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 STATE POLICY NETWORK AND 24 STATE PUBLIC POLICY GROUPS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae consist of the State Policy Network ("SPN") and 24 of its members, 501(c)(3) nonprofit corporations, that advocate on matters of public policy and interest throughout all fifty states. *See* Appendix A. SPN is committed to improving the practical effectiveness of independent, non-profit, market-oriented, state focused think tanks. SPN advises and represents the interests of many nonprofits, including *amici* and Appellant the Independence Institute. Together, *amici* stand for the interests of countless nonprofits and the people associated with them who, through so much time and generosity, contribute to America's robust civil society and work to address some of society's most pressing problems.

Because *amici* are organized as 501(c)(3) nonprofits, they do not engage in partisan political speech or activity, and are strictly prevented from doing so by the Internal Revenue Code ("IRC"). Instead, *amici* must, and do, restrict their communications to political speech pertaining to issues of public policy that affect the way people live their lives.

The mandatory disclosure provisions of the Bipartisan Campaign Reform Act ("BCRA"), as upheld by the District Court below, impose serious burdens on the ability of *amici* to engage in genuine issue advocacy. BCRA's overbroad definition of "electioneering

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel for the parties received timely notice of the intent to file this brief and have consented to its filing.

communications" forces them either to restrict the timing and content of their speech or to publicly disclose their financial donors, who often do not wish to be publicly identified with a potentially controversial issue campaign. SPN and its many member-affiliate nonprofits therefore have a direct stake in the outcome of this case.

SUMMARY OF ARGUMENT

This appeal presents an issue of fundamental importance to First Amendment law—whether the Government may require a private, nonpartisan group, engaged in the genuine discussion of public policy, to publicly disclose the identity of its financial supporters.

Over one million nonprofit organizations contribute to the richness of American civil society by seeking to address social problems, to promote political discussion, and to advance the passions and interests of citizens. In recent years, over $373 billion has been donated to these nonprofits to fund their work—work that has a direct impact on people's lives in every way imaginable.[2] Many of these donations are made anonymously by people who wish to keep their generosity private.

BCRA's disclosure obligation chills the speech and activities of nonprofits by requiring public disclosure of those donors, based on the content of speech. This Court has recognized that such disclosure may be permissible where such speech, expressly or implicitly,

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[2] *See* Lilly Family School of Philanthropy, Indiana University—Purdue University at Indianapolis, *Giving USA 2016 Infographic*, *available at* givingusa.org/see-the-numbers-giving-usa-2016-infographic.

advocates for or against the election of a political candidate. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 206 (2003). However, BCRA's definition of "electioneering communications" sweeps well beyond such partisan activity and encompasses the bona fide exchange of ideas, where such expression is completely divorced from the outcome of any election.

Under this Court's precedents, such mandatory disclosure provisions indisputably impose a genuine burden on protected First Amendment speech. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355-57 (1995); *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam). It must similarly be uncontested that such burdens on speech may not be overbroad, but must be substantially related to a sufficiently important government interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010).

As applied here, BCRA's mandatory disclosure provision cannot possibly withstand such "exacting scrutiny." *Id.* The Independence Institute is a 501(c)(3) nonprofit corporation, which is prohibited from engaging in partisan political speech or activity. The speech at issue concerns a bipartisan bill for sentencing reform and makes but a passing mention of Colorado's two incumbent Senators, encouraging voters to reach out to them to support the pending bill. The advertisement does not in any way resemble the "functional equivalent of express advocacy," *i.e.*, speech "intended to influence the voters' decisions" and likely to "have that effect." *McConnell*, 540 U.S. at 206. Accordingly, the FEC cannot meet its burden of demonstrating a sufficiently important interest here.

Many political candidates are also sitting members of Congress who are responsible to their constituency for pending legislation and other constituent services. 501(c)(3) organizations that speak about policy matters or about pending legislation have the fundamental First Amendment right to encourage the public to speak with legislators about such bills. That right does not go away simply because a primary or general election may be on the horizon. To the contrary, given that Congress may well take up bills in the weeks before an election, the BCRA provision threatens to silence genuine issue advocacy that stands at the heart of the First Amendment.

