting a core right to speak and publish, the approach of the court below (and of many state and lower federal courts) lacks coherence and is inadequately protective. The court below held that the right of anonymity is trumped by an interest in providing the electorate with information regarding the source of a communication, except where there is an as-applied showing of a realistic threat of harassment or retaliation. JS App. 21 n. 5, 31. That presents two insuperable difficulties. First, proof takes time. As this Court has recognized in other contexts, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002); *Freedman v. Maryland*, 380 U.S. 51, 55, 58-60 (1965); *Shuttlesworth v. City of Birmingham*, 394

U.S. 147, 163 (1969); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968), speech typically must be timely to be effective. If speakers with a well-founded fear of retaliation must prove the reasonableness of that fear in court, their speech often will be suppressed *for years*. Full briefing and argument provide an opportunity for this Court to consider requiring, at a minimum, procedural safeguards like those in *Thomas* and *Freedman*, including tight time frames and an appropriate burden of proof, before governments could expose speakers to the chilling effect of disclosure.

Second, requiring speakers to prove they face a realistic threat of retaliation is asking them to prove the unknowable. If there has been no record of retaliation – yet – their fears will appear speculative; if there is retaliation, it is too late. Advocacy on a particular topic may seem innocuous today, but could lead to job loss or death threats years later – depending on shifts in politics and groupthink. Moreover, some forms of retaliation are shrouded in secrecy. No one can ever know whether regulatory discretion is affected by the petty official's knowledge of a regulated party's speech on a controversial topic. A nonprofit supporting an unpopular cause may find itself subject to an IRS audit or a building code investigation, for example, but absent a smoking gun may have a hard time proving the connection. Full briefing and argument can illuminate this Court's consideration of where the burden of proof should lie and how powerful any evidence of potential retaliation must be. In these *amici*'s view, if we care about the chilling effect on speech under the First Amendment,

the dangers of retaliation must be understood realistically, with genuine consideration for the risks a speaker faces.

Under either view – anonymity as an intrinsic part of the freedoms of speech, press, and assembly/association or anonymity as a prophylactic against the chilling effect of potential retaliation – the district court's casual disregard of the importance of anonymity should not be allowed to stand without full examination by this Court.

Summary treatment of this case would be unresponsive to the gravity of this question, the complexity of the intersecting precedent surrounding it, and the significant history and original understanding of the freedoms protected by the First Amendment.

ARGUMENT

The right to anonymity both for individual speech and in association with others has long been understood as an important and intrinsic component of the freedoms protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63, 466 (1958). This case raises substantial questions regarding the protection of that right.

The court below rejected an as-applied challenge to a disclosure requirement, 52 U.S.C. § 30104(f), that would have forced appellant, a non-profit organization, to reveal certain of its donors if it ran a proposed issue advertisement concerning pending legislation. Jurisdictional Statement Appendix (JS App.) at 35. The proposed ad, to be run in Colorado, concluded

with an exhortation to contact that state's Senators regarding the legislation, and provided their names and a phone number. JS at 6-7. Because one of the Senators was up for re-election within sixty days of the proposed air date of the ad, the mere mention of his name made the ad an "electioneering communication" and appellant would have been forced to disclose any donors who contributed $1000 or more for the proposed ad. 52 U.S.C. § 30104(f); *see* JS at 8.

Amici agree with appellant that the decision below is incorrect and that, at a minimum, BCRA's electioneering communication disclosure requirements should be limited to communications that are at least the functional equivalent of express advocacy of the election or defeat of a candidate, where the anti-corruption rationale for regulation is at least plausible. JS at 4, 13, 22-23. In this as-applied challenge, the bare mention of an incumbent Senator's name in the context of discussing legislation pending before the Senate was neither express advocacy nor its equivalent, and had no reference, positive or negative, to the pending re-election campaign. Appellant makes a substantial and persuasive case as to why the decision below is an incorrect application of this Court's precedents and should be reversed.

Amici will not reiterate appellant's substantive points but will instead focus on the importance of these issues and why this Court should note probable jurisdiction and take full briefing and argument in this case.

