Oral Argument Scheduled for September 14, 2012
Nos. 12-5117 & 12-5118

In The United States Court of Appeals
for the District of Columbia Circuit

CENTER FOR INDIVIDUAL FREEDOM, and
HISPANIC LEADERSHIP FUND,
Defendants-Appellants,
v.
CHRIS VAN HOLLEN,
Plaintiff-Appellee,
and
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Columbia

BRIEF *AMICUS CURIAE* OF FREE SPEECH COALITION, *ET AL.* IN SUPPORT OF APPELLANTS AND REVERSAL

Mark Weinberg
WEINBERG, JACOBS & TOLANI, LLP
10411 Motor City Drive, Ste. 500
Rockville, MD 20817

Gary G. Kreep
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 3
Ramona, CA 92065-2355

*Herbert W. Titus
William J. Olson
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
* Counsel of Record
Attorneys for *Amici Curiae*

June 27, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

Except for *amicus* Senator Mitch McConnell, all parties, intervenors, and *amici curiae* appearing before the district court below and this Court are listed in the Briefs for Appellants. The following are the *amici curiae* filing this brief:

- Free Speech Coalition, Inc. (www.freespeechcoalition.org)
- The Free Speech Defense and Education Fund, Inc.
- U.S. Justice Foundation (http://usjf.net/)
- Institute on the Constitution (http://www.theamericanview.com/)
- American Civil Rights Union (http://www.theacru.org/)
- Citizens United (http://www.citizensunited.org/)
- Conservative Legal Defense and Education Fund (www.cldef.org)
- Downsize DC Foundation (http://www.downsizedcfoundation.org/)
- DownsizeDC.org (http://www.downsizedc.org/)
- Gun Owners of America, Inc. (www.gunowners.org)
- Gun Owners Foundation (http://www.gunowners.com/)
- Let Freedom Ring USA (http://www.letfreedomringusa.com/)
- The National Right to Work Committee (http://www.nrtwc.org/)
- Public Advocate of the U.S. (http://www.publicadvocateusa.org/)

- U.S. Border Control (http://www.usbc.org/)
- The U.S. Constitutional Rights Legal Defense Fund, Inc.
- Base Connect, Inc. (http://www.base-connect.com/)

Ruling under Review

References to the ruling at issue appear in the Brief for Appellants.

Related Cases

To the best of counsel's knowledge, this case has not previously been before this Court or any court other than the district court below. Counsel are unaware of any related cases currently pending in this Court or any other court.

DISCLOSURE STATEMENT

The *amici curiae* herein, Free Speech Coalition, Inc., The Free Speech Defense and Education Fund, Inc., U.S. Justice Foundation, Institute on the Constitution, American Civil Rights Union, Citizens United, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners of America, Inc., Gun Owners Foundation, Let Freedom Ring USA, The National Right to Work Committee, Public Advocate of the United States, U.S. Border Control, The U.S. Constitutional Rights Legal Defense Fund, Inc., and Base Connect, Inc., through their undersigned counsel, submit this Disclosure Statement pursuant to Rule 26.1(b), Federal Rules of Appellate Procedure ("Fed. R. App. P."), Rule 26.1(c), Rules of the United States Court

of Appeals for the District of Columbia Circuit ("Circuit Rules"), and Fed. R. App. P. 29(c).

All of these *amici curiae*, except for Institute on the Constitution and Base Connect, Inc., are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. Institute on the Constitution is an unincorporated entity. Base Connect, Inc. is a privately owned corporation with no parent company, which assists nonprofit organizations. Most of the *amici curiae* are organizations exempt from taxation under Internal Revenue Code section 501(c)(4) and have an interest in promoting their respective missions through the types of advocacy regulated by the Federal Election Commission.

/s/ Herbert W. Titus
Herbert W. Titus

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GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act of 2002
CFIF	Center for Individual Freedom
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
FSC	Free Speech Coalition, Inc.
FSDEF	The Free Speech Defense and Education Fund, Inc.
WRTL	Wisconsin Right to Life

INTEREST OF *AMICI CURIAE*

Amici curiae[1] Free Speech Coalition, Inc., The Free Speech Defense and Education Fund, Inc., U.S. Justice Foundation, American Civil Rights Union, Citizens United, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners of America, Inc., Gun Owners Foundation, Let Freedom Ring USA, The National Right to Work Committee, Public Advocate of the United States, U.S. Border Control, and The U.S. Constitutional Rights Legal Defense Fund, Inc., are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code, and each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. *Amicus* Institute on the Constitution ("IOTC") is an educational organization reconnecting Americans with the history of the Republic. *Amicus* Base Connect, Inc. is a for-profit corporation that provides fundraising support for nonprofit advocacy organizations and has an interest in the First Amendment rights of its clients.