This Court has never upheld an effort by the Government to force a nonprofit corporation to disclose its financial supporters where the speech was not the functional equivalent of express advocacy. Such mandatory disclosure regulations violate our tradition of safeguarding the right to freely speak and associate, including anonymously—a right that ensured the vibrant debate that secured both our Nation's independence and the adoption of the Constitution, and that has protected unpopular speakers in the two hundred and forty years since.

The 501(c)(3) nonprofits whose rights are at issue already face heavy burdens from the Internal Revenue Service, which seeks to ensure that they do not use their tax exemption to engage in electoral advocacy. Imposing BCRA's disclosure regime on such genuine issue speech exposes these charities to burdensome, duplicative regulations, and chills their speech in multiple ways. The statute limits what nonprofits can say and when they can say it, creates additional legal uncertainty, and deters donors who fear

the threat of stigmatization, violence, and simple invasion of privacy, that may result from public disclosure.

While the District Court upheld a provision of federal law, the question presented here is not limited to BCRA and federal elections. A number of the States have built on BCRA's already overbroad foundations by passing even more burdensome disclosure laws that chill still more speech. Absent this Court's correction of the decision below, SPN and its member-affiliates will remain compelled to deal with this burgeoning influx of state electioneering communications laws. Compliance with all these laws is burdensome and expensive, and it will cause many nonprofits simply to stay silent.

The First Amendment is rests upon the value of robust political debate. The question in this case is not whether disclosure is a less restrictive means of regulating express advocacy, but whether Congress has the power to regulate genuine issue advocacy at all, particularly by nonpartisan speakers, such as the Appellant. The judgment of the District Court should be reversed.

ARGUMENT

I. The First Amendment Protects the Rights of 501(c)(3) Nonprofits To Seek To Influence Legislative Action in Ways Unrelated to Elections.

Our American democracy is premised upon the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Throughout our history, people have joined to-

gether to advocate for their point of view and to advance their interests. *See McIntyre*, 514 U.S. at 360-61 (Thomas, J., concurring) (documenting the history of anonymous pamphleteering to affect political change in America's founding era); 3 Alexis de Tocqueville, Democracy in America 902 (1840) ("In [America,] the science of association is the mother science; the progress of all the rest depends on its progress."). Today, people associate together through nonprofits and charities, which may in turn pursue their objectives by urging fellow citizens and elected representatives to take action to address pending social problems.

Over one million nonprofit organizations exist in America, and collectively they are involved with almost every pursuit imaginable, ranging from healthcare and religion, to education, the humanities, and public policy. *See* Lilly Family School of Philanthropy, Indiana University—Purdue University at Indianapolis, *Giving USA 2016: The Annual Report on Philanthropy for the Year 2015* (2016). By joining together, people with like-minded views can strengthen their voices to advocate for the pursuits, goals, and policies of their supporters. *See, e.g.*, *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.").

Financial donations to nonprofits are crucial to their ability to function. And a lot of money is at stake. Last year, over $373 *billion* in charitable contributions made it possible for the many nonprofit organizations to conduct their work and fulfill their missions. *See Annual Report on Philanthropy for the Year*

2015, *supra*. This figure places America among the most generous countries in the world in terms of charitable giving. *See id.*; Gallup, *2016 Global Civic Engagement Report*, *available at* http://www.gallup.com/reports/195581/global-civic-engagement-report-2016.aspx?g_source=CATEGORY_CIVIC_PARTICIPATION&g_medium=topic&g_campaign=tile. The work of these nonprofits, which touches on every facet of American life, greatly benefits American life and enhances the strength of our civil society.

Some of the goals that these 501(c)(3) organizations pursue are controversial. Whether these organizations seek to advance free trade or to protect the rights of workers; whether they seek the legalization of illegal immigrants or to secure our borders; whether they advocate in support of same-sex marriage or oppose such initiatives, these organizations may engender strong disagreement and controversy. In cases such as those, and others, it is not uncommon for financial supporters to seek to preserve their anonymity. And the First Amendment unquestionably protects their right to do so.

A. The Court Has Recognized that Freedom of Association Depends Upon the Right To Anonymity.

The First Amendment protects the rights of these 501(c)(3) organizations to enjoy the freedom of association. This Court has long recognized that a corollary of that right is the protection to associate anonymously. *See McIntyre*, 514 U.S. at 357 (anonymous speech and association are "not a pernicious, fraudulent practice, but an honorable tradition of advocacy

and dissent"); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("The First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.").

