No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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QUESTION PRESENTED[1]

Whether applying the reporting and disclosure requirements of § 201 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") to speech that was not functionally equivalent to express advocacy violated the First Amendment.

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[1] All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with the Court. 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation representing an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's

underlying membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being. The Chamber is incorporated. For purposes of federal campaign finance regulation, the Chamber and most of its members are classified as corporations.

The Chamber plays a key role in advocating for the interests of its members, including their First Amendment rights. In that role, the Chamber was a party to the *McConnell v. FEC*, 540 U.S. 93 (2003), litigation challenging the facial constitutionality of the electioneering communication ban on corporate political speech that is the subject of the instant as-applied challenge. The Chamber regularly files briefs *amicus curiae* where the business community's right to political speech is at stake. *See, e.g.*, *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). And the Chamber also has litigated to preserve its own First Amendment rights of speech and association. *See*, *e.g.*, *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

This appeal asks whether donor disclosure requirements may constitutionally be imposed on speech received by television or radio that refers to candidates during pre-election periods but does not advocate the election or defeat of any candidate. On behalf of America's business community, the Chamber actively

engages in such speech. During 2008, the Chamber filed reports with the Federal Election Commission ("FEC") disclosing more spending on such speech than any other entity.[2] The Chamber thus is intimately aware of the burdens such filings impose and is all too familiar with the suppressive effect they have on core First Amendment speech and expressive association.

STATEMENT OF THE CASE

The First Amendment forbids applying the "electioneering communications" provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), to prohibit corporate speech that refers to candidates prior to elections but is not the functional equivalent of "express advocacy." *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). Construing *WRTL II* very narrowly, the FEC applies BCRA § 201 to such "exempt speech," deeming it unlawful unless the speaker makes various public reports and disclosures.

Section 201 and the accompanying FEC regulations require persons who spend more than $10,000 in the aggregate on electioneering communications in a calendar year to file disclosure reports with the FEC. *See* 11 C.F.R. § 104.20(a). In particular, the reports must

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[2] The disclosures are made using FEC Form 9, entitled *24-Hour Notice of Disbursements/Obligations for Electioneering Communications*, which is available on the FEC's website at *http://www.fec.gov/info/forms.shtml*. In addition to disclosing the largest amount of spending on electioneering communications in 2008, the Chamber also made more Form 9 filings than almost any other entity.

disclose each donor of $1,000 or more (aggregated yearly) that either gave in response to a solicitation for the specific purpose of engaging in electioneering communications or earmarked the donation for such a purpose, in whole or in part. *See Electioneering Communications*, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

Appellant Citizens United produced a documentary concerning U.S. Senator and presidential candidate Hillary Clinton. During the summer and fall of 2008, Citizens United sought to distribute its documentary and to broadcast ten and thirty second advertisements concerning the film. Br. of Appellant at 8. Whatever the status of the documentary itself – the parties are briefing that point – the ads clearly were "exempt speech" under *WRTL II*. Nevertheless, because Citizens United was not willing to disclose project donors, it did not broadcast those ads, *see id.* at 10, and persons interested in receiving them were entirely deprived of any opportunity to do so.

The FEC's application of BCRA § 201 to such exempt speech caused injury far beyond Citizens United, including to the Chamber. Business entities are profoundly affected by federal legislation, policy, and executive action on a wide range of issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, businesses are critically interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public, federal legislators, and other government

officials. Because elected public officials are central to the formulation and implementation of public policy, that interest often requires incumbent officeholders and candidates to be identified and discussed in public communications.

