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 AMICUS CURIAE OF THE FREE SPEECH DEFENSE AND EDUCATION FUND, INC., FREE SPEECH COALITION, INC., *ET AL.* IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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(All amici curiae listed on inside front cover)

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The Lincoln Institute for Research and Education,
The National Center for Public Policy Research,
The National Right to Work Committee,
National Taxpayers Union,
The Richard Norman Company,
The Senior Citizens League,
U.S. Border Control,
U.S. Border Control Foundation, and
The United States Constitutional Rights Legal Defense Fund, Inc.

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INTEREST OF AMICI CURIAE[1]

These *amici curiae* form a coalition of interested nonprofit, tax-exempt, and political organizations, individuals, and for-profit corporations, committed to the proper construction of the Constitution and laws of the United States. Most of these *amici* have filed *amicus curiae* and/or party litigant briefs in the past in cases before federal courts, including this Court. Certain of these *amici* were among the appellants in McConnell v. FEC, 540 U.S. 93 (2003).

Twelve of these *amici* are tax-exempt under section 501(c)(3) of the Internal Revenue Code ("IRC"):
The Free Speech Defense and Education Fund, Inc.,
American Values,
Concerned Women for America,
Conservative Legal Defense and Education Fund,
Downsize DC Foundation,
English First Foundation,
Gun Owners Foundation,
Institute on the Constitution,
The Lincoln Institute for Research and Education,
The National Center for Public Policy Research,
U.S. Border Control Foundation, and
The United States Constitutional Rights Legal Defense Fund, Inc.

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Ten are tax-exempt under IRC section 501(c)(4):
Free Speech Coalition, Inc.,
The Abraham Lincoln Foundation for Public Policy Research, Inc.,
Americans for the Preservation of Liberty,
DownsizeDC.org, Inc.,
English First,
Gun Owners of America, Inc.,
The National Right to Work Committee,
National Taxpayers Union,
The Senior Citizens League, and
U.S. Border Control.

Two are former Libertarian Party candidates for federal office:
Michael Cloud, and
Carla Howell.

One is a national political party organization:
Constitution Party.

Three are for-profit companies which assist nonprofit organizations in developing and implementing outreach programs for the public:
Base Connect, Inc.,
Eberle Communications Group, Inc., and
The Richard Norman Company.

The *amici* believe that their brief will be of assistance to the Court, bringing to its attention relevant matter on freedom of the press, not fully addressed by the parties.

SUMMARY OF ARGUMENT

Citizens United's challenge to federal regulation of electioneering communications should be sustained, and this Court's decisions in Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), and in McConnell v. FEC, 540 U.S. 93 (2003), as applied to BCRA section 203, should be overruled. Both decisions endorse an erroneous view of the freedom of speech that conflicts with Citizens United's freedom of the press.

Contrary to the assumptions in Austin and McConnell, the freedom of the press does not confer a special privilege upon the institutional press, but is enjoyed by all the people. Austin's and McConnell's narrow reading of the press freedom is not only contrary to history, but at odds with new realities of journalism.

BCRA section 203 violates Citizens United's freedom of press by: (1) establishing a licensing system; (2) operating as an unconstitutional previous restraint; (3) intruding into the editorial function; (4) imposing discriminatory economic penalties and burdens; and (5) forcing the public disclosure of the names and addresses of authors and publishers.

Because Austin and those portions of McConnell upholding BCRA section 203 violate these free press principles, they should be overturned.

ARGUMENT

I. CITIZENS UNITED'S FIRST AMENDMENT CHALLENGE SHOULD BE SUSTAINED, AND AUSTIN AND MCCONNELL, AS APPLIED TO BCRA SECTION 203, SHOULD BE OVERRULED.

A. Austin and McConnell Denigrate the Freedom of the Press.

With the enactment of the Federal Election Campaign Act of 1971, and its subsequent amendment in 1974 ("FECA"), Congress installed the Federal Election Commission ("FEC") as its gatekeeper to the marketplace of ideas concerning political campaigns for federal elective office. Under the constraints imposed by Buckley v. Valeo, 424 U.S. 1 (1976), the FEC's licensing power initially applied only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.*, at 44.