The right to speak anonymously helped pave our way to independence and to the adoption of our Constitution. The Court has described such forms of speech as "historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). "There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution." *McIntyre* 514 U.S. at 360 (Thomas, J. concurring). Anonymous speech stands as a "shield from the tyranny of the majority," *id.* at 357 (majority opinion), and without it, our civic discourse would be impoverished.

In the Civil Rights era, the Court recognized this link between freedom of speech and freedom of association. There has rarely been doubt in this country that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. Yet the "[d]isclosure of membership lists is likely to have" a "deterrent effect on the free enjoyment of the right to associate." *Id.* at 466; *see also Bates v. City of Little Rock*, 361 U.S. 516, 524

(1960) (the compulsory disclosure of group membership is "a significant encroachment upon personal liberty").

Laws that hinder group association are suspect because "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (collecting cases). "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 460-61.

B. The Court Subjects Mandatory Disclosure Provisions to Exacting Scrutiny.

This Court has recognized that the Government's interest in preventing the appearance of corruption and in ensuring an informed electorate may extend towards requiring the disclosure of those who contribute funds towards speech that seeks to influence elections. *McConnell*, 540 U.S. at 196. Because disclosure laws can impose a significant burden on speech, however, the Court has emphasized that such laws must be subject to "exacting scrutiny" and may only be sustained if they are substantially related to a sufficiently important government interest. *Citizens United*, 558 U.S. at 366-67; *McConnell*, 540 U.S. at 201-02; *Buckley*, 424 U.S. at 64.

Under this "strict test," *Buckley*, 424 U.S. at 66, the burden is on the government to demonstrate "a 'sufficient relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting

Buckley, 424 U.S. at 64, 66). This test ensures that the freedom to speak and associate freely are not curtailed without an extremely strong and compelling reason, because to undermine that right is to chip away at the bedrock of our democracy. *Buckley*, 424 U.S. at 80-81 (recognizing disclosure requirements for unambiguously campaign-related speech are sufficiently linked to an important government purpose because they "increase the fund of information concerning those who support the candidates"). Exacting scrutiny requires courts to undertake a facts and circumstances inquiry to ensure a "sufficient relation" exists between the government's interest and the laws burdening free speech. *See Citizens United*, 558 U.S. at 368 (reviewing proposed documentary in a holistic way and focusing on its "pejorative references to [Hillary Clinton's presidential] candidacy").

The District Court read this Court's more recent precedents to have altered these principles, and specifically to have upheld BCRA's disclosure provisions against any and all challenges. *Independence Inst. v. Fed. Election Comm'n*, No. 14-cv-1500, at *13-15 (D.D.C. Nov. 3, 2016). Yet this Court has never upheld these provisions as applied to a genuine issue advertisement, such as the one in this case. *See Buckley*, 424 U.S. at 80-81 (discussing regulation of "unambiguously campaign related" speech). To the contrary, each of the Court's recent decisions has emphasized that disclosure provisions remain subject to heightened scrutiny and must be justified on the facts of the case. *See, e.g.*, *Citizens United*, 558 U.S. at 366-67; *McConnell*, 540 U.S. at 201-02; *Buckley*, 424 U.S. at 64.

In *McConnell*, this Court upheld BCRA's mandatory disclosure regime against a facial challenge. The Court found that BCRA targeted the growing prevalence of "sham" issue ads, which had grown out of the bright-line limits on "express advocacy," which had been established by *Buckley v. Valeo*. *McConnell*, 540 U.S. at 126-28. By avoiding the use of "magic words" like "vote for" or "against" a political candidate, organizations would avoid triggering the federal election regulations, but still attempt to influence the election, often in a patently obvious way. *Id.*

McConnell observed that these types of "sham" ads were "functionally identical" to advocacy speech, even though they masqueraded as issue ads. *Id.* at 126. *Buckley*'s definition of express advocacy did not articulate the constitutional limit on speech subject to regulation, and in fact, the "majority" of issue ads amounted to the "functional equivalent" of express advocacy. Therefore, the Government could justify BCRA's definition of "electioneering communications" against the facial challenge that had been brought in that case. *See id.* at 206. At the same time, the Court expressly "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88.

