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

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CHRIS VAN HOLLEN,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant,

AND

CENTER FOR INDIVIDUAL FREEDOM,
Intervenor-Appellant in No. 12-5117,

AND

HISPANIC LEADERSHIP FUND,
Intervenor-Appellant in No. 12-5118.

On Appeal from the
United States District Court for the District of Columbia
No. 1:11-cv-00766-ABJ
Hon. Amy Berman Jackson

BRIEF OF AARP, BRENNAN CENTER FOR JUSTICE, CENTER FOR MEDIA AND DEMOCRACY, CENTER FOR RESPONSIVE POLITICS, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, PROGRESSIVES UNITED, AND SUNLIGHT FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

Dated: July 27, 2012 *Counsel listed on inside cover*

HOGAN LOVELLS US LLP

Ira M. Feinberg*
875 Third Avenue
New York, NY 10022
ira.feinberg@hoganlovells.com
T 212.918.3000
D 212.918.3509
F 212.918.3100

Chantell Taylor
One Tabor Center, Suite 1500
1200 Seventeenth Street
Denver, CO 80202
chantell.taylor@hoganlovells.com
T 303.899.7300
D 303.454.2466
F 303.899.7333

Mary Helen Wimberly
555 Thirteenth Street, NW
Washington, DC 20004
maryhelen.wimberly@hoganlovells.com
T 202.637.5600
D 202.637.5790
F 292.637.5910

Counsel for *Amici Curiae*

* Counsel of record

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rules 26.1 and 29 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 28, the undersigned counsel for *amici* AARP, Brennan Center for Justice, Center for Media and Democracy, Center for Responsive Politics, Citizens for Responsibility and Ethics in Washington, Common Cause, League of Women Voters of the United States, Progressives United, and Sunlight Foundation certifies the following:

A. Parties and *Amici*.

Parties. The appellants in this case, Hispanic Leadership Fund and Center for Individual Freedom, were intervenors-defendants below. The appellee is Congressman Chris Van Hollen, who was the plaintiff below. The Federal Election Commission was the defendant in the district court, but is not a party to this appeal.

Amici for Appellants. There were two *amicus* briefs filed in support of appellants. One brief was filed by Senator Mitch McConnell. The other brief was filed by the following organizations and entities: 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.

Amici for Appellee. The instant brief is filed jointly by the following *amici* in support of appellee: AARP; the Brennan Center for Justice at N.Y.U. School of Law; the Center for Media and Democracy; the Center for Responsive Politics; Citizens for Responsibility and Ethics in Washington; Common Cause; the League of Women Voters of the United States; Progressives United; and the Sunlight Foundation. The Statement of Interest for these *amici* is located at pages 1-5, *infra*.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that all of the *amici* joining this brief are nonprofit organizations which do not issue stock, and that none has any parent company. No person or entity owns 10% or more of any of these *amici*.

B. Rulings Under Review. The ruling on review is the Order of the District Court (Hon. Amy Berman Jackson) dated March 30, 2012, which is found in the record below at docket number 47, as amended by docket number 49. Judge Jackson's memorandum opinion is found below at docket number 48 and has been designated. These documents are located in the Joint Appendix at pages 133-65.

C. Related Cases. This case has not previously been before this Court, and the undersigned counsel is aware of no pending related cases.

D. *Amici* Certification. Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that all parties have consented to the filing of this brief. Undersigned counsel likewise certifies that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund the brief's preparation or submission; and that no person other than *amici* and their members and counsel contributed money intended to fund the brief's preparation or submission.

/s/ Ira M. Feinberg

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GLOSSARY

BCRA:	Bipartisan Campaign Reform Act of 2002
CFIF:	Center for Individual Freedom
EC:	Electioneering Communication
E&J:	Explanation and Justification
FEC:	Federal Election Commission
FECA:	Federal Election Campaign Act
IRS:	Internal Revenue Service
Super PAC:	Independent Expenditure-Only Political Committee

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BRIEF OF AARP *et al.*
AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST OF *AMICI CURIAE*

AARP, the Brennan Center for Justice, the Center for Media and Democracy, the Center for Responsive Politics, Citizens for Responsibility and Ethics in Washington, Common Cause, the League of Women Voters of the United

States, Progressives United, and the Sunlight Foundation respectfully submit this brief as *amici curiae*.