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. These *amici* have filed a Representation of Consent of Parties to the Filing of Brief *Amicus Curiae*.

Four of the *amici* herein (Gun Owners of America, Inc., Citizens United, DownsizeDC.org — then RealCampaignReform.org — and The National Right to Work Committee) were plaintiffs in an unsuccessful facial challenge, *inter alia*, to Bipartisan Campaign Reform Act of 2002 ("BCRA") section 203 in McConnell v. FEC, 540 U.S. 93 (2003).[2] Thereafter, *amicus* Citizens United submitted an *amicus* brief in Wisconsin Right to Life v. FEC ("WRTL I"), 546 U.S. 410 (2006), where the U.S. Supreme Court decided that an as-applied challenge to BCRA Section 203 had not been foreclosed by the McConnell decision.[3] This led to an as-applied challenge to BCRA Section 203 in which an *amicus* brief was filed by several *amici* herein (Citizens United, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Free Speech Coalition, Inc., The Free Speech Defense and Education Fund, Inc., Public Advocate of the United States, DownsizeDC.org, and Downsize DC Foundation) in FEC v. Wisconsin Right to Life ("WRTL II"), 551 U.S. 449 (2007).[4]

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[2] *See*, e.g., Brief for Appellants Congressman Ron Paul, *et al.*, pp. 34-39, http://www.lawandfreedom.com/site/election/PaulApp.pdf.

[3] *See* Brief *Amicus Curiae* of Citizens United and Citizens United Foundation in Support of Appellant (Nov. 14, 2005), http://www.lawandfreedom.com/site/ constitutional/CU_WRTL_amicus.pdf.

[4] *See* Brief *Amicus Curiae* of Citizens United, *et al*. (Mar. 23, 2007), http://www.lawandfreedom.com/site/election/WRTL%20II%20amicus.pdf.

Following the Supreme Court's decision in WRTL II in 2007, the FEC conducted a rulemaking to modify its regulations to comport with that decision by determining the scope of the electioneering communications exemption. *Amici* Free Speech Coalition and The Free Speech Defense and Education Fund participated by submitting comments[5] and providing testimony[6] at the FEC's hearing on October 18, 2007. *Amicus* Citizens United also submitted comments[7] and provided testimony in the FEC's 2007 rulemaking.[8]

When Rep. Van Hollen introduced the "Democracy Is Strengthened by Casting Light On Spending in Election Act" ("Disclose Act") in 2010, the Free Speech Coalition strongly opposed it.[9]

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[5] Free Speech Coalition, Inc. and The Free Speech Defense and Education Fund, Inc. Comments on the FEC's Proposed Regulations on Electioneering Communications (72 FR 50261) (Oct. 1, 2007), http://www.freespeechcoalition .org/pdfs/FEC_Electioneering_Com.pdf.

[6] Statement of Jeremiah L. Morgan (Oct. 18, 2007), http://www.lawandfreedom.com/site/election/JLM_10-18-07.pdf.

[7] Comments of Citizens United Concerning Proposed Revisions to Rules Governing Electioneering Communications (Oct. 1, 2007), http://sers.nictusa.com/fosers/ showpdf.htm?docid=4954.

[8] After the FEC's 2007 rulemaking, Citizens United became the plaintiff in Citizens United v. FEC, decided by the Supreme Court in 2010.

[9] http://freespeechcoalition.org/pdfs/DISCLOSE_Act_Analysis.pdf.

Amici were not aware that Sen. McConnell was submitting a brief herein, and thus did not know to coordinate with him when he filed his brief on the same day as Appellants. Further, the Senator's interest is significantly different than that of the 17 *amici* who join together to file this brief, most of which have had long involvement with the regulations at issue, and whose interests are more focused on the principle of anonymity and the increased administrative burden from disclosure that would be imposed on political speech by the district court's opinion. Although Senator McConnell is not a "government entity" for the purpose of Circuit Rule 29(d), he is an incumbent office holder and presumed to be a candidate for re-election, and he has very different interests from the organizational *amici* herein. And different issues are addressed in the two briefs. Finally, *amici* are not aware of any other *amicus curiae* briefs at this time.