First, because this is an appeal, any disposition of this case will have precedential weight. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro &

Kenneth S. Geller, SUPREME COURT PRACTICE §§ 4.28, 5.17, pp. 215-17, 264-65 (7th ed. 1993). Unlike denial of a petition for a writ of certiorari, which implies no view on the merits, an affirmance here will be viewed by the lower courts as an endorsement of their often-lackadaisical review of disclosure requirements. JS at 28-31 (describing minimal scrutiny often applied to disclosure requirements). To dismiss for want of a substantial federal question will tell the state and lower federal courts that the right of speech anonymity *is not even a substantial constitutional question*. Surely that is not so. As noted in the Jurisdictional Statement, at 19-22, 28-30, reconciling tensions in the tangle of precedent on campaign finance and disclosure can be difficult and can lead courts astray. Occasionally such difficulty can give pause even to the most astute jurists. *See, e.g*, *Majors v. Abell*, 361 F.3d at 355-58 (Easterbrook, J., *dubitante*) (discussing tension in Supreme Court's anonymity and disclosure precedents that "makes it impossible for courts at our level to make an informed decision – for the Supreme Court has not told us what principle to apply," and failing to understand how decision upholding state disclosure law "can be reconciled with established principles of constitutional law"). This Court's more thorough consideration and guidance is thus needed and appropriate.

Second, in casually accepting disclosure requirements, the lower courts have lost sight of the nature of anonymity as an intrinsic part of the freedoms of speech and of the press protected by the First Amendment. Rather than a mere prophylactic add-on to other expressive freedoms, anonymity was part

and parcel of the original understanding of those freedoms.

There can be no doubt that individuals who pool their resources to purchase advertisements on matters of public concern are exercising the freedoms of speech and press. This Court's signal decision on freedom of the press, *New York Times Co. v. Sullivan*, 376 U.S. 254, 256-57 (1964), involved an advertisement purchased by a group of southern ministers and civil rights leaders. The proposed advertisement by appellant Independence Institute stands on the same constitutional footing.

As has frequently been noted, advocates for and against ratification of the Constitution most often did so under pseudonyms. *McIntyre*, 514 U.S. at 360, 368 (Thomas, J., concurring in the judgment); *see* Pauline Maier, RATIFICATION 71-72 (2010) (noting that the use of pseudonyms was "standard practice"). More than 200 years later, we still read the words of "Publius," "Brutus," "Agrippa," "Centinel," and "the Federal Farmer." The identities of some of these writers remain unknown to this day. The practice of pseudonymous writing extended to significant debates in the early Republic. Examples include the "Pacificus"-"Helvidius" debates (Hamilton vs. Madison) and John Marshall's debate as "A Friend of the Constitution" against his adversaries "Amphictyon" and "Hampden." Gerald Gunther, ed., JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 1-2 (1969).

Advocates of the freedom of the press, such as William Livingston, who wrote (under a pseudonym) a four-part essay entitled "On the Liberty of the Press," typically regarded anonymity as part and parcel of

the right. "[P]ray may not a man, in a free country, convey thro' the press his sentiments on publick grievances * * * without being obliged to send a certified copy of the baptismal register to prove his name." Scipio [William Livingston], *On the Liberty of the Press* (Part IV), NEW-JERSEY GAZETTE, Apr. 26, 1784. Printers both in Britain and in the colonies, later states, formed the first line of defense against assaults on this right. Not unlike reporters today who go to jail for months rather than reveal their sources, founding-era printers would endure prosecutions for seditious libel rather than reveal the identity of the writers of essays they had printed. *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring in the judgment).

In the most famous seditious-libel case in America prior to the First Amendment, the printer John Peter Zenger refused to divulge the author (who happened to be Gouverneur Morris's grandfather) of essays criticizing the royal governor, and stood trial instead. *See* Paul Finkelman, ed., A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (1997). A similar trial in Britain was even more notorious. The incendiary parliamentarian John Wilkes wrote a scandalous essay, *North Briton No. 45*, under an assumed name. Everyone knew Wilkes had written it, but in order to prosecute the author for seditious libel, the author's identity had to be proved in court. The printer refused to identify Wilkes as the author, despite the threat of imprisonment. The formal law of Britain did not protect Wilkes's anonymity, but Americans rejoiced in Wilkes' cause. As Professor Akhil Amar has observed, "'Wilkes and Liberty' became a rallying cry for all

who hated government oppression," and Wilkes' case became a "'cause celebre' in the colonies"; it was familiar to "every schoolboy in America." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 & n. 54 (1994).

The Continental Congress debated whether it could seek the identity of "Leonidas" (Benjamin Rush), who had published an essay critical of the Congress. After a debate centering on the idea that the freedom of the press protected the anonymity of the writer, the Congress roundly rejected this effort at mandatory disclosure. Dwight L. Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 JOURNALISM Q. 445, 451 (1968); *see McIntyre*, 514 U.S. at 361-362 (Thomas, J., concurring in the judgment). After adoption of the First Amendment, James Madison led the effort in Congress to protect the right of the Democratic-Republican clubs to meet secretly. *See* John D. Inazu, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 26-29 (2012). Never in the founding era did the government succeed in compelling disclosure of the identity of persons exercising their rights of speech, press, or association/assembly.

