IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	
Plaintiff,	
v.	Case No. 1:14-cv-1500-CKK-PAM-APM
FEDERAL ELECTION COMMISSION,	
Defendant.	

BRIEF *AMICUS CURIAE* OF FREE SPEECH DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, U.S. JUSTICE FOUNDATION, GUN OWNERS FOUNDATION, NATIONAL RIGHT TO WORK COMMITTEE, U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND, DOWNSIZE DC FOUNDATION, DOWNSIZEDC.ORG, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, AND POLICY ANALYSIS CENTER IN SUPPORT OF PLAINTIFF

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Dated: June 24, 2016

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Free Speech Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, Downsize DC Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code ("IRC"). Free Speech Coalition, National Right To Work Committee, and DownsizeDC.org are exempt from federal income taxation under IRC Section 501(c)(4).

Each organization participates in the public policy process and has filed numerous *amicus curiae* briefs in federal and state courts. Many of these amici filed an *amicus curiae* brief[2] in the present case when it was before the U.S. Court of Appeals for the D.C. Circuit on the issue of entitlement to a three-judge district court.

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] See Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, and Conservative Legal Defense and Education Fund in Support of Appellant and Reversal (April 15, 2015), http://www.lawandfreedom.com/site/election/Ind%20Inst%20CU%20amicus%20brief.pdf.

STATEMENT

This lawsuit concerns the constitutionality of the compulsory "electioneering communications" disclosure provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), as applied to the radio broadcast of an issue ad by the Independence Institute, a nonprofit corporation exempt from federal income taxation under IRC Section 501(c)(3). The ad in question was written to encourage the people of Colorado to exercise their right to petition the government, urging their two sitting United States Senators to vote in favor of a bill — the Justice Safety Valve Act — then pending in Congress. The electioneering communications disclosure requirement includes disclosure of the names and addresses of certain donors to the organization.[3]

BCRA imposed an all-out ban on corporations and unions engaging in so-called "electioneering communications," which are certain advertisements that mention the name of a federal candidate during a window of time before an election, regardless of whether the ad actually constitutes "electioneering" — *i.e.*, advocating for or against a federal candidate. Although the Supreme Court rebuffed the first **facial** challenge to BCRA's electioneering communications ban in McConnell v. FEC, 540 U.S. 93 (2003), it later ruled that the ban was

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[3] The FEC has interpreted the donor disclosure requirement to apply to those donors who contribute for the purpose of electioneering communications. There is a pending lawsuit challenging this interpretation. The plaintiff (an incumbent member of the U.S. House of Representatives) in that lawsuit claims that the disclosure requirement should apply to **all** donors to the organization, regardless of the donors' intentions. *See* Plaintiff's Motion for Summary Judgment and Memorandum in Support at 9 n.3. Many of these *amici* filed an *amicus* brief in the first appeal of that lawsuit. *See* Van Hollen v. FEC, Brief *Amicus Curiae* of Free Speech Coalition, *et al.* in Support of Appellants and Reversal.

unconstitutional **as applied** to **genuine issue ads** in FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) ("WRTL II").

In 2010, in a suit brought by Citizens United, an IRC section 501(c)(4) nonprofit organization, the Supreme Court decided that the electioneering communication prohibition was unconstitutional **as applied to a corporation** engaged in an electioneering communication. *See* Citizens United v. FEC, 558 U.S. 310 (2010). However, in the same case, the Court upheld BCRA's disclosure and reporting requirements for such electioneering communications.

The Federal Election Commission ("FEC") has taken the position that Independence Institute's proposed issue ad is an electioneering communication because it meets all four criteria in the statute and the FEC's regulation. First, incumbent Senator Mark Udall, one of the two Senators referred to in the ad, was a candidate for reelection.[4] Second, the ad was scheduled to be broadcast within 60 days of a general election. Third, the ad was targeted to the relevant electorate. Fourth, the expenditure for the ad exceeded $10,000. *See* 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29.