SUMMARY OF ARGUMENT

The BCRA section 201 provision requiring disclosure of the names and addresses of all contributors who contributed an aggregate of $1,000 or more is subject to the rule of statutory construction to avoid serious constitutional problems. Contrary to the opinion of the court below, and the opinion of this Court on motion for a stay of judgment, the Supreme Court did not address or resolve in Citizens United the constitutionality of whether the disclosure

requirement applied to any donor who gave money generally to the publisher of an electioneering communication without direction as to how the funds should be used.

The district court was also mistaken in its assumption that the only constitutional standard governing forced disclosures of the identity of "contributors who contributed" is whether there is evidence that such disclosure would threaten, harass, or cause retaliation against any such donor. This Court was also mistaken in its assumption that the constitutional standard governing forced disclosure of donors' identities is subject only to whether Congress had a rational basis for requiring such disclosures.

To the contrary, forced disclosures are subject to "exacting scrutiny" requiring proof of a strong governmental interest in the prevention of corruption or the appearance of corruption. The government interest in a better informed public, standing by itself, is not sufficient to override the well-established anonymity principle undergirding the freedoms of speech and the press. To avoid compromising that principle, BCRA's disclosure provision should be construed to require proof that the "contributor who contributed" did so with the specific purpose of supporting an electioneering communication.

Moreover, there is no constitutionally legitimate basis to require any reporting and disclosure for any communication merely because it mentions the name of a candidate for federal office. To label such communications as anything more than issue advocacy is to apply a misnomer.

Additionally, to justify such disclosure requirements as furthering the interest of the government in a better informed public camouflages the real purpose — to protect incumbent office holders at the expense of their challengers. Forced disclosure is anathema to this nation's founding commitment to a self-governing people's marketplace of ideas free from licensure and censorship by the government.

ARGUMENT

I. BCRA SECTION 201 IS SUBJECT TO THE RULE OF STATUTORY CONSTRUCTION TO AVOID SERIOUS CONSTITUTIONAL PROBLEMS.

In its brief, appellant Center for Individual Freedom ("CFIF") argues that BCRA section 201 is subject to the rule that statutes are construed to avoid serious constitutional problems. *See* CFIC Brief, pp. 36-40. This salutary rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." DeBartolo Corp. v. Florida Gulf

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). While there is no constitutional claim being made in this case, there is no question that there are constitutional problems lurking in the wings should the district court's decision be affirmed striking down 11 C.F.R. § 104.20(c)(9) governing forced disclosure of "contributors who contributed." Indeed, it is because of previous constitutional litigation that the FEC conducted its 2007 rulemaking. Prudence would dictate, therefore, that this Court apply this rule of construction to avoid serious constitutional problems that need not be confronted.

CFIF contends that construing the BCRA section 201 disclosure provision to apply to any person who has made a financial contribution regardless of the contributor's purpose "imposes significant burdens" on the contributor's freedom of speech. CFIF Br. at 36. Thus, CFIF has argued that section 201 ought to be construed to permit the FEC rule that only those contributors whose purpose is to support an electioneering communication need be disclosed.

To date, both the district court below and this Court have declined to apply this rule of construction, on the ground that Citizens United has "already rejected [CFIF's] constitutional arguments." *See* Van Hollen v. FEC, 2012 U.S. App. LEXIS 10333*, p. 8*. *See also* Van Hollen v. FEC, 2012 U.S. Dist. LEXIS 44342*, p. 53 ("[A]ny constitutional concerns that defendant-intervenors raised

about the burdens the regulation would impose were addressed by the Supreme Court in *Citizens United*....”). Both opinions are mistaken. Although Citizens United addressed BCRA’s disclosure requirement, it did not assess the precise constitutional question raised by CFIF here. Consequently, it did not address the adverse impact that rejection of 11 C.F.R. § 104.20(c)(9) would have, not only on the freedom of speech, but also on the freedom of the press.

A. The Forced Disclosure Issues in this Case Were Not Addressed in Citizens United.

Citizens United resolved two particular aspects of challenges to the BCRA section 201 disclosure requirements. First, Citizens United argued that the disclaimer provision requiring disclosure of those responsible for the electioneering communication adversely burdened the freedom of speech. That challenge was rejected on the ground the disclaimer provision promotes accountability to the citizenry and shareholders, and contributes to “informed decisions” by the “electorate.” Citizens United, 558 U.S. __, 130 S.Ct. 913-16 (2010). To resolve this question, the Court paid careful attention to (a) the statutory definitions describing the person responsible for the publication of the electioneering communication and (b) the specific disclaimers and particularized

disclaiming language required. *See id.* at 913-14. *See also* 2 U.S.C. sections 434(f) and 441(d)(2).