AARP is a nonpartisan, nonprofit organization dedicated to assuring that older Americans have independence, choice, and control in ways beneficial and affordable to them and to society as a whole. AARP engages in advocacy to implement public policies of benefit to older Americans. AARP policy recognizes that the federal government should encourage disclosure by all who participate in supporting or opposing specific candidates and that all campaign funding and financing entities should provide timely and full disclosure of contributions to enable the electorate to make informed decisions and give proper weight to different speakers and messages.

The Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a nonpartisan public policy and law institute focused on the fundamental issues of democracy and justice. The Brennan Center's Money in Politics Project works to reduce the real and perceived influence of special interest money on our democratic values. The Brennan Center believes that robust disclosure laws will reduce the power of money and special interests in our elections and return voters to the center of our democracy.

The Center for Media and Democracy ("CMD") is a national, independent, and nonpartisan media, policy, and consumer watchdog group. CMD believes that

the vitality of America's democracy and economy requires informed citizens and political transparency, and CMD's mission, in part, is to scrutinize public relations "front groups" established by political, corporate, or other special interests. CMD's reporting and analysis focus on exposing corporate spin and government propaganda, including through publication of PRWatch, SourceWatch, BanksterUSA, and ALECexposed.

The Center for Responsive Politics ("CRP") is the nation's premier research group tracking money in U.S. politics and its effect on elections and public policy. Nonpartisan, independent, and nonprofit, the organization aims to create a more educated voter, an involved citizenry, and a more transparent and responsive government. CRP pursues its mission largely through its website, OpenSecrets.org, which is the most comprehensive resource for federal campaign contributions, lobbying data, and analysis available anywhere.

Citizens for Responsibility and Ethics in Washington ("CREW") is a nonprofit, nonpartisan corporation. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files ethics complaints

with Congress. CREW also prepares written reports, including a yearly report it disseminates publicly about unethical members of Congress.

Common Cause is one of the nation's oldest and largest citizen advocacy organizations, with approximately 300,000 members around the country. Common Cause has long supported efforts to reform campaign finance laws to reduce the potential for actual and apparent *quid pro quo* corruption. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government, and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 800 communities, in every state, and has more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

Progressives United, Inc. is a nonprofit, nonpartisan organization created to educate policymakers, opinion leaders, and the public about the corrupting influence of unlimited and corporate money in our political system. Progressives United was founded by former U.S. Senator Russ Feingold, one of the co-authors of the Bipartisan Campaign Reform Act of 2002.

The Sunlight Foundation ("Sunlight") was founded in 2006 with the nonpartisan mission of using the power of the Internet to make information about Congress and the federal government more meaningfully accessible to citizens. Through its projects and grant-making, Sunlight serves as a catalyst for greater political transparency, in an effort to make the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since its founding, Sunlight has assembled and funded an array of Web-based databases and tools, including OpenCongress.org, FedSpending.org, OpenSecrets.org, and EarmarkWatch.org, that make information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. Sunlight has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

The Brennan Center, Common Cause, and the League of Women Voters provided comments to the Federal Election Commission during the rulemaking proceedings that led to the regulation at issue on this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court correctly held that the Federal Election Commission ("FEC") regulation at issue is inconsistent with Section 201 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 434, and is therefore not a valid exercise of the FEC's rulemaking authority. Section 201 of BCRA requires any entity making a disbursement for an electioneering communication – if it chooses not to use a segregated account established for that purpose – to disclose the identity of "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement." 2 U.S.C. § 434(f)(2)(F). Rather than enforcing this statutory requirement, the regulation adopted by the FEC in 2007 required corporations or labor organizations making such disbursements to disclose only the identity of those individuals or entities who made such a donation "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).