Because the ad qualifies under BCRA as an "electioneering communication," it is subject to BCRA's disclosure rules. These reporting requirements include making a public filing with the FEC of the names and addresses of certain donors who gave an aggregate of $1,000 or more to the ad sponsor since the first day of the preceding calendar year.

On September 2, 2014, Independence Institute filed suit in the U.S. District Court for the District of Columbia seeking a ruling that, as applied to its genuine issue ad, the BCRA

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[4] Independence Institute states that it would like to do similar ads in the future.

disclosure requirement unconstitutionally abridged its freedom of speech. The Institute urged this Court to limit the Citizens United mandatory disclosure ruling to its facts. Pointing out that the electioneering communication involved in Citizens United was "'unambiguously campaign related,'" whereas the Institute's proposed communication was a genuine issue ad, the Institute urged Colorado's two Senators to support a specific bill. *See* Plaintiff's Motion for Summary Judgment and Memorandum in Support at 7-8. Only by happenstance was one of the two U.S. Senators from Colorado then a candidate for reelection.

The Institute claims that, in Buckley v. Valeo, 424 U.S. 1 (1976), "the Court held that the reporting and disclosure requirements … survived 'exacting scrutiny' so long as they were construed to reach **only** that speech which is 'unambiguously campaigned related,'" thereby strictly protecting genuine issue ads. Plaintiff's Motion at 15-16 (quoting N.M. Youth Organized v. Herrera, 611 F.3d 669, 676 (10th Cir. 2010)) (emphasis added). Otherwise, the Institute asserts, the disclosure mandate of the names and addresses of donors supporting genuine issue ads would transgress an unbroken, 60-year line of jurisprudence acknowledging that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Id*. at 26 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

ARGUMENT

I. BCRA FORCED DISCLOSURE RULE VIOLATES THE FIRST AMENDMENT ANONYMITY PRINCIPLE AS EXPLAINED AND APPLIED IN MCINTYRE V. OHIO ELECTIONS COMMISSION

A. Mrs. Margaret McIntyre and the Independence Institute: Anonymity in Action.

On April 27, 1988, a woman named "Margaret McIntyre distributed leaflets to persons attending a public meeting … to discuss an imminent referendum on a proposed school tax levy." McIntyre v. Ohio Elections Commission, 514 U.S. 334, 337 (1995). Some of her leaflets identified her as the author, while others "purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." *Id.* The leaflets read, in part, as follows:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY
***
WASTE of tax payers dollars must be stopped.
Our children's education and welfare must come first.
WASTE CAN NO LONGER BE TOLERATED.
PLEASE VOTE NO
ISSUE 19
THANK YOU.
CONCERNED PARENTS AND TAX PAYERS

Helped by a friend and her son, Mrs. McIntyre managed to leaflet the automobiles in the school parking lot, only to be confronted by a school district official who advised that her actions did not "conform to the Ohio election laws." *Id.* at 338. "Undeterred, Mrs. McIntyre appeared at another meeting on the next evening and handed out more of the handbills." *Id.* At first, the levy was defeated. After it later passed, the school official who had confronted Mrs. McIntyre filed a complaint with the Ohio Elections Commission ("OEC"), charging her with a violation of an Ohio law which provided, in relevant part, as follows:

> "No person shall write, print, post, or distribute … a notice, placard, dodger, advertisement … or any other form of general publication which is designed to … promote the adoption or defeat of any issue, or to influence the voters in any election … through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place … the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." [*Id.* at 338, n.3.]

The Commission found that Mrs. McIntyre had violated the statute and fined her $100.

Fast forward a quarter century.

In 2014, the Independence Institute, a Colorado-based nonprofit corporation organized under IRC Section 501(c)(3), with a strong track record in research and education on matters of public policy, wished to produce a radio advertisement urging Colorado voters to contact their two Senators to support the Justice Safety Valve Act, allowing federal judges discretion in the sentencing of nonviolent offenders. The text of the radio ad included the following:

Independence Institute
Radio :60
"Let the punishment fit the crime"

***

Unfair laws tie the hands of judges, with huge
increases in prison costs that help drive up the debt.