James Madison stressed that the First Amendment, properly understood, must be seen in light of the "practice in America" rather than the formal judge-made law of England. James Madison, *Report on the Virginia Resolutions* (1800) (available at http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html) (viewed Jan. 8, 2017); *see generally* Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION 53-54 (2012) (discussing how freedom

of the press in America exceeded such freedom in England, and Madison's emphasis on how the more expansive American freedom helped form and inform the Constitution). The practice in America was that writers could publish without exposing their names and thus their persons and property to abuse. This Court would benefit from the in-depth discussion of this historical background that could be provided on full briefing in this case.

Third, part of the reason for the diffident protection of anonymity in some courts may be that anonymity is often analyzed as *only* a mere means to an end – a way of avoiding chill of the substantive speech itself – rather than as a directly protected component of the "freedom" of speech. Such a purely functional approach encourages case-by-case balancing of anonymity against non-constitutional information interests, rather than treating anonymity as a right to be protected by more rigorous scrutiny. *See, e.g.*, JA App. at 24, 31 (opinion below discussing information interests and deeming the ability of voters to "evaluate the message more critically" to be sufficient to justify disclosure, which is viewed as a less restrictive alternative to restricting speech); JS at 2, 21-23 (criticizing the treatment of "'speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents.' [citation omitted]"; court's exaggerated "conception of the informational interest is boundless"). But if there is a presumptive constitutional right to publish one's views on matters of public concern anonymously or pseudonymously, there cannot be a generalized public right to disclosure. It would be like saying there is a

constitutional right against self-incrimination, but that right must be balanced against the public's right to find out who committed crimes. And to the extent there is an inchoate public "interest" in obtaining information about speakers, defining that interest in terms of the communicative qualities or impact of the speech flies in the face of the First Amendment's entrusting choices about such matters to the speaker and the audience, not the state. Such a claimed interest would not merely be weak or uncompelling, *see also infra* at 15 n. 2, it would be illegitimate. Any requirement of disclosure would have to be justified by specific regulatory objectives unrelated to communicative impact, such as the prevention of corruption or the identification of a wrongdoer.

The district court's reliance on the value of disclosure to improve the public's evaluation of the argument proves too much. The public's ability to evaluate arguments might be enhanced by any number of requirements: the speaker could be required to cite his sources for factual statements, the speaker could be required to identify any financial interests he may have in the argument, the speaker could be required to give information about his profession, his partisan affiliation, or his religion. All these things might make it easier for the public to decide what weight to give the speaker's arguments. But that is not our First Amendment tradition. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-98 (1988). We allow speakers to decide what to say and what not to say. Speaking anonymously is fundamentally intertwined with all other aspects of speech, and is no different than the myriad other choices regarding what

words to use, what arguments to make, and what to leave out. The lower court's blithe acceptance of the notion that the government has near-plenary power to compel additional information that might be valuable to the public in evaluating an argument has no stopping point.[2]

The founding generation did not value the right to publish one's views anonymously or pseudonymously as merely a prophylactic against the risk of harassment or reprisal. The founding generation held to an ethic of public discourse that maintained that arguments should be evaluated on the cogency of their substance and not the status (or disrepute) of their authors. For example, an essay by "Scipio" entitled *On the Liberty of the Press* (Part I), NEW-JERSEY GAZETTE, Mar. 30, 1784, noted various reasons why an author might choose anonymity. "Sometimes his publications may lose the effect they would otherwise have produced, merely from his being known to be the author." Scipio asked, rhetorically: "Is a man's reasoning either the better or the worse for its being communicated without a name?" In particular, anonymity enabled public figures to participate in vigorous public debate without implicating their official positions. As Chief Justice, Marshall could not have

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[2] And to the extent there is *any* valid informational interest in compelling disclosure, courts have ample reason to doubt that such interest is significant, much less important or compelling. *See, e.g.*, David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 ELECTION L.J. 114 (2013) (concluding, based on survey analysis, that "disclosure information provides few marginal benefits for voters, calling into question the informational rationale for disclosure laws").

written his responses to Amphictyon and Hampden in his own name; Hamilton and Madison could not have taken their argument over the Neutrality Proclamation to the public in their own names without generating confusion over the position of the Washington Administration. Similarly today, citizens may refrain from speaking not because of fear of overt retaliation, but because they do not wish their views to be imputed to their employers or their offices. Under the holding of the court below, none of these considerations, so important to the founding generation, is given any weight.

It is the *speaker's right* to decide what information about himself or herself to reveal, just as it is the speaker's right whether to use understatement or hyperbole, satire or gravitas, or any other of the various choices speakers must make when communicating their ideas.