But BCRA plainly requires disclosure of "all contributors" – there is no ambiguity in this statutory language, and it does not leave room for a test that requires examination of a donor's purpose. Moreover, this is the only reading

consistent with BCRA's legislative intent. The FEC acknowledged that it drew its "purpose" requirement from the pre-BCRA language of the Federal Election Campaign Act ("FECA"), but Congress' purpose in enacting BCRA was to *tighten* FECA's disclosure requirements and to *close* loopholes in FECA that had permitted widespread evasion of its requirements. The FEC's return to pre-BCRA standards in the challenged regulation is inconsistent with BCRA's language, purpose, and legislative intent.

BCRA's adoption of this disclosure requirement for electioneering communications is a key element of the statutory scheme, as the Supreme Court recognized in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The Court in *Citizens United* upheld the constitutionality of the portion of Section 201 at issue here by a wide 8-1 majority. In so doing, the Court emphasized that the disclosure required by Congress "permits citizens and shareholders to react to the speech of corporate entities in a proper way," and "enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. Indeed, the Court noted that it had previously upheld Section 201 on its face in *McConnell v. FEC*, 540 U.S. 93 (2003), because "[t]here was evidence in the record that independent groups were running election-related advertisements, while hiding behind dubious and misleading names," and the disclosure required by Section 201 "would help citizens make informed choices in the political

marketplace." 130 S. Ct. at 914 (quoting *McConnell*, 540 U.S. at 197) (internal quotation marks omitted).

These same considerations are relevant here. The regulation at issue is not only inconsistent with the statute – it has also opened the door to massive evasion of BCRA's disclosure requirements, and turned the clock back to precisely the evils that Congress was trying to address in BCRA. As detailed below, disclosure of donors for electioneering communications has dropped precipitously since the FEC adopted the challenged regulation. Before the rule was promulgated, 71 percent of all electioneering communication reports filed with the FEC in 2004 disclosed the names of their donors, but by 2010, only 15 percent of the reports provided this disclosure. In dollar terms, in 2004 electioneering communication reports disclosed the source of $100 million of donations to groups filing reports with the FEC, leaving only $218,000 whose source was undisclosed. But by 2010, disclosure had shrunk to only about $8 million in donations, while the source of some $67 million in spending was undisclosed.

For all of these reasons, as explained below, *amici* urge this Court to affirm the decision of the District Court and hold that the FEC exceeded its statutory authority when it promulgated 11 C.F.R. § 104.201(c)(9).

A R G U M E N T

I. CONGRESS IN SECTION 201 UNAMBIGUOUSLY MANDATED THAT THE IDENTITY OF "ALL CONTRIBUTORS" BE DISCLOSED, AND DID NOT LEAVE ROOM FOR THE FEC TO ADOPT A "PURPOSE" TEST.

The District Court correctly held that the challenged FEC regulation was inconsistent with Section 201 of BCRA, and was therefore invalid under step one of the analysis mandated by *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Section 201 explicitly provides that any person who spends more than $10,000 per year on electioneering communications – and who makes the disbursements for those communications out of general treasury funds rather than establishing a segregated account – must disclose "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement." 2 U.S.C. § 434(f)(2)(F). There is no ambiguity to this statutory command. As a motions panel of this Court explained in denying a stay, "nothing in the plain text of section 201 suggests Congress did not mean what it said – that section 201's disclosure requirement applies to all contributors regardless of their subjective purpose in contributing." JA180-81.

Nor is the statute's clear command requiring disclosure of "all contributors" inadvertent. On the contrary, Congress insisted on disclosure of the identity of all contributors of the specified amounts to permit voters to understand who was behind the welter of electioneering communications being aired shortly before

elections and to enable voters to make an informed choice on the weight to give their message. As appellant Center For Individual Freedom acknowledges, CFIF Br. at 6, the electioneering communications disclosure provisions were added by the Snowe-Jeffords Amendment to BCRA. The co-sponsors of that Amendment, Senators Olympia Snowe and James Jeffords, left no doubt of the purpose and breadth of these provisions. As Senator Snowe explained:

> While the public correctly perceives that electioneering communications are meant to influence their vote, the public is confused about the origin of these communications . . . an overwhelming majority – 75 percent – of the public believe that these communications are being paid for by the party or the candidate themselves. *The voters deserve to know who is trying to influence their vote*, and the Snowe-Jeffords provisions will give them that information.