***

Fortunately, there is a bipartisan bill to help fix the problem —
the Justice Safety Valve Act, bill number S. 619.

***

Call Senators Michael Bennet and Mark Udall at 202-224-3121.
Tell them to support S. 619 ….

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.

Before running the ad, Independence Institute realized that the radio communication would cost an excess of $10,000 and, thus, would be treated by the FEC as an "electioneering communication," since it referred to a person who was a candidate for federal election in Colorado and the ad would be run in Colorado, thereby triggering the BCRA disclosure requirements set forth in 52 U.S.C. § 30104(f), which reads in pertinent part as follows:

> Every person [here, the Independence Institute] who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall … file with the Commission a statement [that includes] the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement…. [52 U.S.C. § 30104(f).]

There can be substantial civil penalties imposed for failure to file the electioneering communication notices required by 52 U.S.C. § 30104(f)(1). First, there is a maximum civil penalty of "the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation…." 52 U.S.C. § 30109(a). For a "knowing and willful violation," the civil penalties increase to "the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation….." And criminal penalties may also be imposed for a knowing and willful violation of any provision of the Federal Election Campaign Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure. Indeed, such a violation involving an expenditure:

> (i) aggregating $25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or
> (ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both. [52 U.S.C. § 30109.]

B. The McIntyre Anonymity Principle Explained.

In a 1995 opinion written by Justice Stevens, the Supreme Court reversed the order of the Ohio Elections Commission requiring Mrs. McIntyre to pay the $100 fine. McIntyre at 357. Relying primarily upon Talley v. California, 362 U.S. 60 (1960), the Court found the Ohio forced-identity disclosure law to be a violation of the First Amendment principle of anonymity. McIntyre at 341-43. After a brief review of the history of the freedoms of speech and of the press, Justice Stevens (as had Justice Black before him in Talley) concluded that the decision whether to disclose the identity of the author, the publisher, or anyone else associated with the decision to speak out belongs, as a constitutional matter, not to the civil authorities, but to the speaker himself: "[A]n 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." McIntyre at 342. Indeed, Justice Stevens continued:

> Anonymity … provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," … the most effective advocates have sometimes opted for anonymity. [*Id.* at 342-43.]

In sum, the McIntyre ruling stands for the fixed principle that a law which requires the public disclosure of the identity of the author, publisher, distributor, circulator, or sponsor of a communication advocating support or opposition to a government policy is unconstitutional because such a law divests editorial control vested in the people by the freedoms of speech and

the press, to the exclusion of the government. *See id.* at 348, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). As Chief Justice Burger wrote in Miami Herald:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.... The choice of material to go into a newspaper, and the decisions made as to limitations on the ... content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. [*Id.* at 258.]

C. The First Amendment Anonymity Principle Applied to BCRA.

Like Mrs. McIntyre's handbills issued in the name of the Concerned Parents and Taxpayers, the advertisement proposed by the Independence Institute does not provide the names and addresses of the persons on whose behalf the Institute is acting. Like the Ohio law which prohibited the circulation of any handbill without naming the person responsible for the content of the handbill, BCRA would require the disclosure of the names and addresses of the Institute's major donors, the persons ultimately responsible for the proposed advertisement. This Court should strike down the BCRA law as applied to the Independence Institute, the same as the Supreme Court did to the Ohio forced disclosure law as applied to Mrs. McIntyre. As observed in McIntyre, "the [anonymous] speech in which Mrs. McIntyre engaged — handing out leaflets in the advocacy of a politically controversial viewpoint — is the essence of First Amendment expression (*id.* at 347)." Likewise, the politically controversial viewpoint speech proposed by the Independence Institute is equally the essence of such First Amendment expression. Indeed, as Justice Stevens exclaimed in his McIntyre opinion: "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id.* at 347 (emphasis added).