This Court confirmed that genuine issue speech remained free from regulation in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"). There, the Court reviewed proposed advertisements in a holistic, contextual approach and concluded that the ads were "not the functional equivalent of express advocacy"; as such, the BCRA regulatory regime did not apply to them. 551 U.S. at 476.

The Court emphasized that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-70. In making this determination, courts should look at the content of the ad to see whether they focus on legislative or policy issues, or whether they mention an election, candidacy, or political party. *Id.*

Citizens United too is consistent with the distinction between genuine issue ads and express advocacy. There, a 501(c)(4) entity (which in contrast to a 501(c)(3) organization is expressly permitted to engage in political advocacy), challenged BCRA's limits on corporate speech in the context of a political documentary directed at opposing the candidacy of Hillary Clinton. 558 U.S. at 325. The Court emphasized that Clinton was campaigning for the presidency and the documentary portrayed her as corrupt, problematic, and ultimately, an ineffectual leader. *Id.* at 325-26. The film "contained pejorative references to her candidacy," rendering it improbable the film was intended to do anything but oppose her election. *Id.* at 368. Accordingly, the Court held that "the film qualifies as the functional equivalent of express advocacy." *Id.* at 326.

Citizens United then went on to uphold BCRA's disclosure requirements as applied to the communication at issue. To be sure, the Court did reject Citizens United's "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 369. Yet the case in fact involved express advocacy, and the speech came from a 501(c)(4) organization permitted to engage in

the electoral process. While the Court observed that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *id.*, the Court had no occasion to explain how "exacting scrutiny" would apply, or what interest the Government could advance, in a case involving genuine issue speech, such as that at issue here.

Accordingly, as the Court recognized in *Wisconsin Right to Life*, it remains true that "[t]his Court has never recognized a compelling interest in regulating ads . . . that are neither express advocacy nor its functional equivalent." *WRTL II*, 551 U.S. at 476. Nor has the Court applied mandatory disclosure regulations to genuine issue speech that was not intended to influence an election, such as the speech at issue here. The District Court's decision therefore chips at the foundations of these First Amendment freedoms.

II. The Government Cannot Demonstrate an Interest in Regulating Genuine Issue Advertisements by 501(c)(3) Nonprofit Organizations.

BCRA's mandatory disclosure regime threatens the rights of these nonprofit organizations, which are barred by law from engaging in electioneering. While these organizations do not, and may not, engage in electoral advocacy, BCRA's mandatory disclosure provisions unnecessarily sweep in their speech as well and thereby threaten to chill efforts by these organizations to influence their fellow citizens on matters of public policy. While the Government likely cannot offer any legitimate interest to regulate issue speech, regardless of the identity of the speaker, the Government's justification in this case is even weaker, because the speaker is a 501(c)(3) organization already banned from engaging in electoral activity by virtue of

its tax status, and there is no argument here that the organization had violated those requirements.

A. The Justification for Mandatory Disclosure Provisions Do Not Apply to Issue Ads.

BCRA's definition of "electioneering communications" goes well beyond speech "intended to influence the voters' decisions" and likely to "have that effect." *McConnell*, 540 U.S. at 206. BCRA applies to any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 60 days of a general election or 30 days of a primary election. 52 U.S.C. § 30104(f)(3)(A)(i)(I)-(II). The advertisement must be aired before the candidate's constituency, which in the case of a Senator running for election, means the advertisement would be "received by 50,000 or more persons" in the relevant state. 52 U.S.C. § 30104(f)(3)(C).

BCRA's disclosure requirement does not advance the Government's "informational interest" in facilitating "individual citizens seeking to make informed choices in the political marketplace" by disclosing the names of financial supporters of genuine issue speech. *McConnell*, 540 U.S. at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)). By definition, genuine issue speech does not seek to influence political elections, nor could it reasonably be interpreted that way. *WRTL II*, 551 U.S. at 469-70.

Regulation of such speech, which has nothing to do with political elections, does not advance the Government's interest in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary

to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. It cannot withstand exacting scrutiny, because there is no linkage between the Government's interest and the effect of the law on genuine issue speech. *Id.*

B. There Is Even Less of a Justification for Regulating the Issue Speech of 501(c)(3) Organizations, Which Are Barred from Political Activity.