Dissatisfied with this "express advocacy" rule, and in an effort to extend the FEC's market entry control,[2] Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), expanding FEC's reach to "electioneering communication[s]" — broadcasts "targeted to the relevant electorate" that "refer[red] to a clearly identified candidate for Federal office" during

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[2] *See* McConnell v. FEC, 540 U.S. 93, 126-129, 189-90 (2003).

a statutorily-specified time proximate to an election. *See* 2 U.S.C. § 434(f)(3)(A)(i).

Initially, it appeared to this Court that such enlargement of FEC market control was sufficiently constrained by the literal language of the statute to meet First Amendment standards. *See* McConnell v. FEC, 540 U.S. 93, 194 (2003). However, in 2006, by unanimous vote, this Court ruled that a broadcast communication that met the statute's specified criteria could be constitutionally protected. *See* Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410, 411-12 (2006). In an ensuing "as applied" challenge, the Court ruled that the First Amendment constricted the FEC's power to regulate a communication that referred to a candidate only if the broadcast language was "the **functional equivalent of express advocacy**." FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, ___, 168 L.Ed.2d 329, 346 (2007) (emphasis added) (hereinafter "WRTL II").

Following WRTL II, the FEC adopted new regulations permitting corporations and labor unions to draw on their general treasuries "to 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* 11 C.F.R. § 114.15(a). As the FEC acknowledged, the new rules empowered the FEC to **scrutinize the content** of any "issue ad" to ascertain whether it qualified for an exemption under either (i) its three-pronged "safe harbor" provision (11 C.F.R. § 114.15(b)) or (ii) its multi-factor interpretative provision (11 C.F.R.

§ 114.15(c)). *See* FEC Notice 2007-26, 72 *Fed. Reg.* 72,899-913 (Dec. 26, 2007). Thus, the FEC has assumed wide discretionary power controlling the terms under which a corporation or labor union would be permitted access to the marketplace of ideas during a federal election season.

According to both McConnell and Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), the lodging of such discretionary **censorship powers** in the executive branch accords with the **freedom of speech**, because of the "'the **corrosive and distorting effects of immense aggregation of wealth** ... that have little or no correlation to the public's support for the corporation's [or union's] political ideas.'" *See* McConnell, 540 U.S. at 206 (emphasis added). For the reasons set out below, McConnell and Austin should be overturned because they rest upon an erroneous view of **freedom of speech** that conflicts with Citizens United's **freedom of the press**.

B. BCRA Section 203 Implicates the Freedom of the Press.

BCRA section 203 appears to apply equally to all candidates for election to federal office. In reality, it was deliberately crafted to vest incumbent members of Congress with a kind of super-trademark over their names — to be enforced by the FEC against independent entities, including incorporated nonprofit groups known to engage in the pesky activity of educating the public about the legislative actions of

those incumbents.[3] In the past, this Court has not hesitated to look behind high-sounding legislative pronouncements to uncover ulterior goals. For example, in Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court, alerted by such censorious antecedents in English history (297 U.S. at 245-247), saw through a Louisiana statute — disguised by the Huey Long political machine as a revenue-raising "tax" measure[4] — when, in fact, its "plain purpose [was to] penaliz[e] the publishers and curtail[] the circulation of a selected group of newspapers" in violation of the freedom of the press (*id*., at 250-51). Likewise, BCRA section 203, while "wrapped ... in the verbal cellophane of a [campaign finance reform] measure,"[5] is designed to penalize and curtail corporate and union communications in violation of the press guarantee.

Although this case appears to have been litigated as a generic First Amendment challenge with primary emphasis on freedom of speech (*see*, *e.g*., Brief for Appellant, pp. 10-12), free press issues bubbled to the surface during oral argument following the government's disturbing responses to Justice Alito's probing questions as to whether a book could be banned as an "electioneering communication." (Oral Argument Transcript, p. 27, l. 16 – p. 31, l. 1 (Mar. 24,

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[3] *See* McConnell, 540 U.S. at 260 (Scalia, J., dissenting).