D. There Is No Good Reason Not to Apply the Anonymity Principle Here.

In its Memorandum in Support of its Motion for Summary Judgment, Independence Institute emphasizes that forced disclosure of the names of the Institute's major donors violates their "associational privacy." Plaintiff's Motion at 11-13. But the right of the people to associate together for a common cause also enhances their ability to persuade others by presenting a united front behind the Institute's policy positions. *See* Plaintiff's Motion at 26. *See also* NAACP v. Alabama, 357 U.S. 449, 460 (1958). Oftentimes, individuals associate with one another, designating some brave souls to lead the way, leaving the tactics, priorities, and strategies in the hands of others. Forced disclosures upend these tactical decisions, and might even cause divisions and dissension within the ranks, eroding the effectiveness of the association in reaching its policy goals.

Additionally, the Institute expressed concern about how the strength of the government's purported interest in a more fully informed people is carefully circumscribed, contending that whatever "informational interest" the government has is "'narrowly limited' … to 'spending that is unambiguously campaign related.'" *See* Plaintiff's Motion at 14. Relying on the anonymity principle, however, Justice Stevens flat out stated that, "Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement." McIntyre at 349. Not only did Justice Stevens find the OEC's informational interest a weak reed, but more importantly, he found that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." *Id.* at 348.

To be sure, Justice Stevens did concede that the state's informational interest, **if** coupled with a disclosure requirement governing campaign expenditures, could justify the mandatory disclosure of campaign donors in the interest of combating *"quid pro quo"* corruption. McIntyre at 356. But that is not the case here. As the Institute's motion ably points out, the ad contains no unambiguously campaign-related speech, and is an electioneering communication in name only — there being no electioneering in fact. *See* Plaintiff's Motion at 13-16, 38.

E. The McIntyre Anonymity Rule Should Prevail.

Mrs. McIntyre's leaflet activity opposing a local school board tax levy may appear pedestrian when compared with the Independence Institute's polished radio ad addressing national criminal sentencing policy. But the constitutional rule of anonymity applies equally to both. Paraphrasing Justice Stevens' observation in McIntyre: "Urgent, important, and effective speech [like that of the Independence Institute] can be no less protected than impotent speech [like that of Mrs. McIntyre], lest the right to speak be relegated to those instances when it is least needed." *See* McIntyre at 347. The rule of anonymity applies across the board regardless of the importance of the policy issue at stake, or of the likely impact of the communication involved. *See id.* at 348-49.

II. THE BCRA FORCED DISCLOSURE RULE VIOLATES THE FREEDOM OF THE PRESS, AS EXPRESSED IN TALLEY V. CALIFORNIA.

As noted above, Talley v. California — the primary precedent upon which McIntyre rests — traced the anonymity principle back to the freedom of the press. *See* McIntyre at 341-42. As Justice Black observed in Talley:

> The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. [*Id.* at 64-65.]

To be sure, BCRA does not employ the literal historic rack and screw, but as the Institute has demonstrated, "[o]nce triggered, BCRA's electioneering communication disclosure system is burdensome." *See* pp. 9-10. Continuing, the Institute points out that the reporting burdens are especially heavy when applied to small organizations, leaving them with "an unconstitutional choice: either stay silent on issues important to its mission or violate the privacy rights of its donors and comply with heavy administrative burdens." *Id.* at 10.

Like the English licensing system condemned in Talley, the BCRA disclosure mandate imposes a form of censorship, with the heaviest burden falling on those organizations that do not have the wherewithal to pay both the administrative costs in addition to the cost of the distribution of the advertisement. And, as Talley points out, "'[l]iberty of circulating is as essential to [the freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* at 64. It is no wonder then that "[b]efore the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts." *Id.* at 65.