These interests do not mysteriously evaporate during the lengthy periods during which BCRA restricts electioneering communications.[3] To the contrary, Members of this Court have recognized the importance of issue ads and similar speech during pre-election

[3] The period in which BCRA forbids or restrains electioneering communications includes 30 days before each state's relevant presidential nominating primary, convention, or caucus, 30 days before the relevant national party convention, and 60 days before the relevant national presidential election. *See* BCRA § 201(a). The regulation applies to television and radio broadcasts (including cable and satellite transmissions) that can be received by at least 50,000 persons in a relevant jurisdiction. *Id.* Since broadcasts often reach multiple states that conduct nominating events on differing dates, the regulation effectively applies for much of the year prior to a presidential election. For example, many broadcasts in stations serving Boston, Massachusetts, also can be received in Rhode Island, Connecticut, Vermont, New Hampshire, and Maine. *See* Fed. Comm. Comm'n, Electioneering Communications Database (ECD), available at *http://gullfoss2.fcc.gov/ecd/* (results obtained using Boston-area stations WCBV, WHDH, and WBZ). During the 2008 election cycle, the combined presidential blackout period for those states – and hence for Boston broadcasts – encompassed six months. *See* FEC, *Electioneering Communications Periods* (2008), *available at http://www.fec.gov/info/charts_ec_dates_prez.shtml#Presidential.* As recent economic developments demonstrate, a great deal can happen during four to six months.

periods. *WRTL II*, 127 S. Ct. at 2667-68.[4] The Chamber likewise believes that both candidates and the American public are most receptive and attuned to such communications during pre-election periods. Thus, since December 26, 2007,[5] the Chamber spent and reported to the FEC, as required by BCRA § 201, over $15 million on its own exempt electioneering communications.

The Chamber's own general resources are quite limited. The Chamber wanted to seek and accept additional funds for the stated purpose of engaging in exempt speech on specific issues of direct concern to its members. However, many corporations, including many members of the Chamber, were not and are not willing to be publicly disclosed as supporting such speech. To avoid putting its member interests at risk, the Chamber decided as a matter of policy to limit itself to funds that were not solicited or designated for the specific purpose of financing electioneering communications. Thus, it was required to forego substantial exempt speech that could have been funded by specific solicitations that would have required disclosure. Moreover, the Chamber was forced to refrain from communicating with its members about specific plans for core speech since such speech might be deemed a solicitation that would trigger disclosures.

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[4] Unless otherwise noted, all citations herein are to the opinion of Chief Justice Roberts, which is controlling. *See Marks v. United States*, 430 U.S. 188, 192-93 (1977); *Horn v. Thoratec Corp.*, 376 F.3d 163, 175 (3d Cir. 2004).

[5] This is the date on which the FEC's regulations implementing this Court's decision in *WRTL II* went into effect.

Citizens United and the Chamber were not the only speakers whose speech was suppressed in this fashion. The Chamber has reviewed the FEC Form 9 reports of the 30 entities that spent the largest sums on exempt speech during 2008. Virtually no corporate donors were disclosed. Thus, BCRA § 201 suppressed nearly all corporate exempt speech except to the extent organizations like the Chamber could rely on funds raised without informing donors of their intended use.[6] Indeed, at least with respect to exempt speech funded by corporations, BCRA § 201 achieved almost no disclosure of donors, but instead functioned primarily to curtail corporate speech.

SUMMARY OF ARGUMENT

This Court long has recognized that compelled disclosures may substantially suppress speech. It also has made clear that the government bears the heavy burden of justifying each application of a statute that restricts First Amendment rights. Where, as here, a restriction impairs speech relating to core concerns of the First Amendment (i.e., how we are governed and who governs us), and particularly where it does so precisely because of the core content of the speech, this Court traditionally has required the government to meet the stringent demands of strict judicial scrutiny.

In several cases involving disclosure requirements, this Court has used the term "exacting" scrutiny. Particularly where disclosures have been a condition of

[6] Of course, some reporting groups did not accept corporate contributions at all, although others did.

the right to engage freely in core speech, however, "exacting" scrutiny is indistinguishable from "strict" scrutiny. For example, the government still must prove narrow tailoring and demonstrate a compelling interest.