While the Government cannot justify applying the BCRA regulations to any genuine issue speech, the Government's interest in this case is even weaker, because the Independence Institute is a 501(c)(3) organization. As a condition of its tax-exempt status, the Independence Institute is pervasively regulated by the Internal Revenue Service and specifically prohibited from participating in any political activity.

The IRC prohibits 501(c)(3) nonprofits from participating in any political campaigns, directly or indirectly. *See* 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii). These nonprofits agree to forgo their right to engage in political speech and partisan activity in exchange for tax benefits which allow them to deduct charitable donations from their tax liabilities.[3]

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[3] The tax penalties for violations of these rules provide a strong incentive for compliance and further undermine the FEC's interest in policing the speech of 501(c)(3) organizations. A 501(c)(3) organization that is determined by the IRS to be engaged in political activity can be fined an initial ten-percent tax on the amount of money spent on political speech. 26 U.S.C. § 4955(a)(1). It can then face a penalty of up to one hundred percent if it does not correct the violation during the tax year. 26 U.S.C. § 955(b)(1). Failure to correct a violation and continuing to engage in political behavior can also subject the nonprofit to

Consistent with the Court's approach in *WRTL II*, and in marked contrast with BCRA, the IRS evaluates whether a nonprofit is participating in electoral activity by considering all of the facts and circumstances around the organization's actions. *See Revenue Ruling* 2007-41 ("Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.").

These factors include two of the factors contained in BCRA's definition of "electioneering communication," notably whether the statement "identifies one or more candidates for a given public office," and "is delivered close in time to the election." *Id.* But the IRS does not take those two facts as dispositive. *Id.* Instead it goes on to consider several other factors that would distinguish between genuine issue speech and electoral activity, including whether the speech "expresses approval or disapproval for one or more candidates' positions and/or actions," "makes reference to voting or an election," involves an issue that "has been raised as an issue distinguishing candidates for a given office," "is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election," and whether "the timing of the communication

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taxation at the highest corporate rate under 26 U.S.C. § 527(b), and managers and employees of the nonprofit can be subject to monetary penalties. *Id.* § 4955. These strict penalties provide a strong incentive for 501(c)(3) nonprofit to ensure they do not give even the appearance of engaging in political behavior, lest they lose their tax exempt status and pay these significant penalties. *See Branch Ministries, Inc. v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office." *Id.* In marked contrast with the BCRA definition, the IRS emphasizes that no one of these factors is dispositive, and the context of a broadcast message or other communication must always be taken into account before evaluating whether the organization is engaged in political behavior. *Id.*

IRS Revenue Ruling 2007-41 contains twenty-one illustrative examples. "Situation 14" is almost identical to the Institute's proposed advertisement. In Situation 14, a 501(c)(3) university wishes to publish in large-circulation state newspapers an advertisement urging members of the public to contact a senator to vote a certain way in pending legislation. The senator is also a candidate for election in a primary which will be held "shortly" after the advertisement would be published. Although the advertisement mentions the name of the senator in the context of encouraging members of the public to call him, it does not say he is a candidate for office, nor does it mention the upcoming election. Under these facts, the IRS would conclude this advertisement is not an electioneering communication. *Id.* Yet such a communication would be regulated under BCRA.

Ironically, the District Court ruled the Independence Institute's position "is entirely unworkable as a constitutional rule" because the "Institute itself has offered no administrable rule or definition that would distinguish which types of advocacy specifically referencing electoral candidates would fall on which side of

the constitutional disclosure line, or how the Commission could neutrally police it." *Independence Inst.*, No. 14-cv-1500, at *15. Yet this Court already recognized the need for a context-based test in *WRTL II*, where it affirmed that such a test would be administratively feasible. 551 U.S. at 470. And the IRC regulations demonstrate what such a test might look like in practice. Rather than imposing a bright-line burden on communications mentioning an incumbent during an election season, Congress could well have prescribed standards by which the FEC or courts could evaluate the facts and circumstances surrounding a communication to determine whether it was genuine issue speech.