But there is an even greater principle at stake here than assessing costs and benefits, as modern courts are wont to do, in deciding whether a law unconstitutionally "burdens" a First

Amendment right. Concurring in the judgment in McIntyre, Justice Thomas faulted the majority for not asking the right question: "whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting." *Id.* at 359 (Thomas, J., concurring). With that introduction, Justice Thomas dove into early American history, zeroing in on the "most famous American experience with freedom of the press, the 1735 Zenger trial, [noting that it] centered around anonymous political pamphlets." *Id.* at 361. As Justice Thomas retold the story, the seditious libel charge against Zenger, a printer, was that he "refused to reveal the anonymous authors of published attacks on the Crown Governor of New York." *Id.* The jury refused to convict, "set[ting] the colonies afire" and "signif[ying] at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind." *Id.* at 361.

The American jury's mind undoubtedly was shaped by events in England in the 1600's. As chronicled by Sir William Blackstone in the fourth volume of his Commentaries on the Laws of England published in 1769, "[t]he art of printing, soon after it's [sic] introduction, was looked upon … as merely a matter of state, and subject to the coercion of the crown" (*id.* at 152, n.a):

> It was therefore regulated … by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. [*Id.*]

Even after the "demolition of this odious jurisdiction [the Star Chamber] in 1641," Blackstone acknowledged, it was not until 1694 that "the press became properly free … and has ever since so continued." *Id.*

By the time that Blackstone published the last volume of his Commentaries, he wrote without reservation that "[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications…." *Id.* at 151. The essence of the liberty, Blackstone continued, was that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *Id.* at 151-52. Thus, he concluded: "To subject the press to the restrictive power of a licenser …is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." *Id.* at 152.

Although Blackstone did not specifically identify the anonymity principle, can there be any doubt that a law requiring the disclosure of the identity of an author of a book, or the publisher of a political pamphlet, or the financial sponsor of a radio ad as a precondition of circulating the book, handing out of the leaflet, or the running of a radio ad would run afoul of the no-licensing principle undergirding the freedom of the press? Yet, that is what the Ohio law did in McIntyre, and what BCRA does here. Indeed, BCRA authorizes the FEC to review the Independence Institute's radio ad to ascertain whether it is a genuine issue ad, or a subterfuge electioneering communication subject to the FEC's jurisdiction and, hence, subject to its disclosure mandate. If that is not censorship, what is? Like the Star Chamber before it, the FEC functions as a licenser of the press, requiring those who use the broadcast media either to comply voluntarily with FEC regulations, or to risk civil sanction or criminal prosecution for violation of the FEC's rules. *See* Philip Hamburger, Is Administrative Law Unlawful? at 258 (Univ. Chi. Press: 2014).

As reflected in the most recent cases addressing the First Amendment freedoms of press and speech, lawyers and judges have abandoned the constitutional text and history, only to be sucked up by a quagmire of precedents that not only transcend the text, but practically obliterate it. Instead of looking at the historical meaning of the text, litigants and judges wrestle with the meaning of such terms as "**exacting scrutiny**," hoping to discover whether there is a "'**substantial relation** between the disclosure requirement and a **sufficiently important** governmental interest.'" Plaintiff's Motion at 6-7 (emphasis added). These are not constitutional terms. Indeed, they are not even legal terms with any fixed meaning. Rather, they are subjective policy considerations that yield political decisions, not legal judgments. Although a search of the constitutional text — the actual law involved in this case — may be a difficult one, as Justice Thomas's McIntyre concurrence admits, the very integrity of the oft-expressed view that "we are a government of laws, not men," is at stake. As Chief Justice Marshall emphasized in Marbury v. Madison, "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Id.,* 5 U.S. 137, 176 (1803). If it is within the "province and duty of the judicial department to say what the law is," how can courts discharge that function if they ignore the text, context, and history of the words ratified by the people as the "superior, paramount law" — this Constitution?

III. THE EFFORT BY CONGRESS TO REQUIRE SPEAKERS IN THE PUBLIC POLICY ARENA TO SELF-IDENTIFY IS BEST UNDERSTOOD AS INCUMBENTS PURSUIT OF THEIR OWN SELF-INTEREST.