[4] *See generally* Richard Cortner, The Kingfish and the Constitution: Huey Long, the First Amendment, and the Emergence of Modern Press Freedom in America (1996).

[5] The phraseology is that of Justice Frankfurter from his dissent in United States v. Kahriger, 345 U.S. 22, 38 (1953).

2009)). At one point, the government even argued that "media corporations, the institutional press, would have a greater First Amendment right" than non-media entities such as Citizens United.[6] Tr. 28, ll. 7-11, p. 34, ll. 1-25. Such a dangerous assertion cannot go unchallenged. Nor can this appeal be resolved properly unless the Court grapples with what has now been revealed to be the central issue — the applicability and scope of the freedom of the press.

II. THE FREEDOM OF THE PRESS IS NOT A SPECIAL PRIVILEGE OF THE INSTITUTIONAL PRESS.

In Austin, the Michigan State Chamber of Commerce never raised the First Amendment free press issue. In McConnell, however, one group of litigants (Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org[7], Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell) did, assailing BCRA section 203 "as violative of Freedom of the Press" (*see, e.g.*, Brief for Appellants Congressman Ron Paul, *et al*., pp. 16-50). This argument was summarily dismissed (*see* 540 U.S.

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[6] The Deputy Solicitor General was reflecting not only his own flawed view of press freedom, but that of Congress. Apparently believing the institutional press to have greater rights than other Americans, Congress largely exempted the institutional press from its ban on electioneering communications. 2 U.S.C. § 434(f)(3)(B)(i). This exemption parallels the press exemption applicable to campaign expenditures. 2 U.S.C. § 431(9)(B)(i).

[7] Now DownsizeDC.org, Inc.

at 209 n.89), apparently on the ground that BCRA's media exemption preserved whatever press rights might be at stake. *See* 540 U.S. at 208-09. Both Austin and McConnell having failed to address the press issue, the two were wrongly decided.

McConnell found BCRA's "narrow exception [2 U.S.C. section 434(f)(3)(B)(i)] [to be] wholly consistent with First Amendment principles," because of Austin. *Id.*, 540 U.S. at 208. Quoting from Mills v. Alabama, 384 U.S. 214, 219 (1966), Austin adopted the view that: "'[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and **as a constitutionally chosen means** for keeping officials elected by the people responsible to all the people whom they were selected to serve.'" Austin, 494 U.S. at 667-68 (emphasis added).

But Mills did not elevate the institutional press to such a preferred position. To the contrary, Mills stated that "[t]he Constitution specifically selected the press, which includes not only newspapers, books and magazines, but **humble leaflets and circulars** ... to play an important role in the discussion of public affairs." Mills, 384 U.S. at 219 (emphasis added). Furthermore, Mills emphasized that the people's press freedom plays a key role in the electoral process. *Id.*, 384 U.S. at 218-19. Thus, Mills ruled unconstitutional a statute that forbade "'any electioneering ... for or against the election or nomination of any candidate ... that is being voted on **on the day on which the election** affecting such candidates ... **is being held.'"**

Id., at 216 n.2, 220 (emphasis added). And it so ruled on the grounds of the freedom of the press:

> The Alabama Corrupt Practices Act ... silences the press **at a time when it can be most effective**. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed **freedom of the press**. [*Id.*, 384 U.S. at 219 (emphasis added).]

While Mills concerned a newspaper editorial, it was most certainly not based on Austin's and McConnell's "narrow reading of the Press Clause," which would cause "fundamental difficulties" of interpretation and application. *See* First National Bank of Boston v. Bellotti, 435 U.S. 765, 798-801 (1978) (Burger, C.J., concurring). As Justice Scalia pointedly asked at oral argument: "But does 'the press' mean the media in that constitutional provision? You think in 1791 there were ... people running around with fedoras that had ... little press tickets in it.... Doesn't it cover ... the right of any individual to ... write, to publish?" Tr. 34, ll. 5-13.