Second, the Citizens United Court addressed the disclosure requirements of those persons who paid for the electioneering communications without, however, paying comparable attention to the meaning of the statutory phrase, "contributors who contributed." Instead, it addressed the constitutionality of forced disclosure of "the names of certain contributors" in general terms. *See id.* at 915-16. On the one hand, the Court addressed the constitutionality of forcing the disclosure of "the funding sources of the ads." *See id.* at 915. On the other hand, the Court addressed the constitutionality of forced disclosure of the names of Citizens United's "donors." *Id.* at 916. Indeed, in back-to-back sentences the Citizens United Court addressed the First Amendment question as if the issue were whether disclosure requirements "chill donations to an **organization** by exposing donors to retaliation," and then addressed the question of the threat of retaliation as if the issue were whether the forced disclosure threatened the identities of "**donors to certain causes**." *Id*. (emphasis added).

Such indiscriminate treatment without engaging in a discrete discussion of the meaning of "contributor who contributed" demonstrates that the distinction raised by CFIF — between (i) a person who contributes for the purpose to help

pay for a specific electioneering communication, and (ii) a person who gives money to that communicator generally — was not raised, much less decided, in Citizens United.

B. Citizens United Does Not Limit the Constitutional Scope of Forced Disclosure to Evidence of Threats or Reprisals.

Relying on Citizens United, the district court assumed that the BCRA "disclosure requirements" inevitably facilitate "'informed choices in the political marketplace.'" 2012 U.S. Dist. LEXIS at 53*-54*. Thus, it assumed that, by vacating the FEC rule requiring disclosure of only purposeful contributions, the electorate would be just as informed about the sources of election-related spending as it would be if the FEC rule were left in place. According to this reading of Citizens United, "the only outer limit the Court seems to have imposed is whether disclosure would subject an organization's donors to threats or reprisals...." *Id.* at 53*-54*.

In its brief, however, CFIF has challenged the district court's reading of Citizens United, asserting that "[a] law that conditions the right to free political speech on disclosure of the speaker's supporters or funding sources imposes significant burdens on that speech, regardless of whether those who are disclosed face retaliation." *See* CFIF Br., p. 36. CFIF's argument is not new. Fifty-two

years ago, the Supreme Court struck down a state law outlawing anonymous pamphlets without requiring any proof that forced disclosure of the author would trigger open retaliation:

> The obnoxious press licensing law of England, which also was 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. [Talley v. California, 362 U.S. 60, 64 (1960).]

The freedom of the press established that "[e]very freeman has the undoubted right to lay what sentiments he pleases before the public,"[10] including the right to publish anonymously. McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342-43 (1995). This right against forced disclosure was not confined to only those who could prove that they were actually threatened or retaliated against or harassed. As the Supreme Court observed in McIntyre, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity."[11] *Id.*, 514 U.S. at 342.

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[10] IV W. Blackstone, Commentaries on the Laws of England, p. 151 (Univ. Of Chi. Facsimile ed.:1789).

[11] *See, e.g.,* the account of Noah Webster signing a pamphlet with a pen name, "A Citizen of America." "Having been recently vilified in the popular press, ... this pen name, he felt was likely to improve his chances of getting a fair hearing." J. Kendall, The Forgotten Founding Father 166 (Penguin:2010).

Just because the Citizens United Court focused its analysis on lack of evidence of retaliation does not mean, as the district court apparently assumed, that forced disclosure of one's name as author or publisher violated the First Amendment only if there was actual evidence of threats, harassment, or retaliation. There is nothing in the Citizens United opinion to indicate that retaliation is the singular standard by which the constitutionality of a disclosure requirement is to be measured. *See id.*, 130 S.Ct. at 916. Moreover, for the reasons discussed in Section II, *infra*, the Citizens United opinion applying the retaliation standard must be read in the context of non-electoral process cases, such as McIntyre v. Ohio Elections Commission, which establish that "the purpose of the ... First Amendment in particular [is] to protect unpopular individuals [not only] from retaliation but [their] ideas from suppression – at the hand of an intolerant society." *Id.*, 514 U.S. 334, 357 (1995).

C. Citizens United Does Not Establish that Forced Disclosure Is Generally Permissible In the Free Marketplace of Ideas.

In its opinion denying an emergency order for a stay, this Court assumed that there was no constitutional reason to narrow the class of "contributors" to only those persons whose purpose for contributing was to facilitate the publication of electioneering communications. In support of its ruling, this Court emphasized

that "Congress was clear that *all* contributors of $1,000 or more are covered." 2012 U.S. App. LEXIS at 7* (italics original). In justification of its expansive reading that "all contributors" means "all givers" regardless of purpose, this Court stated that "Congress could have **rationally** concluded that organizations expressly advocating for or against specific candidates are more ascertainable and accountable, and thus opted for greater disclosure of funding sources for more nebulous organizations that do not expressly advocate for or against specific candidates." 2012 U.S. App. LEXIS at 7*-8* (emphasis added).