This case challenges a statute cleverly crafted by incumbent legislators to discourage the public, including nonprofit organizations, from communicating with the constituencies of those Representatives and Senators about their official acts, political positions, and votes in Congress. In this case, the communication which the government seeks to severely limit included important information about an important policy issue and related legislation before Congress. Unable to impose an obviously unconstitutional complete ban on communications which would rile up their constituents, BCRA invents a category of communications that incumbents find particularly meddlesome, labels them as "electioneering communications," and then regulates those communications to the point that few would want to venture into that minefield.

Compliance with these rules requires a detailed understanding of obscure and complex statutory and regulatory terms which often have counter-intuitive definitions, including "clearly identified candidate," "publicly distributed shortly before election," "targeted to the relevant electorate," "exemptions," as well as rules on "when to file," "disclosure date," "where to file," and "content of disclosure."[5] Among the exemptions from these rules are "[e]xpenditures or independent expenditures that must otherwise be reported to the Commission…" *Id*. Therefore, it is important to note that this statute and these rules were

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[5] The FEC Brochure describing its rules for electioneering communications is now online at http://www.fec.gov/pages/brochures/electioneering.shtml (published October 2006; updated January 2010).

designed to control organizations which are not political committees, and therefore, which are not necessarily familiar with even the basics of FEC recordkeeping and reporting. In this sense, they are a trap for the unwary. The motion of the Independence Institute rightfully focuses on the "burdens" of compliance with the electioneering communication restrictions,[6] but the problem is so much more serious than that.

First, the regulatory scheme that Congress employed is shaped in such a way as to vest in incumbent Congressmen and Senators a type of trademark protection over the use of their names. Thus, the first ingredient of an electioneering communication is communication "that 'refers to a clearly identified candidate for Federal office.'" *Id.* The term "candidate" is used to make it appear that the law applies equally to both incumbents and challengers. However, it would be the rare — if not nonexistent — electioneering communication that would commandeer large amounts of money to ask the public to let their views be known on a bill before Congress to a challenger who cannot vote on the matter. Laws like BCRA are written by incumbents, not challengers, and this law, like all campaign finance laws, was written by incumbents for the benefit of incumbents.[7] The electioneering communications law severely limits the use of an incumbent's name in broadcast ads during the time of year that most Americans are paying the most attention to the activities of their elected officials in the period before elections. Protected by the trademark on their name provided by the electioneering

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[6] *See, e.g.*, Plaintiff's Motion at 8-10.

[7] Former Federal Trade Commission Chairman James C. Miller's book Monopoly Politics summarizes it this way: "More than two decades of research has concluded that the major effect of the 1974 reforms was to help incumbents ward off challengers." J. Miller, Monopoly Politics, (Hoover Institution Press, 1999) at 89.

communications rules, incumbents are free to use this period before an election to legislate while interest groups are largely muzzled.

Second, the electioneering communications rules were actually calculated to deter communications about issues presently before Congress. The issue ads which the law targets are generally designed to urge the public to contact incumbents and let them know how they feel about pending legislation or an important policy issue. Without receiving public pressure, incumbents decide how to vote based on their own independent political calculus, without any meddlesome input from the electorate to which they have no desire to be accountable. The law's specific benefit to incumbents is to prevent public input to Congress — known as "grassroots lobbying." To the extent that the criminal restrictions on electioneering communications chills grassroots lobbying, that serves the purposes of the incumbent nicely.

Third, for those who nevertheless decided to run ads, the rules on electioneering communications require nonprofit organizations to disclose the names of their major donors, so that powerful members of Congress can have a complete list of the names and addresses of those relatively wealthy persons who would dare to meddle in their states and districts. Of course, since an overwhelming number of Senators and Representatives who seek re-election achieve that goal and will continue to wield governmental power, this discourages dissenting voices from expressing their opinions. Congressmen have one overriding objective: re-election. And they have one secondary goal: preventing their constituencies from pressuring them in how to vote, which causes at least some voters to be annoyed with them. Accordingly, incumbents have designed campaign finance laws and the rules on electioneering communications to benefit incumbents and allow them to be able to vote and act as they please,

with as little interference from their constituencies as possible. *See generally* J. Miller, Monopoly Politics, pp. 89, 127-29. The public rationale for laws like BCRA is always high-sounding — that "the people" might be better able to evaluate the message by knowing who is communicating — but this is subterfuge. Just as King George wanted to know the name of the person identified as "An Englishman" who published Common Sense, Senators McCain and Feingold wanted to know who would dare to communicate with their constituents about their activities in Washington, D.C.