No matter whether the Court applies "strict scrutiny" or the "strict test" that is exacting scrutiny, *Buckley v. Valeo*, 424 U.S. 1, 64-66 (1976), the First Amendment injury inflicted by applying BCRA § 201 to exempt speech certainly requires extremely stringent review. Experience has shown that many corporations will refrain from core speech if it comes at the price of public disclosure. That has been the experience of the Chamber and other groups, whose core First Amendment speech has been and is substantially curtailed by BCRA's disclosure obligations. In short, BCRA's disclosure requirements suppress substantial exempt speech, just as occurred with respect to Citizens United. And those disclosure requirements threaten an even more Draconian impact on the First Amendment rights of willing listeners. Listeners have no ability to make disclosures such as those demanded of speakers by BCRA. If unacceptable disclosure demands force a speaker into silence, the right of willing listeners to hear is entirely destroyed. Thus, the government must satisfy stringent review in justifying the application of BCRA § 201's disclosure requirements to exempt speech. The government has not and cannot meet its stringent burden here.

- Because exempt speech is not the functional equivalent of express advocacy, *McConnell*'s record and facial ruling do not apply.

- Because exempt speech cannot be banned, there is no enforcement or "anti-circumvention" rationale for requiring disclosure of donors for such speech.

- Because exempt speech is independent of any candidate or campaign, there can be no actual or apparent *quid pro quo* corruption from funding such speech.

- Because exempt speech is not express advocacy or its functional equivalent, the aberrant theory of corporate wealth corruption in *Austin v. Michigan Chamber of Commerce*, 494 US. 652 (1990), does not apply, and *Austin* should be overruled rather than extended.

- Because voters can appropriately discount speech if those supporting it are not disclosed, there is no important need to compel such disclosures.

Indeed, the primary motivation for BCRA § 201's disclosure requirements seems to have been congressional hostility to independent speech, leading to a desire to burden and encumber whatever speech could not be banned outright. *See McConnell*, 540 U.S. at 245-50 (Scalia, J., concurring and dissenting in part). Such an anti-speech governmental purpose is not even constitutionally legitimate, much less a compelling reason to subordinate First Amendment guarantees. Therefore, § 201 violates the First Amendment as applied to exempt electioneering communications.

ARGUMENT

This brief focuses on the application of the disclosure requirements of BCRA § 201 to advertisements that refer to candidates but are not functionally equivalent to express advocacy. Appellant Citizens United specializes in making full length feature films and its brief understandably emphasizes its right to freely broadcast those films. But the issue in this case with the broadest significance is the constitutionality of applying BCRA § 201's disclosure requirements to advertisements that mention candidates. The Chamber and many similar groups rely on such ads, and they are central to efforts to communicate its policy speech to members of the public. At the same time, the constitutionality of demanding donor disclosure from sponsors of such ads is the vital question left open by *WRTL II*.

Citizens United suppressed several such ads. Even though *WRTL II* exempted those ads from the corporate ban, the FEC would have applied BCRA § 201's disclosure requirements, making the ads unlawful unless Citizens United disclosed its donors, which it would not do. In this amicus brief, the Chamber focuses on the status of such exempt ads, showing that application of BCRA § 201 to them violates the First Amendment rights of both speakers and listeners.

I. APPLYING THE DISCLOSURE REQUIREMENTS OF BCRA § 201 TO EXEMPT SPEECH SERIOUSLY IMPAIRS CORE FIRST AMENDMENT RIGHTS.

A. Forced Reporting and Disclosure Of Donors Seriously Burdens And Suppresses Corporate Speech.

This case confirms this Court's long-standing recognition that compelled disclosures may substantially suppress speech. *Buckley*, 424 U.S. at 64 (citing authority); *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008). Nor should that be surprising. At the time Congress adopted § 201's disclosure requirements, it also increased the penalties for failing to comply. *See* BCRA § 312 (increasing penalties for criminal violations). It also made filing false reports punishable as perjury. *See* BCRA § 201(a). Such severe penalties would not have been necessary if these disclosures were thought to be a minimal burden that Congress expected few speakers to resist. Moreover, it is common experience that, where the supporters of exempt speech are not disclosed, opponents can and do exploit the silence as a reason for discounting the speech. The fact that many speakers decline to identify their donors, even though doing so weakens the credibility of their speech, again confirms that required donor disclosure is burdensome and likely to suppress speech.