Respectfully, the Court simply employed the wrong standard. Whether Congress had a "rational" basis for extending the disclosure requirement to all contributors who contribute without regard to purpose is not the constitutional framework within which to assess the authority of the FEC under the Chevron doctrine. The FEC is not an agency established by Congress to regulate interstate commerce where "rationality" is the measuring rod of constitutionality. *See, e.g.,* Katzenbach v. McClung, 379 U.S. 294, 304 (1964). To the contrary, as Citizens United plainly states, disclosure requirements are subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914. The question, then, is not whether it is rational to conclude that Congress employed "the ordinary

meaning of contributor" in fixing who was subject to BCRA's disclosure requirement. Rather, the question is whether the ordinary meaning of contributor bears a substantial relationship to important government interests. The FEC, the agency that Congress put in charge of enforcing nearly all of BCRA, concluded that "contributor" should be construed, not according to its meaning in Webster's dictionary, but in harmony with the general meaning of "contribution" set forth in FECA of which BCRA is an integral part. *See* CFIF Br., pp. 27-35.

Ironically, this Court's "rationality test" would afford greater constitutional protection to FECA's "express advoca[cy] for or against specific candidates" than for a BCRA-sanctioned electioneering communication that only refers to such candidates. According to this "rationality" test, Congress "could have" concluded that express advocacy for or against a candidate is, on its face, "more ascertainable and accountable" than implied advocacy, and thus, Congress "opted for greater disclosure of funding sources for more nebulous organizations that do not expressly advocate for or against a specific candidate." 2012 U.S. App. LEXIS at 7*-8*.

This would turn FECA on its head, unhinging the government's secondary interest in an informed electorate in the general marketplace of ideas from the government's primary interest in ridding the electoral process of corruption and

the appearance of corruption. As the Supreme Court stated in McIntyre v. Ohio Elections Commission, the governmental "informational interest is plainly insufficient to support the constitutionality of [a] disclosure requirement." *Id.*, 514 U.S. at 349.

It is the threat of corruption and the appearance of corruption in the electoral process that undergirds forced disclosure. Thus, in McIntyre, the Supreme Court ruled:

> In candidate elections, the Government can identify a compelling state interest in avoiding the **corruption** that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse. [*Id.*, 514 U.S. at 356 (emphasis added).]

This rationale could apply only to contributors whose purpose is to help finance an electioneering communication, including ones that "merely mention a federal candidate,"[12] but certainly makes no sense with respect to contributors whose purpose is otherwise.[13] To the contrary, a person who gives money to an

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[12] *See* Real Truth about Abortion v. FEC, No. 11-1760 (4th Cir. June 12, 2012).

[13] Section II, *infra*, explains why this rationale is flawed in application to all electioneering communications.

organization which participates in a wide variety of speech and press activity which does not include any covered BCRA electioneering communication is constitutionally entitled to anonymity:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think 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.... The simple interest in providing voters with additional relevant information does not justify a ... requirement that a writer make statements or disclosures she would otherwise omit. [McIntyre, 334 U.S. at 348.]

In light of this well-established anonymity principle, it makes good sense for the FEC to construe the statutory "contributors who contributed" phrase to include only those persons who give money for the purpose of supporting a covered BCRA electioneering communication, lest the disclosure requirement invade the right of editorial control secured to the people by the freedom of the press. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

CFIF contends that the burden of disclosing the names of each person who has given an organization an aggregate amount of $1,000 or more for the period, without regard to whether the contributor purposed that it be spent on electioneering communications, would shut the door on electioneering communications. CFIF Br., p. 36. Indeed, the district court's order vacating the

FEC rule that would require proof of purpose as a condition of disclosure already has prompted organizations to change their electioneering communications into express advocacy ads, thereby bringing them under the rule requiring disclosure only of those persons who have contributed "for the purpose of influencing" the election of a named candidate, as provided in 2 U.S.C. section 431(8)(A)(i). *See* D. Eggen, "Chamber says it will evade disclosure ruling by tweaking ads," *Washington Post* (May 30, 2012).[14]

II. There Is No Legitimate Basis to Require Any Reporting and Disclosure for Targeted, Broadcast Issue Ads which Mention the Name of a Candidate.