Fourth, the rules on electioneering communications are not true campaign finance laws at all. They regulate issue ads with neither express advocacy, nor the functional equivalent of express advocacy. They are restrictions on grassroots lobbying — not electioneering. They regulate efforts by the public, including nonprofit organizations like Independence Institute, to put pressure on Congressmen to vote a particular way in their capacity as legislators. These communications do not address them in their capacity as candidates. Yet these politicians take full advantage of the fact that incumbents wear both hats, purporting to enact campaign finance laws, but really seeking to restrict grassroots lobbying. Grassroots lobbying is considered a powerful tool, more effective than direct lobbying, because it generates public pressure, and it is often said that "Congress does not see the light until it feels the heat." The electioneering communications rules were designed to protect incumbents from that heat. This supposed connection to elections is a fraudulent justification for the rules on independent expenditures, as those rules were designed for a very different purpose than to fight *quid pro quo* corruption.

The right to criticize and petition government anonymously is not new — it is a right that traces its ancestry in the United States to the 1735 trial of printer and government critic

John Peter Zenger, and to Thomas Paine's decision in 1775 to publish the pamphlet Common Sense under the pseudonym, "An Englishman." When incumbent Congressmen establish rules governing how the American people can communicate about legislators' behavior, the courts owe Congress no deference. Rather, courts have a duty to the Constitution to strike down such laws which punish legitimate political discourse.

The motion of Independence Institute repeatedly invokes the term "informational interests" of the U.S. Government, arguing that the government's interests are not as compelling with respect to issue advocacy as they are with campaign spending. *See, e.g.,* Plaintiff's Motion at 13, 17. Certainly this is true. But these *amici* suggest that the interests that Congress was pursuing in the enactment of BCRA were not wholesome, not beneficial to the interests protected by the First Amendment, and actually were in pursuit of a wholly illegitimate interest of members of Congress — the desire to shield themselves from political criticism and pressure in their official votes. And, this has a secondary effect well known to members of Congress — if the public knew their views, then someone would disagree, and votes would be lost. Better for the incumbent that the grassroots lobbying never occur.

These illicit Congressional interests can be seen in the government's defense of the facial challenge to BCRA leading to the Supreme Court's decision in McConnell v. Federal Election Commission, 540 U.S. 93 (2003). There, the government's briefs before the three-judge court revealed that "the inducements of money" must be eliminated from the shaping of public policy so that the true "national interest" may be served. Brief of Defendants at 1. Without grassroots lobbying, members of Congress have greater latitude to determine exactly what that "national interest" is on their own. The government defended the restrictions on

electioneering communications against overbreadth charges, stating only that they "may place incidental regulatory burdens on a tiny percentage of genuine issue advocacy that might be broadcast in proximity to federal elections." Br. at 163. Of course, if that was all such restrictions did, the ads would not have been regulated — as the regulations would provide no benefit to incumbents. And the government explained that, since the electioneering communications restrictions represented the "judgment that Congress came to only after many years of deliberation over the constitutionality of the statutory provisions," "'considerable deference'" to these laws was justified. *Id*. But when members of Congress enact legislation to immunize themselves from public criticism and input, they should be entitled to no deference whatsoever. As Justice Kennedy explained in his dissent in McConnell, "Our precedents teach, above all, that Government cannot be trusted to moderate its own rules for suppression of speech." McConnell at 288.

CONCLUSION

Plaintiff Independent Institute's Motion for Summary Judgment should be granted and an injunction should issue against the Federal Election Commission's enforcement of 52 U.S.C. § 30104(f) and related Commission regulations governing electioneering communications by nonprofit organizations.

Respectfully submitted,

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