Although "indispensable to the political ... life of their communities," colonial printers were not a dominant institution. Jeffrey L. Pasley, The Tyranny of Printers: Newspaper Politics in the Early American Republic, p. 24 (U. of Va. Press 2001). Indeed, newspapers were transient concerns, as "more than two-thirds of the American newspapers established before 1821 published for three years or less." *Id*., at 52.

Prior to the recognition of the freedom of the press in England, it was assumed "the press should be regulated so as to ensure the success of the royal policies." Fredrick Siebert, Freedom of the Press in England, 1476-1776, U. of Ill. Press, p. 6 (1965). By "the end of the eighteenth century," however, the "freedom of the press became one of the natural rights of man as derived from the law of God and incapable of infringement by any man-made power." *Id.*, at 7.

As James Madison put it, in the United States:

> **[t]he people**, not the government possess the absolute sovereignty. The legislature, no less than the executive is under limitations of power.... This security of the **freedom of the press** requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also. [James Madison, "The Virginia Report of 1799," reprinted in Garrett Epps, ed., The First Amendment: Freedom of the Press, p. 78 (2008) (emphasis added).]

Thus, the American experience validated Blackstone's description that the "liberty of the press is indeed essential to the nature of a free state." IV William Blackstone, Commentaries on the Laws of England, p. 151 (U. of Chicago, facsimile ed. 1769). In his concurring opinion in Bellotti, Chief Justice Burger rejected the notion that the freedom of the press bestows First Amendment monopoly rights upon the institutional press. *Id.*, 435 U.S. at 802. *See also* Lovell v. Griffin, 303 U.S. 444, 452 (1938); Branzburg v. Hayes, 408 U.S. 665, 704 (1972) ("the traditional

doctrine [of the] liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher....").

The government's narrow reading of the press freedom is not only contrary to history, but is at odds with the realities of the twenty-first century. To believe that the institutional press was granted special constitutional privileges would be to grant special rights largely to "[f]ive global-dimension firms [which] own most of the newspapers, magazines, book publishers, motion picture studios, and radio and television stations in the United States" — *i.e.*, Time Warner, The Walt Disney Company, News Corporation, Viacom, and Bertelsmann. Ben H. Bagdikian, The New Media Monopoly, Beacon Press, p. 3 (2004). And the government's view would deny the reality of the Internet:

> It was not long ago that the boundaries between journalists and the rest of us seemed relatively clear.... Those days are gone. The lines distinguishing professional journalists from other people who disseminate information, ideas and opinions to a wide audience have been blurred, perhaps beyond recognition.... [Scott Gant, We're All Journalists Now, Free Press, p. 3 (2007).]

Contrary to Austin and McConnell, freedom of the press belongs not just to corporations like General Electric, but rather to "the people."

III. BCRA SECTION 203 VIOLATES CITIZENS UNITED'S FREEDOM OF THE PRESS.

A. BCRA Section 203 Establishes an Unconstitutional Licensing System.

Empowered by BCRA section 203's grant of editorial discretion, and subject to no objective standard, the FEC decides which issue ads may be broadcast without compliance with all of the rules imposed on political committees (*e.g.,* financial stricture, reporting, and public disclosure). Notwithstanding WRTL II, the FEC commissioners also assert jurisdiction over issue ads that are not the functional equivalent of express advocacy, requiring the sponsors of constitutionally-protected ads to comply with BCRA section 203's reporting and disclosure requirements. *See* 11 C.F.R. § 114.15(f).[8]

For over 70 years, it has been well-established that any effort by the government to require a permit before dissemination of ideas "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *See* Lovell v. Griffin, 303 U.S. 444, 451 (1938). Yet, 2 U.S.C. section 434(f)(1) and its implementing regulation (11 C.F.R. § 104.20(a) and (b)) require that Citizens United "file a statement" with the FEC within 24 hours after disbursement of an initial $10,000 of direct costs for airing any communication referring to a candidate for federal office — whether or not it is the functional equivalent of express advocacy

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[8] *See also* FEC Notice 2007-26, 72 *Fed. Reg.* 72,899-901 (Dec. 26, 2007).