The Chamber's own experience has made it acutely aware of the reluctance of business corporations to be identified as supporters of issue speech near elections. During 2008, the Chamber was one of the most frequent

filers of FEC Form 9s, and it reported more spending on electioneering communications than any other group.[7] Yet the Chamber's reports did not disclose donors.

The reason no Chamber donors are disclosed is simple. Many of its members have made clear that they are not willing to be identified and will terminate or withhold support if disclosure becomes a risk. If the Chamber had solicited funds for the specific purpose of electioneering communications, or if donors had specified such a use, the FEC would have applied BCRA to require the Chamber to report the donation and the donor. *See* 11 C.F.R. § 104.20. Thus, the Chamber adopted a policy against soliciting or accepting donations for the specific purpose of exempt speech, and it repeatedly declined contributions offered to support specific speech.

The policy forced on the Chamber by BCRA § 201 carried a substantial First Amendment cost, for the American public as well as for the Chamber and its members. The Chamber's general resources are limited. If the Chamber had been able to solicit support for particular exempt speech and to accept donations earmarked for such speech, it could have done considerably more than it did to convey the views of the business community. This is understandable. After all, the

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[7] As Citizens United explains in its brief at 54, citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986), the administrative costs incurred when filing these reports is a burden of constitutional significance. The Chamber had to dedicate staff to draft the Form 9s, subject them to both internal and external legal review, and sign them under penalty of perjury, all within the required 24-hour reporting period. This was a major undertaking for engaging in otherwise exempt speech.

Chamber's members are businesses that are accustomed to knowing how their money is spent and ensuring that it is spent to further their respective enterprises.

The reluctance of corporations to be publicly identified with controversial speech or positions is not an idiosyncrasy of Chamber members. The Chamber examined Form 9 disclosures of the 30 groups reporting the highest levels of spending on electioneering communications during 2008. Those reports are available at *http://www.fec.gov/finance/disclosure/ec_table.shtml.* In some cases, individual donors were disclosed. But none of these reports disclosed any significant number of corporate contributors. In short, as applied to corporate exempt speech, the donor disclosure requirements of BCRA § 201 operate only to suppress the speech, not to obtain disclosures. And no one pretends that the disclosure of individual donors serves a vital role.[8]

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[8] The use of donor information for retaliation purposes is part of the daily news. For example, at http://www.eightmaps.com, the specific names and addresses of donors to the successful referendum to ban gay marriage in California are superimposed on local maps. A former member of the FEC, writing with a University of Maryland professor, discusses resulting retaliation in John Lott and Brad Smith, *Donor Disclosure Has Its Downsides*, Wall Street Journal, Dec. 26, 2008, at A13, *available at* http://online.wsj.com/article/SB123025779370234773.html. Recent news reports confirm that business corporations identified as supporting a group taking controversial positions may be penalized. *See, e.g.*, Mark Pitsch, *EPIC Won't Deal with WMC*

(Cont'd)

The disclosure requirements also burdened and suppressed the Chamber's internal communications and interfered with the effective exercise of its right of expressive association. In practice, the Chamber would inform its members that it was raising money for public educational or grassroots lobbying programs, but when asked what those would be or how they would be carried out, the Chamber had to remain silent, at least as to any exempt speech. The Chamber's members were forced to guess and, based on that guess, decide whether to support the programs. Similarly, if a member interested in a campaigning incumbent officeholder's position on a particular policy issue wanted the Chamber to use the member's donation – combined with those of others – to run advertising about the issue, the member was precluded from communicating that to the Chamber. Ironically, even though the speech the Chamber ultimately funded with its members' donations was exempt from BCRA's prohibition pursuant to *WRTL II*, the Chamber and its members were prevented from