The IRS's definition of election activity is not perfect. The facts and circumstances test can impose significant burdens on 501(c)(3) organizations asked to show that they have not participated in electoral activity. It can further provide undue discretion to those charged with administering those rules. Nicholas Confessore et al., *Confusion and Staff Troubles Rife at I.R.S. Office in Ohio*, N.Y. TIMES, May 18, 2013, *available at http://www.nytimes.com/2013/05/19/us/politics/at-irs-unprepared-office-seemed-unclear-about-the-rules.html*. What the standard demonstrates, however, is that the BCRA definition of "electioneering communication" is overbroad, because it unnecessarily sweeps in speech, such as that at issue in this case, where no reasonable observer would conclude said speech was actually intended to, or likely to, influence a pending election.

C. BCRA Imposes Substantial Burdens on 501(c)(3) Groups.

BCRA's mandatory disclosure provision imposes substantial burdens on speech on multiple levels. Many donors will lose their voice because they will not wish to contribute for fear of public disclosure and its consequences; many charities will have fewer resources with which to support their message. *See, e.g.*, *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.").

First, BCRA restricts nonprofits from mentioning the name of a candidate for federal office, even if that person is an office holder responsible to his constituency and able to push for legislative change. Spurring people into action is key to the mission of SPN's members, and it is significantly harder to do so when the speaker cannot tell its audience which legislators to contact and how to do so.

Second, BCRA restricts the timing of issue speech in the weeks before elections, a period of often intense legislative activity. For example, on September 29, 2016, Congress approved an appropriations law that included funding for the Zika virus, victims of catastrophic floods, and military and veterans affairs. P.L. 114-223. In the run-up to the 2004 presidential election, the Senate voted on an amendment affecting the Department of Homeland Security's no-fly lists. S. 2845, 108th Cong. (2004). Issue groups need to communicate with the public about these issues whenever legislative issues arise. But BCRA chills this ability

to engage in the democratic process and restricts communication during important parts of election years.

Third, because 501(c)(3) organizations do not regularly engage in politics, they are often ill-equipped to navigate the complexities of campaign finance laws. These complex regulations require the assistance of lawyers and other professionals to ensure compliance. This is burdensome, expensive, and time-consuming. It imposes an extra layer or regulation above and beyond what they must do under the IRC.

Fourth, BCRA's disclosure mandate inevitably reduces charitable donations to those organizations that speak to the public. "Confidentiality is indispensable to the trust relationship that must exist between a nonprofit organization and its constituents." Eugene R. Tempel, ed., HANK ROSSO'S ACHIEVING EXCELLENCE IN FUND RAISING 440 (2d ed. 2003). Even the mere threat of disclosure can make donors think twice. Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, INST. FOR JUSTICE, 2007, *available at* http://www.ij.org/disclosure-costs (empirically documenting the deterrent effect of mandatory disclosure).

And the consequences of public disclosure can include harassment, threats, vandalism, and outright violence. *See* Thomas Kaplan, *Nonprofits Are Balking at Law on Disclosing Political Donors*, N.Y. TIMES, Aug. 20, 2013, *available at* http://http://www.nytimes.com/2013/08/21/nyregion/citing-safety-nonprofits-balk-at-law-on-disclosing-donors.html; Letter from Arthur Eisenberg, Legal Director, NYCLU, to Rob Cohen, N.Y. State Joint Commission on Public Ethics at 6-7 (Apr. 24, 2014), *available at* http://jcope.ny.gov/source_funding/forms/2014-04-24-

NYCLU%20appeal.pdf; *see also* FEC Advisory Op. 2012-38 at 9 (Apr. 25, 2013) (renewing exemption from disclosure of Socialist Workers Union members because of workplace violence and harassment against members of the group), *available at* http://saos.fec.gov/aodocs/AO%202012-38.pdf.

Disclosure of donations also reveals associations with groups, and this has the potential to brand someone with a form of identity. *See* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 19 (2003). Disclosure can expose all manner of interests, beliefs, passions, and activities. *See* Seth F. Kreimer, *Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 11 (1991) (referring to the "spotlight of public opinion"). And with the advent of the internet, these associations and brandings may remain permanent for all time. *See* Daniel J. Solove, *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation: Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1178 (2002); *Kreimer*, *supra* at 115 ("Although today I may not care who knows about my ACLU membership, I may dearly wish in twenty years that it be confidential."). Predictably, many donors will choose to forgo donations rather than have their identities and ideological sympathies made known.