— during the specified statutory periods. Such statement must include the name and addresses of all persons directly involved in the communication. 11 C.F.R. § 104.20(c). Such forced disclosure is tantamount to "'censorship through license'" which, contrary to "'the doctrine of the freedom of the press ... makes impossible the free and unhampered distribution'" of ideas. *See* Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150, 162 (2002), quoting from Schneider v. State, 308 U.S. 147, 164 (1939).

B. BCRA Section 203 Operates as an Unconstitutional "Previous Restraint."

BCRA section 203 also violates the press principle against "previous restraint[s]." *See* Lovell, 303 U.S. at 451-52. In Near v. Minnesota, 283 U.S. 697 (1931), this Court ruled that a statute authorizing **injunctive relief** against an allegedly libelous publication constituted "an unconstitutional restraint upon publication." *Id.*, 283 U.S. at 723. Since Near, this Court has found governmental efforts to enjoin the publication of protected speech to be presumptively unconstitutional, a presumption that can be overcome only by an "overwhelming national interest." *See* New York Times Co. v. United States, 403 U.S. 713, 726 n.*, 726-27 (1971) (Brennan, J., concurring).

Yet, Congress has equipped the FEC with the power to seek **injunctive relief** in a federal district court without having to meet this extraordinarily high burden. *See* 2 U.S.C. § 437g(a)(6). Additionally, Congress has established an enforcement process that

can be triggered by a complaint filed with the FEC, signed by a person who only believes that a violation of the FECA laws "**is about to occur**." *See* 2 U.S.C. § 437g and 11 C.F.R. §§ 111.4-111.17 (emphasis added). Further, under 2 U.S.C. section 437g(a)(2), the FEC may initiate its own investigation and enforcement processes to determine if there is probable cause that a violation is about to occur. *See* 11 C.F.R. §§ 111.9-111.17. Such intrusive administrative powers do nothing to alleviate the "previous restraint." Rather, they exacerbate it.

By these administrative means, the FEC would "substitute[] [its] judgment ... for the judgment of ... individual householder[s],"[9] at times most critical to them — just before a federal election. As the Court observed in Watchtower, "'the evils to be prevented [by the Free Press Clause] were not the censorship of the press merely, but **any action** of the government by means of which it might prevent such **free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens**.'" *Id.,* 536 U.S. at 168 (emphasis added).

C. BCRA Section 203 Unconstitutionally Intrudes into the Function of Editors.

Purportedly, BCRA section 203 is warranted by a Congressional policy designed to protect the federal electoral process from "'the corrosive and distorting

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[9] Martin v. Struthers, 319 U.S. 141, 144 (1943).

effects of immense aggregations of wealth.'" *Id.*, 540 U.S. at 205. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court rejected an almost identical justification for a 1913 Florida statute requiring a newspaper to print a state office candidate's reply "to criticism and attacks on his record by a newspaper." *Id.* at 243. Although the statute was defended as necessary to counter the "noncompetitive and enormously powerful" established press (*id.*, at 249), the Court ruled that it "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.*, at 258.

According to Blackstone's pristine statement of the liberty of the press, "Every 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...." IV Blackstone's Commentaries 151-52. Thus, the Court in Miami Herald ruled that "the choice of material to go into a newspaper ... and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment" outside of "governmental regulation." *Id.*, 418 U.S. at 258.

In an effort to implement WRTL II, the FEC has embarked on an editorial quest to sort out those issue ads that "function" as express advocacy from those that do not. *See* FEC Notice 2007-26, 72 *Fed. Reg.* 72,899-915. To that end, FEC has promulgated regulations to guide its "content" and "interpretive" judgments. *See, e.g.,* 11 C.F.R. § 114.15(c)(2). Indeed, as evidenced by FEC Advisory Opinion 2008-15, the FEC commissioners may have no better reason for ruling

that a proposed issue ad may be an electioneering communication than that it did not receive a majority Commission vote to authorize it. In such case, the rejected ad did not fall to the "newsroom floor" because of the editorial judgment of its author; rather, it fell to the "FEC floor," because BCRA section 203 "allow[s] government to insinuate itself into the editorial rooms of this Nation's press." *See* Miami Herald, 418 U.S. at 259 (White, J., concurring).