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(Cont'd)

Backers, Wis. State Journal, June 27, 2008; Jim Lobe, *ExxonMobil Takes Heat on Global Warming*, Inter Press Service News Agency, July 12, 2005, *available at* http://www.ipsnews.net/print.asp?idnews=29469 (last visited Jan. 15, 2009) (describing boycott of corporation's products for, among other things, "lobbying Congress to open the Artic National Wildlife Refuge (ANWR) to drilling"). Because a cautious corporate executive, of course, has no way of being sure in advance which contribution will produce negative consequences for his company, the safe course is to withhold financial support for expressive activities.

speaking about it to potential supporters. This directly impaired internal speech necessary to the effective exercise of the right to expressive association.[9]

In short, it is clear that the application of BCRA § 201 to require donor disclosure for exempt speech substantially suppresses such speech, causing direct First Amendment injury to would-be speakers and expressive associations.

B. Such Disclosure Requirements Also Threaten Complete Destruction Of The First Amendment Rights Of Willing Listeners.

The First Amendment's protections are not limited to speakers. Meaningful speech involves a process of communication, not just utterance. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). Thus, the First Amendment "equally" protects the right of willing

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[9] *Buckley* held that compelled disclosure of associational acts was a sufficient burden to trigger exacting scrutiny. 424 U.S. at 64. *Roberts v. United States Jaycees* said that requiring "disclosure of the fact of membership in a group seeking anonymity" or "interfere[nce] with the internal organization or affairs" of an expressive association were examples of burdens that triggered strict scrutiny. 468 U.S. 609, 623 (1984) (collecting authority). Moreover, where litigation discovery is sought concerning such internal associational matters, courts regularly recognize a presumptive First Amendment shield that can be overcome only by a tailored showing of necessity. *See, e.g.*, *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389-90 (D.C. Cir. 1981); *FEC v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987).

listeners to hear what a speaker has to say. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (collecting authority); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (although limited frequency spectrum justifies regulation of broadcast speakers, the constitution requires protection of "the right of the public to receive" speech).

In many circumstances there is no need to analyze listener rights separately, but disclosure requirements affect listeners differently than speakers. A potential speaker can choose between making the required disclosure and standing silent. A listener, by contrast, has no such choice. If the speaker is unwilling to disclose, and so stands silent, the listener's right to hear is entirely defeated. Thus, the First Amendment burden on the listener's First Amendment rights is measured, not by the required disclosure, but by a complete loss of the desired speech. To justify inflicting such a substantial First Amendment injury, the government must prove that it has a sufficiently compelling need for speakers' disclosures to justify destroying listeners' rights to receive desired speech.

This Court long has recognized that disclosure requirements may be unconstitutional because of injury to listeners, even where the speaker's practical burden may be deemed minor. *Thomas v. Collins*, 323 U.S. 516 (1945), involved a Texas statute requiring labor organizers to identify themselves, their position, and their union to the Texas Secretary of State before soliciting workers to join a union. *Id.* at 524. Texas argued that the required disclosures were minimal and did not

significantly burden the speakers. However, the Court's opinion repeatedly mentioned the rights of listeners – e.g., "the rights of the workers to hear," *id.* at 534, and "the right of workmen," *id.* at 539 – in holding that the First Amendment had been violated even if Texas was correct that the speaker's burden was minor. *Id.* at 541-43. Focusing on the silence that would result if a speaker would not disclose, the Court said the "restraint is not small when it is considered what [is] restrained [i.e., speech and association]. . . . Seedlings planted in that soil [of "the most basic rights of all"] grow great and, growing, break down the foundations of liberty." *Id.* at 543. Thus, application of the disclosure requirement to the labor organizers violated the First Amendment. *Id.*