Congressman Van Hollen's complaint and the district court's opinion presume not just that BCRA section 201(a) mandates the FEC to require the reporting and disclosure of electioneering communications, but also that such reporting and disclosure have been sanctioned by reviewing courts. At the time that BCRA was enacted and the FEC's rulemaking was conducted in 2007, the only two decisions which had addressed federal election reporting and disclosure were Buckley v. Valeo, 424 U.S. 1 (1976) and McConnell v. FEC, 540 U.S. 93 (2002). WRTL II did not address reporting and disclosure, no challenge having

[14] http://www.washingtonpost.com/politics/the-influence-industry-chamber-says-it-will-evade-disclosure-ruling-by-tweaking-ads/2012/05/30/gJQA8eMk2U_story.html.

been brought to those provisions. Indeed, FEC's 2007 rulemaking relied on the absence of such a challenge in WRTL II to justify its view that the FEC's reporting and disclosure rules still applied, and required the FEC to conduct a rulemaking to consider how to apply them.[15] However, close examination of Buckley and McConnell reveals support for neither the extensive reporting and disclosure demanded by Congressman Van Hollen and the district court, nor the limited reporting and disclosure required under the FEC's 2007 regulations for electioneering communications.

Before examining those cases, it is important to identify the true nature of the advertisements under review. Considerable confusion in the public debate appears to have been caused by the very terminology selected by Congress in BCRA — "electioneering communication." By that name, it would seem logical, even obvious, that most of these communications expressly address federal elections, but the opposite is true. BCRA section 201(a) defines the term "electioneering communications" to **exclude** "a communication which constitutes an **expenditure** or an **independent expenditure** under this Act." (Emphasis

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[15] Three years after the FEC's 2007 rulemaking was conducted, the Citizens United case was decided. Section I, *supra*, explains why reliance on that decision to support the type of reporting and disclosure required by the FEC in its 2007 rules is problematic.

added.) As a result, by definition, there is no such thing as an electioneering communication which either: (i) contains express advocacy, or (ii) "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate" (11 C.F.R. § 114.15(a)). If a targeted, broadcast, communication referring to a clearly identified federal candidate made shortly before elections (meeting the four tests in BCRA section 201(a)(3)) were to contain express advocacy or its equivalent, then reporting and disclosure would be governed by other provisions of 2 U.S.C. section 434, but not section 434(f).

Accordingly, electioneering communications would have been better described as "targeted issue ads naming a federal candidate broadcast when citizens are most focused on the record of incumbents." If such a label had been applied to such communications, it would be obvious why Congress has chosen to regulate them: so that Congressmen would know detailed information about an ad where the sponsor had the temerity to name a federal candidate — generally, an incumbent legislator — and then tell his constituents how he has voted. As electioneering communications are neither FECA contributions nor expenditures, they are, by definition, not being made "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. § 431(8) and (9). Therefore, the constitutional

rationale for requiring reporting and disclosure of FECA contributions and expenditures simply does not apply.

Of course, Buckley v. Valeo involved the reporting and disclosure of FECA "contributions" and "expenditures" under 2 U.S.C. section 431(8) and (9). In Buckley, the lead plaintiff was an incumbent office holder, and none of the plaintiffs even challenged the disclosure requirements "as per se unconstitutional," but conceded that "narrowly drawn disclosure requirements are the proper solution to virtually all the evils Congress sought to remedy." *Id.* at 60. In response to this passive challenge, the Court identified the "governmental interests sought to be vindicated by the disclosure requirements" as (i) "provid[ing] the electorate with information," (ii) "deter[ing] actual corruption and avoid[ing] the appearance of corruption," and (iii) providing "an essential means of gathering the data necessary to detect violations of the contribution limitations...." *Id.* at 66-68. All three of these reasons purported to justify disclosure of financial activity made for the purpose of influencing a federal election and are inapposite here. The informational rationale is called into question by McIntyre. *See* McIntyre, 514 U.S. 349, as discussed in Section I.C, *supra*. Further, once WRTL II struck down restrictions on electioneering communications, the rationale about detecting violations no longer applies. In dissent in Buckley, Chief Justice Burger found it

remarkably candid for the Court to acknowledge that "public disclosure ... will deter some individuals who otherwise might contribute" and that at least one Senator admitted that "disclosure provisions really have in fact made it difficult for challengers to challenge incumbents.'" *Id*. at 237. Former FEC Chairman Bradley Smith explained that "The [disclosure] interest identified by the *Buckley* Court doesn't really exist at all. In fact, focusing on the sources of money may simply distract voters from analyzing the underlying issues [and] impoverish debate." B. Smith, Unfree Speech: The Folly of Campaign Finance Reform, Princeton Univ. Press (2001), p. 224. In McConnell, the Court did little more than rely on Buckley, finding that it "forecloses a facial attack" on disclosure relating to electioneering communications, and then finding that the three factors addressed in Buckley "amply support[] application of FECA section 304's disclosure requirements to the entire range of "electioneering communications." McConnell, p. 193. In McConnell, the Court never analyzed the reporting and disclosure requirements of electioneering communications in any way different from FECA contributions and expenditures.