Fourth, even considering a prophylactic understanding of the right to anonymity, current jurisprudence places too much emphasis on the ability of the speaker to prove a reasonable probability of threats, harassment, or reprisals resulting from from disclosure. *NAACP*, 357 U.S. at 462-63; *Citizens United v. FEC*, 558 U.S. 310, 370 (2010). Placing the burden of proof on a speaker who prefers to remain anonymous both gets it backwards and inevitably under-protects, and hence chills, speech. This case is a prime example. Appellant sought to run a genuine issue ad many months ago, when that ad would have been timely. It recognized that it could not surmount the legal and evidentiary hurdles of demonstrating an identifiable threat of retaliation, but in the real world

its donors were not willing to assume the risk entailed by forfeiture of their anonymity. JS App. at 21 n. 5 (noting stipulation that appellant "does not rely upon the probability that the group's members would face threats, harassment, or reprisals if their names were disclosed"). This is practically the textbook definition of "chilling effect." If the mere threat of libel suits is enough to chill the speech of media giants like the New York Times, *see New York Times v. Sullivan*, 376 U.S. at 278, imagine the risk calculus of an ordinary citizen who is thinking of speaking out on a controversial subject.

Appellant was thus forced to go to court to defend its donors' anonymity. Regardless of the outcome of that procedure, the very process made it impossible for appellant to run the ad at the time it would have had an impact. The point is that speech and politics are fluid and constantly changing, and the need to obtain pre-approval for anonymity imposes an obstacle to the dissemination of speech that is responsive to the issues and actions of the day.

Just because a speaker cannot confidently predict, much less prove to a court's satisfaction, the adverse consequences that might flow from disclosure does not mean her speech will not be chilled. While one might hope for bold speakers willing to take unquantifiable risks of public or government disapproval and harassment, the reality is that retaliation as a means of suppressing speech is a powerful and increasingly widespread tactic. *See, e.g.*, Fred Smith, *Bullying Culture*, CLAREMONT REVIEW OF BOOKS (DIGITAL), Dec. 19, 2016 (reviewing THE INTIMIDATION GAME by Kimberley Strassel; noting that "the more serious

threats to free speech often come from disclosure mandates that dissuade donors who seek anonymity or fear retaliation. "Shaming" tactics, for example, accuse donors of supporting some politically incorrect policy positions, and entail boycotts, picketing (sometimes at the donor's home), and attacks that harm reputations and sometimes threaten targets' physical safety.") (viewed Jan. 6, 2017, available at http://www.claremont.org/crb/basicpage/bullying-culture); Maier, RATIFICATION 71-72 (noting that "vicious denunciation" and "threats" against antifederalist critics of the proposed constitution "encouraged writers to continue the standard practice of publishing essays under pseudonyms").

Arguably the most successful assault on freedom of speech and press in American history took the form of a disclosure requirement. In the wake of abolition of slavery in the British empire, American anti-slavery advocates thought the time was ripe for reconsidering the legality of slavery in the southern states. To prevent the distribution of abolitionist literature in the South, President Andrew Jackson's post office adopted a rule that such literature could be delivered only to recipients willing to request publicly to receive it. Daniel Walker Howe, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 428 (2007). Thus, harnessing the power of the mob, the anti-slavery propaganda effort was shut down – not through censorship, but through disclosure laws.

Perhaps times have changed, but we doubt it. The internet is alive with discourse identified only by user names, the twenty-first century analogs to "Publius." These *amici* do not take the position that anonymous

speech is better, or that it is worse. We contend that the question must be resolved by speakers and their audiences – not by the coercive apparatus of the state. It is no secret that disclosure requirements are sometimes proposed with the specific intent of silencing or undermining certain voices. That these requirements are nominally viewpoint-neutral does not make them any less potent.

The sad fact in today's world is that people whose viewpoints are displeasing to the modern mob (namely, the bullying power of social media), or to bureaucracies with discretionary power over their lives or businesses, suffer a grave risk if they communicate those unpopular views without the protective cloak of anonymity. Often, they will take the safer course, and hold their tongues.

Whether any specific speaker or donor can predict retaliation for a particular instance of speech or association is largely irrelevant to an overall risk assessment when such targeted suppression has become the *modus operandi* in many quarters. Smith, *Bullying Culture*, *supra*. Even a partially prophylactic approach to anonymity, therefore, should be mindful of how the risks from disclosure chill speech and association and should not place the burden of proving adverse consequences on the speaker.

In sum, each of the above considerations is important to the issue of anonymity and disclosure and deserves more in-depth treatment via full briefing. Summary disposition of this case would do a disservice to the important rights involved and the complexity of the issues.

Amici thus respectfully encourage this Court to note probable jurisdiction and set this case for full briefing and argument.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and direct full briefing and argument in this appeal.

Respectfully submitted,

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