Bellotti confirmed that injury to the right to receive "political" speech violates the First Amendment. There, parties seeking to suppress corporate speech concerning a ballot issue argued that corporations had no protected First Amendment right to speak. 435 U.S. at 775-76. Of course they were mistaken.[10] But the Court ruled that it made no difference whether corporate

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[10] *See WRTL II*, 127 S. Ct. at 2677-78 (Justice Scalia's concurrence collecting authority that corporations have "full First Amendment protection"); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (the First Amendment "rights of association and of petition" allow "groups with common interests" – a group of trucking companies – "to advocate their causes and points of view respecting resolution of their business and economic interests"); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (construing antitrust laws narrowly to preserve the right of a group of railroads to petition the government).

speakers were protected, since the First Amendment centrally protected the "capacity for informing the public" of the speech. *Id.* at 777. *See also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (protecting the ability of "voters seeking to inform themselves about the candidates and campaign issues"); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (a listener's right to receive speech does not depend on speaker's right to speak).[11]

Thus, the First Amendment injury inflicted by application of BCRA § 201 reaches far beyond the interests of Citizens United. The core First Amendment right of persons interested in receiving speech about a nationally-prominent Senator and candidate was entirely destroyed.[12]

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[11] These are not cases in which listeners were merely granted standing to assert the rights of speakers. In addition, *Bellotti* suggested in footnote dicta that a disclosure requirement might be more acceptable than the ban at issue there. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.32. That comment was dismissed as "dicta" in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 353-54 (1995). Moreover, that footnote dicta did not evaluate the effect on listener rights, where a disclosure requirement often operates as a ban.

[12] To be clear, the Chamber must not be understood to endorse the contents of the Citizens United materials. A listener may wish to receive speech with which the listener expects to disagree.

II. THE GOVERNMENT HAS FAILED TO JUSTIFY THESE SERIOUS INFRINGEMENTS OF CORE FIRST AMENDMENT RIGHTS.

A. The Applicable Standard Is Strict Scrutiny.

This Court long has recognized that compelled disclosures may substantially suppress speech. *Buckley*, 424 U.S. at 64 (collecting authority); *Davis*, 128 S. Ct. at 2774-75. It also has made clear that the government bears the heavy burden of justifying "each application" of a statute that restricts First Amendment rights. *WRTL II*, 127 S. Ct. at 2664. Where, as here, a restriction impairs speech relating to core concerns of the First Amendment (i.e., how we are governed and who governs us), and particularly where it does so precisely because of the core content of the speech, this Court traditionally has required the government to meet the stringent demands of strict judicial scrutiny. *See id.* (collecting authority).

In several cases involving disclosure requirements, this Court has used the words "exacting" scrutiny. *See Buckley*, 474 U.S. at 64; *Davis*, 128 S. Ct. at 2775. However, it has made clear that this is a "strict test." *Buckley*, 474 U.S. at 66; *see also Davis*, 128 S. Ct. at 2775 (noting that the Court has "*closely scrutinized* disclosure requirements") (emphasis added).

At least where disclosures have been a condition of the right to engage freely in core speech, "exacting" scrutiny is indistinguishable from "strict" scrutiny. This is not surprising since "exacting" and "strict" have very

similar meanings.[13] *Bellotti* held that, to satisfy exacting scrutiny, the government was required to prove a compelling interest. 435 U.S. at 795. And *McIntyre v. Ohio Elections Commission* held that, to satisfy exacting scrutiny, the government had to prove narrow tailoring. 514 U.S. 334, 347 (1995).

Thus, lower courts often have held that exacting and strict scrutiny mean the same thing. *McConnell v. FEC*, 251 F. Supp. 2d 176, 358 n.139 (D.D.C. 2003) (opinion of Henderson, J.) ("In no case of which I am aware does the [Supreme] Court hold that exacting scrutiny is any *less* rigorous than strict scrutiny"), *id.* n.140 (noting that courts "apply exacting (i.e., strict) scrutiny to disclosure and reporting requirements"); *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 51 (D.D.C. 2008) (reviewing Supreme Court authority).