Primarily based on these two decisions, the mantra has developed on Capitol Hill and elsewhere that reporting and disclosure are the answer to the problem of corruption and the appearance of corruption in federal elections

because they inform the public about who is doing what with respect to money and federal elections. But that mantra does not apply with respect to targeted, broadcast issue ads naming a federal candidate, which by definition are **not** electoral in context. Where the reason for the rule does not apply, so also should not the rule. If electioneering communications contain express advocacy, or are susceptible of no other interpretation, they are immediately, by operation of statutory definition, transmuted out of the category of being electioneering communications and into the category of expenditures or independent expenditures where Buckley and McConnell could be read as requiring reporting and disclosure. But without express advocacy or the equivalent, the only connection they have with elections is that they mention federal candidates — usually incumbents — and only by fiat of those same "powers that be," do they attain the label "electioneering communication."

It is no coincidence that the instant litigation was brought by incumbent Congressman Van Hollen, and that his standing is based on "his intention to seek re-election in November 2012 and communications related to that election will be subject to the regulation at issue in this case." Van Hollen, 2012 U.S. Dist. LEXIS 44342 *4. Therefore, to demonstrate standing, Mr. Van Hollen represented to the Court: "If the FEC regulations do not faithfully implement these disclosure

provisions, I will be deprived of **information to which I am entitled** under FECA and BCRA." (Van Hollen, 2012 U.S. Dist. LEXIS 44342 *20 (emphasis added). Impliedly, Mr. Van Hollen states that he needs the information which he believes BCRA mandates be disclosed and reported, and having that information will be important to the success of his campaign for re-election.[16] While the statutory definition of electioneering communication references a "candidate for Federal office" (2 U.S.C. § 434(f)(3)(A)(i)(I)), it is worth noting the obvious, that it is incumbents that write the laws, not challengers. There is no reason to assume that incumbents write laws to benefit challengers, but there is every reason, beginning with human nature, to assume that they are written to protect incumbents.[17]

Accordingly, it is important for courts not to blindly defer, but to open their eyes wide to see the self-serving motives that Congressmen have in writing

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[16] No stranger to the methods by which incumbents attain reelction, from 2007 through 2011, Congressman Van Hollen served as Chairman of the Democratic Congressional Campaign Committee.

[17] In his book Monopoly Politics, former Chairman of the Federal Trade Commission and Director of the Office of Management and Budget, James C. Miller III, Ph.D. explained that the major effect of FECA has been to protect incumbents from challengers. "To the extent they can exclude rivals, political parties and candidates get their way on issues.... Candidates who can exclude rivals have an easier life... They can more often 'vote their consciences,' even when these positions conflict with those of their constituents.... They are less likely to suffer the humiliation of being criticized by opponents." *Id*. at 41.

campaign finance laws. The instant litigation provides yet another opportunity to consider the degree to which BCRA section 201(a) and other similar laws are written not to protect the public, but to protect incumbents. This is not a new concept. In his dissent in Citizens United, Justice Thomas revealed the greatest threat to dissident voices choosing to exercise their core right to political speech — "the threat of retaliation from elected officials."[18]

The press reports that President Obama is using the public disclosure process to create hit lists for his supporters to use for public attacks. *See* "Trolling for Dirt on the President's List," *Wall Street Journal*, May 10, 2012[19] and "Obama, NYTimes Targeting Wealthy Conservatives for a Sudden Tax Scrutiny," *The New York Sun* (June 25, 2012).[20] Understanding fully the fear that such retaliation

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[18] Justice Thomas used this illustration: "a candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent: in his words ... 'I can't afford to have my name on your records. He might come after me next.'" Citizens United, 130 S. Ct. at 981 (Thomas, J., dissenting).

[19] http://online.wsj.com/article/SB10001424052702304070304577396412560038208.html.