D. BCRA Section 203 Unconstitutionally Imposes Economic Penalties and Burdens on Issue Advertising.

As McConnell pointed out, BCRA section 203 does not ban corporate- or union-sponsored issue ads referring to a candidate for federal office broadcast during the covered periods before election. Rather, "under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.*, 540 U.S. at 204. A similar argument was made in Miami Herald — that the right-to-reply statute "does not amount to a restriction of [the newspaper's] right to speak because 'the statute in question here has not prevented the Miami Herald from saying anything it wished.'" *Id.*, 418 U.S. at 256. But, as the Miami Herald Court pointed out, "Government restraint on publishing need not fall into familiar and traditional patterns to be subject to constitutional limitations on government powers." *Id.* Rather, the question is whether BCRA section 203 "exacts a penalty on the basis of the content" of the

communication (*id.*), and therefore, "under the operation of the statute, political and electoral coverage would be blunted or reduced" (*id.*, at 257). If so, it would be a violation of the freedom of the press. *See* Grosjean, 297 U.S. at 250.

The very purpose of BCRA section 203 is to "blunt or reduce" corporate and labor union influence in the electoral marketplace, by forcing corporations and labor unions to form a PAC and conform to the strict rules by which money is to be raised. By increasing the costs of corporate and labor union participation in the public debate swirling about in the electoral politics marketplace, BCRA section 203 plays the same role as the infamous English "taxes on knowledge," the "main purpose of [which] was to suppress the publications of comments and criticisms objectionable to the Crown." *See* Grosjean, 297 U.S. at 246.

Moreover, the financial burden imposed by BCRA section 203 is discriminatory in that a like burden is not placed upon a news story or commentary or editorial by a "broadcast facility." *See* 2 U.S.C. § 434(f)(3)(B)(i). As this Court observed in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), "a discriminatory tax on the press burdens rights protected by the First Amendment ... because selective taxation of the press ... poses a particular danger of abuse by the State." *Id.*, 481 U.S. at 227-28.

E. BCRA Section 203 Violates the Press Principle of Anonymity.

Even if an issue ad is found not to be the functional equivalent of "express advocacy," the FEC requires corporations and labor unions to comply with BCRA section 203's disclaimer and disclosure provisions, including identification of the person(s) responsible for the issue ad and the person(s) whose finances made the ad possible. *See* FEC Notice 2007-26, 72 *Fed. Reg.* 72,900. In short, the FEC requires that the author and publisher of the ad be disclosed to the public.

As Justice Black observed in Talley v. California, 362 U.S. 60 (1960):

> 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. [*Id.*, 362 U.S. at 64 (emphasis added).]

In his concurring opinion in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), Justice Thomas documented "the extent to which anonymity and the freedom of the press were intertwined in the early American mind." *Id.,* at 361. And rightfully so. The principle of anonymity is akin to the principle of editorial control. As the McIntyre majority acknowledged, "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., 514 U.S. at 348. And as McIntyre pointed out, the people need no help from the government to sort out the true from the false:

> "Don't underestimate the common man. People ... can evaluate [the] anonymity along with [the] message as long as they are permitted ... to read that message. [O]nce they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth." [*Id.*, 514 U.S. at 348 n.11.]

The FEC rules requiring disclosure bespeak the opposite view, that people are not capable of ferreting out the truth without the government's paternalistic oversight. Such a policy is anathema to the freedom of the press. *See* Miami Herald, 418 U.S. at 259 (White, J., concurring).

CONCLUSION

Austin, and those portions of McConnell which relate to BCRA section 203, should be overturned, and BCRA section 203 should be declared unconstitutional as violative of the freedom of the press.

Respectfully submitted,

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