B. The Government Has Failed To Justify Application Of BCRA § 201 To Exempt Speech.

The 1974 version of the Federal Election Campaign Act ("FECA") included former 2 U.S.C. § 437a, a provision requiring disclosure of the donors to any group that spent funds to broadcast to the public any material referring to a candidate for the purpose of affecting an election. *Buckley v. Valeo*, 519 F.2d 821, 869-70 (D.C. Cir. 1975) (*en banc*), aff'd in part, rev'd in part,

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[13] "Exacting" means "unremittingly severe," while "strict" means "stringent in requirement" and "exact." Merriam-Webster's Collegiate Dictionary, 402, 1161 (10th ed. 2001). Moreover, *Random House Roget's College Thesaurus* lists "exacting" as a synonym for "strict." Thesaurus 24 (2000).

424 U.S. 1 (1976). Reading this provision to reach beyond speech directly tied to an election, the en banc court ruled the government had no sufficient justification to burden such vital speech and held it unconstitutional. *Id.* at 872, 878. The government did not even appeal that ruling.

Similarly here, the FEC has applied BCRA § 201 to demand donor disclosures during much of an election year for speech that is not express advocacy or its functional equivalent, so long as it mentions a candidate. It has not and cannot show an adequate justification for thus burdening this speech that, on the one hand, is central to the First Amendment and, on the other hand, has no immediate and unambiguous link to any election. *See North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) (the government's interest in regulating elections does not extend beyond speech unambiguously associated with an election).

Indeed, the exercise of looking for such a justification in this case is highly artificial. The fact is that Congress simply does not like independent speech near elections. Such speech raises issues incumbent candidates would prefer to ignore and can give a boost to challengers contrary to the interests of the incumbents who, of course, enact the laws. *See McConnell*, 540 U.S. at 248-50 (Scalia, J., concurring and dissenting in part). In BCRA, Congress set out to ban as much independent speech as it could, and to minimize the rest by making it as burdensome as possible. The burdens imposed have no other real

purpose – except perhaps satisfying curiosity and identifying political opponents for retaliation.[14]

1. *McConnell*'s Record And Facial Holding Do Not Apply.

The government cannot rely on *McConnell* to meet its burden. The record in *McConnell* was directed toward electioneering communications that were the functional equivalent of express advocacy. 540 U.S. at 206. *McConnell*'s facial holding was similarly limited. *Id.* at 206 n.88.

In upholding the § 201 disclosure requirements, *McConnell* did "not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. This challenge to the application of BCRA § 201 to speech exempt by *WRTL II* is precisely the type envisioned by *McConnell*. And *WRTL II* squarely holds that, if corporate electioneering communications are not functionally equivalent to express advocacy, they cannot be banned. 127 S. Ct. at 2652.

2. No Enforcement Or Anti-Circumvention Interest Exists.

The government cannot establish any anti-circumvention or enforcement justification here. This

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[14] As Justice Scalia noted, "[t]here is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation. . . . Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country." *McConnell v. FEC*, 540 U.S. 93 260 (2003) (Scalia, J., concurring and dissenting in part) (internal citations omitted).

case concerns public speech, so the exempt nature of the speech should be easy to confirm. Where, as here, the speech is not functionally equivalent to express advocacy, it cannot be banned. *Id.* Thus, funding of such speech cannot operate to evade either FECA's ban on corporate express advocacy or BCRA's ban on corporate electioneering communications that are functionally equivalent to express advocacy.

3. No Anti-Corruption Justification Applies.

Citizens United's speech was independent of any candidate or campaign. That is true of exempt speech generally. Coordinated speech is treated as a contribution to a candidate and, as such, is otherwise subject to reporting and limits, including a corporate ban. *See* BCRA § 202 (noting that coordinated communications are treated as candidate contributions).