[20] http://www.nysun.com/national/obama-new-york-times-are-targeting-wealth/87879/.

causes, Senator Charles Schumer praised the Disclose Act, stating, "The deterrent effect should not be underestimated."[21]

Congressman Van Hollen brings this suit to be able to have detailed information about pesky organizations which would dare to criticize him in their targeted, broadcast issue ads. Incumbents particularly dislike advocacy groups (such as many of *amici* herein) communicating detailed information about an incumbent's voting record to his constituents, particularly during the period immediately before an election when the electorate is most likely to be paying attention. Congress first tried to criminalize the use of an incumbent's name by incorporated advocacy organizations, but in WRTL II, the High Court intervened. Now, one Congressman is attempting to salvage what remains of that inappropriate effort to give elected officials a sort of trademark on their own names. When the WTRL II Court struck down the limitations on electioneering communications, it should have also struck down the reporting and disclosure provisions even though they were not expressly challenged by the plaintiff. Although that issue is not before the Court at this time, it is certain that the Court

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[21] "The Influence Industry: Disclose Act could deter involvement in election," *Washington Post* (May 13, 2010) http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205094.html.

should not use those residual provisions to force an expansion of the FEC's current rules beyond what they currently require.[22]

As Justice Thomas remarked in his concurrence in McIntyre, "it is only an innovation of modern times that has permitted the regulation of anonymous speech." McIntyre at 367 (Thomas, J., concurring). Only by turning one's back

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[22] FSC/FSDEF's comments in the 2007 rulemaking made many of these same points. They explained that FEC Regulation Alternative 1 would maintain the reporting requirements for all electioneering communications, even though WRTL II determined that the definition of "electioneering communication" was unconstitutionally overbroad and prohibited protected speech, *i.e.*, an advertisement that was not "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." WRTL II, 127 S.Ct. 2667. "The constitutionality of reporting and disclosure requirements is wholly dependent upon their being linked to funding limitations imposed upon candidacies for election to federal office." FSC/FSDEF Comments, p. 4. FSC/FSDEF argued against FEC Regulation Alternative 2, even though it exempted WRTL-type communications from the disclosure and reporting requirements for electioneering communications, fell short of providing a practical means to prevent the FEC from becoming a national censor of political speech. Alternative 2 would have created several "safe harbors," purporting to define the types of language which are acceptable. This puts the FEC in the role of determining whether a particular communication was permissible or contained words that were taboo.

The FEC did appear to accept one of FSC/FSDEF's recommendations. The FEC had proposed that a communication would qualify under the WRTL II **only** "**if** the communication **is susceptible** of a reasonable interpretation **other than** as an appeal to vote for or against a clearly identified Federal candidate." In the final rule, the FEC followed the language used in the WRTL II opinion, that a corporation may make an electioneering communication "**unless** the communication is susceptible of **no reasonable interpretation other than** as an appeal to vote for or against a clearly identified Federal candidate." *See* 72 *Fed. Reg.* 72902 (emphasis added).

on early American history can incumbents like Congressman Van Hollen get away with employing the power of government to retain their positions of power in that government. As Justice Thomas' review of the history of the freedom of the press explained, "Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the freedom of the press." *Id*. at 361. It is to America's shame that the full force of that historical legacy has been forgotten.

CONCLUSION

For the reasons stated herein, the decision of the district court should be reversed.

Respectfully submitted,

/s/ Herbert W. Titus

*Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
* Counsel of Record
Attorneys for *Amici* FSC, *et al.*

Mark Weinberg
WEINBERG, JACOBS & TOLANI, LLP
10411 Motor City Drive, Ste. 500
Rockville, MD 20817
Attorney for *Amici* FSC/FSDEF

Gary G. Kreep
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 3
Ramona, CA 92065-2355
Attorney for *Amicus* USJF
June 27, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of Appellant complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,868 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point Times New Roman.

/s/ Herbert W. Titus
Herbert W. Titus
Attorney for *Amici Curiae*

Dated: June 27, 2012

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Coalition, Inc., *et al.*, in Support of Appellants and Reversal, was made, this 27th day of June 2012, by the Court's Case Management/Electronic Case Files system upon the following attorneys for the parties:

Jason Brett Torchinsky
Holtzman Vogel Josefiak, PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
jtorchinsky@hvjlaw.com

and

Thomas W. Kirby
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006-2359
tkirby@wileyrein.com

Attorneys for Appellants

Roger M. Witten
Wilmer Cutler Pickering Hale and Dorr LLP
399 Park Avenue
New York, NY 10022
Roger.Witten@wilmerhale.com

Attorneys for Appellees

/s/ Herbert W. Titus
Herbert W. Titus
Attorney for *Amici Curiae*