III. The States Have Built Upon BCRA's Overbroad Foundations and Thus Imposed Additional Burdens on 501(c)(3) Nonprofits.

The decision below not only extends federal law beyond what can be justified, but it relies upon a rationale that the States have used to justify a morass of local campaign finance regulations that chill even more speech. Almost all fifty States have now passed laws regulating "electioneering communications" which are generally modeled after the BCRA but in many cases are more extensive and draconian.

The state electioneering communications laws can be more extensive than the BCRA in several ways. Some states expand the time horizon when electioneering communications trigger mandatory disclosure of donors (the blackout period). For example, in Massachusetts, the window when communications trigger the disclosure requirements is 90 days before an election. Mass. Gen. Laws ch. 55, § 1. In Alabama, the time horizon is 120 days before an election. Ala. Code § 17-5-2(a)(6).

Another way States have broadened the reach of disclosure laws is by expanding the media which trigger disclosure. BCRA covers "any broadcast, cable, or satellite communication." 52 U.S.C. § 30104(f)(3)(A)(i). But many States include direct mailings, print media including flyers and newsletters, and telephone and electronic communications. *See, e.g.*, Fla. Stat. Ann. § 106.011; Ala. Code § 17-5-2(a)(6). The laws of other States cover newspapers, magazines, and billboards—making a communication through one of these media could trigger the disclosure requirements of these states' laws. *See, e.g.*, Oklahoma Ethics Law § 257:1-1-2; Fla. Stat § 106.011;

Idaho Code Ann. § 67-6602(f). Illinois's law covers the use of the internet, a step which could affect relatively innocuous "e-newsletter" attempts to communicate online with people who sign up for news updates from a nonprofit organization to keep abreast of its news and activities. *See* 10 Ill. Comp. Stat. 5/9-1.14.

These state disclosure laws may also be more severe than their BCRA counterpart in a more fundamental way: they can regulate underlying content of the communication more extensively than the BCRA. While the BCRA disclosure requirement is only triggered when a communication clearly identifies a candidate for federal office, some state laws are triggered when the communication mentions a political party or even a "clearly identified question of public policy that will appear on the ballot" within a window of time before an election. *See id.*

In addition to wide variations in the substance of electioneering laws among the States, there are many differences in the reporting and disclosure procedures and obligations among these laws, adding to the burden of compliance. *Compare, e.g.,* Utah Code Ann. § 20A-11-901 (requiring a report within 24 hours of the electioneering communication law being triggered which lists the name and address of relevant donors) *with* Fla. Stat. Ann. §§ 106.0703(1)(b) and (3)(a)(1) (specifying different reporting timeframe and threshold amount).

Few 501(c)(3) nonprofits have the money to pay for expensive compliance departments and the many lawyers necessary to navigate a sea of competing and inconsistent disclosure laws. The FEC's *Campaign Guide for Corporations and Labor Organizations* is 134 pages and outdated (2007), and many State laws

require similarly long exposition. *See* http://www.fec.gov/pdf/colagui.pdf. Given that these laws chill speech of nonprofits, reduce their profiles, and deter financial contributions, they have even less money to invest in regulatory compliance.

These disclosure laws will burden most heavily the nonprofits like Independence Institute and SPN and the sixty-five independent think tanks within SPN, whose missions are concerned with educating the public about matters of public policy. These organizations do not engage in partisan politics or political advocacy, but their messages touch upon legislation and matters of policy which members of Congress or state legislators or governors may be involved with. Under BCRA and these state law electioneering regimes, unless 501(c)(3) nonprofits curtail their communications during certain times of year, they face substantial risk of running afoul of these laws and exposing their donors to the serious consequence of public disclosure. Many nonprofits will conclude this is a risk not worth taking, and will stay silent instead—compromising their mission and the richness of public dialogue at the same time.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

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APPENDIX A

In addition to the State Policy Network, this *amici curiae* brief is submitted on behalf of the following 501(c)(3) groups:

- **The Advance Arkansas Institute** is a nonprofit research and educational organization committed to advancing public policy based on free markets, individual liberty, and limited, transparent government.
- **The Alabama Policy Institute** is dedicated to strengthening free enterprise, defending limited government, and championing strong families.
- **The Buckeye Institute** is an independent research and educational institution whose mission is to advance free-market public policy in the states.
- **The Commonwealth Foundation for Public Policy Alternatives,** Pennsylvania's free-market think tank, transforms free-market ideas into public policies so all Pennsylvanians can flourish.
- **Foundation for Government Accountability** frees millions from poverty by advancing state and federal welfare reforms and other free market policies.
- **The Freedom Foundation** is a nonprofit organization based on the West Coast committed to advancing individual liberty, free enterprise, and limited, accountable government. Currently, the Foundation focuses on

public sector labor reform through litigation, legislation, education, and community activation. The Foundation strives to end forced unionism, enhance the First Amendment rights of workers, and reduce Big Labor's undue influence over our state and federal governments.

- **The Georgia Public Policy Foundation** is an independent think tank that proposes market-oriented approaches to public policy to improve the lives of Georgians.
- **The Goldwater Institute for Public Policy** drives results by working daily in courts, legislatures and communities to defend and strengthen the freedom guaranteed to all Americans in the constitutions of the United States and all fifty states.
- **The Grassroot Institute of Hawaii** is an independent, nonprofit research and educational institution devoted to promoting the principles of individual liberty, free markets, and limited and accountable government throughout the state of Hawaii and the Pacific Rim.
- **Idaho Freedom Foundation, Inc.'s** mission is to hold public servants and government programs accountable, expose government waste and cronyism, reduce the Idaho's dependency on the federal government and inject fairness and predictability into the state's tax system
- **Kansas Policy Institute** is an independent think tank guided by the constitutional

principles of limited government and personal freedom. It specializes in student-focused education and tax and fiscal policy at the state and local level, empowering citizens, legislators, and other government officials with objective research and creative ideas to promote a low-tax, pro-growth environment that preserves the ability of governments to provide high quality services.

- **The Mackinac Center for Public Policy** is a Michigan based, nonprofit, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property.
- **Maine Heritage Policy Center** formulates and promotes conservative public policies based on the principles of free enterprise, limited, constitutional government, individual freedom, and traditional American values.
- **Mississippi Center for Public Policy** eliminate barriers and create opportunities so that Mississippians can prosper.
- **The Montana Policy Institute (MPI)** conducts nonpartisan research and education efforts in order to advance individual and economic liberty policies. MPI provides leadership training, communications support, and research in order to give Montana citizens and policy-makers the tools necessary to enact sound state policies.

- **Oklahoma Council of Public Affairs** seeks to promote free enterprise, limited government, and individual initiative.
- **The Pioneer Institute, Inc**. is an independent, non-partisan, privately funded research organization. It seeks to improve policy outcomes through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government.
- **The Rhode Island Center for Freedom and Prosperity** is Rhode Island's leading free-enterprise public policy research and advocacy organization. The Center is nonprofit, nonpartisan, and is dedicated to providing concerned citizens, the media, and public officials with empirical research data, while also advancing market-based solutions to major public policy issues in the state.
- **The Rio Grande Foundation** is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity.
- **The Texas Public Policy Foundation** is a non-profit, non-partisan research organization dedicated to promoting and defending liberty, personal responsibility, and free enterprise in Texas and the nation through ac-

ademically-sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation.

- **The Virginia Institute for Public Policy** is an independent, nonpartisan, education and research organization committed to the goals of individual opportunity and economic growth. Through research, policy recommendations, and symposia, the Institute works ahead of the political process to lay the intellectual foundation for a society dedicated to individual liberty, dynamic entrepreneurial capitalism, private property, the rule of law, and constitutionally limited government.
- **The Wisconsin Institute for Law & Liberty** is an organization dedicated to litigation and policy research advancing the public interest in individual liberty, limited government and a robust civil society.
- **The Wyoming Liberty Group** was founded in 2008 with the purpose of inviting citizens to prepare for informed, active and confident involvement in local and state government. The Wyoming Liberty Group provides a venue for understanding public issues in light of constitutional principles and governmental accountability.
- **The Yankee Institute** develops and advances policy solutions that promote smart,

limited government; fairness for taxpayers; and an open road to opportunity for all the people of Connecticut.