Such independent speech is not a plausible vehicle for *quid pro quo* corruption. To the contrary, this Court has recognized that independent speech actually may work against candidate interests. *See Buckley*, 424 U.S. at 47 ("independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"). In fact, candidates for federal office have been denouncing and disavowing independent ads for at least the last two decades and continue to do so today for these reasons. *See, e.g.*, Stephen Engelberg, *Bush, His Disavowed Backers and a Very Potent Attack Ad*, N.Y. Times, Nov. 3, 1988; *Coleman Suspending Negative Ads*, Associated Press, October 10, 2008; Pat Minelli, *Negative Television Advertising: Polls Show It Can Have Reverse Effect*, Shakopee Valley News, Oct. 16, 2008.

Nor did Citizen United's speech give rise to a compelling appearance of corruption. Corporations of all kinds engage in public speech of all kinds all the time, and the basic premise of the First Amendment is that such speech is desirable.

4. *Austin* Does Not Apply And, In Any Event, Should Be Overruled.

In *Austin*, the Court adopted the strained position that corporate spending to expressly advocate the election or defeat of a candidate may be deemed inherently "corruptive" in the peculiar sense that some corporations have great resources.[15] One member of the *Austin* majority later changed his view. *See McConnell*, 540 U.S. 286, 323-29 (Kennedy, J., concurring and dissenting in part) (joined by Chief Justice Rehnquist). And *Austin* is in severe tension with other cases protecting corporate speech. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2678-79 (Scalia, J., concurring in part). That tension is particularly acute for corporations like the Chamber that exist for advocacy purposes. Thus,

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[15] Citizens United correctly argues that the aberrant ruling in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) — that independent corporate speech may be "corrupt" — should be overruled. In any event, *Austin* involved express advocacy. *Id.* at 654; *FEC v. Wisconsin Right to Life, Inc v. FEC.*, 127 S. Ct. 2652, 2673 (2007) ("the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech *has no application to issue advocacy*") (emphasis added). As noted above, this case concerns speech that is not express advocacy or its functional equivalent.

Citizens United persuasively argues that *Austin* should be overruled.

In any event, *Austin* certainly should not be extended to reach beyond the express advocacy that was at issue there. As already discussed, exempt speech is neither express advocacy nor its functional equivalent. The First Amendment requires that such independent speech be deemed desirable and protected, rather than condemned as corruptive.

This is doubly so since the disclosure requirements of BCRA § 201 are not facially targeted to great wealth in any way. The reporting obligation extends to individual as well as corporate or labor union donors, regardless of their assets. And it simply is not plausible to maintain that the ability to make a $1,000 donation in connection with an exempt electioneering communication is a reliable measure of vast and corrupting wealth. Stringent scrutiny cannot be satisfied on the basis of a rationale that the statute does little to serve. *See FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984).

5. No Compelling Information Need Has Been Shown.

Finally, there is no showing that the public receives a compelling informational benefit from BCRA's disclosure requirements. Although BCRA theoretically could provide more information than otherwise would be available – assuming the public receives the disclosures – it also might provide less information, since would-be speakers who will not disclose stand silent. The

government has made no showing that the net effect of the BCRA disclosure requirements on public information is positive, much less that any net increase is so substantial and important as to justify defeating listeners' core First Amendment rights to receive speech that is suppressed or reduced by burdensome mandatory reporting. In this case, since Citizens United stood silent, the public suffered a loss of communication.

In this regard, it is offensively paternalistic for the government to simply assume that listeners are incapable of properly evaluating public speech in the absence of full disclosure of the speaker's funding sources. In their daily lives, Americans regularly discount speech to adjust for questions about its source. *See generally McIntyre*, 514 U.S. 334. That is doubly so in the area of political speech where speakers with opposing views are not shy in pointing out the absence of donor information.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed and the Court should hold that applying the disclosure requirements of BCRA § 201 to speech that is not functionally equivalent to express advocacy violates the First Amendment.

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