147 Cong. Rec. S2812-13 (Mar. 23, 2001) (emphasis added). Similarly, Senator Jeffords made clear that the Amendment required any group making electioneering communications totaling $10,000 or more in a calendar year to "disclose . . . the names and addresses of *all* its donors of $1,000 or more." 147 Cong. Rec. S3044 (Mar. 28, 2001) (emphasis added). Senator Jeffords added:

> The Snowe-Jeffords provision satisfies the Court's concerns [in *Buckley*]. We deter the appearance of corruption by shining sunlight on the undisclosed expenditures for sham issue advertisements. Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election.

147 Cong. Rec. S3034 (Mar. 28, 2001).

Thus, the District Court correctly concluded that Congress enacted Section 201 "to shine light on whoever was behind the communications bombarding voters immediately prior to elections." JA154. In promulgating the challenged regulation, the FEC disregarded both the unambiguous statutory language and this clear legislative intent. Instead of adopting the standard mandated by BCRA, the FEC – in providing that disclosure was required only of donors who provided funds "for the purpose of furthering electioneering communications," 11 C.F.R. § 104.20(c)(9) – admittedly reached back to the language of the disclosure provision for independent expenditures, 2 U.S.C. § 434(c)(2)(C), that had been originally enacted as part of FECA. JA87 n.22. Congress could easily have adopted similar "purpose" language in the disclosure provision governing electioneering communications, but chose not to do so. *See* Van Hollen Br. at 28-29. The FEC had no authority to adopt a regulation that disregarded the clearly expressed intent of Congress. *See Chevron*, 467 U.S. at 842-43.[1]

[1] Although the Court does not need to reach the issue unless it concludes that the District Court erred in holding that the FEC's regulation was inconsistent with the clear statutory language, *amici* also agree with Van Hollen that the regulation is arbitrary and capricious and invalid under step two of the *Chevron* analysis. *See* Van Hollen Br. at 42-49.

II. THE SUPREME COURT IN *CITIZENS UNITED* RECOGNIZED THE VITAL FUNCTION OF DISCLOSURE IN CAMPAIGN FINANCE REGULATION.

In promulgating the challenged regulation, the FEC failed to consider the vital function served by Section 201's requirement for disclosure of the contributors behind electioneering communications. The Supreme Court has repeatedly upheld the constitutionality of disclosure requirements in campaign finance and other election-related contexts, and explained their importance in furthering First Amendment values. In *Buckley v. Valeo*, 424 U.S. 1 (1974), the Court upheld the provisions of the original FECA requiring disclosure of the sources of campaign contributions, explaining that "disclosure provides the electorate with information as to where political campaign money comes from . . . , in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67 (citation and internal quotation marks omitted). In *McConnell*, the Court upheld the facial constitutionality of Section 201's disclosure provisions relating to electioneering communications, holding that the disclosure required by Section 201 is an essential component of "uninhibited, robust, and wide-open" political debate, and serves the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." 540 U.S. at 196-97.

The Supreme Court in *Citizens United* recently reaffirmed *Buckley* and *McConnell* in this respect, and specifically upheld the constitutionality of the

disclosure requirements of Section 201 as applied to the electioneering communications at issue in that case. 130 S. Ct. at 913-16. Appellants and their *amici* argue that Section 201's disclosure requirements are problematic under the First Amendment and that the FEC permissibly introduced a narrowing construction into the challenged regulation in order to avoid these constitutional difficulties. But in fact, the Supreme Court in *Citizens United* considered and rejected these claims, and emphasized, to the contrary, the important First Amendment values *served by* these disclosure requirements.

A. *Citizens United* Affirmed The Constitutionality Of Section 201.

In *Citizens United*, the Supreme Court upheld the constitutionality of Section 201's disclosure requirements as applied to a nonprofit corporation that, shortly before the 2008 primary elections, produced a film entitled *Hillary: The Movie*, and several advertisements for the film, which were deemed to be electioneering communications. The Court emphasized that disclosure requirements are of fundamental importance to our democracy. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." 130 S. Ct. at 898. As such, the public has "the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at 899. And, to this end,

"the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 915.

Thus, the Court concluded: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916. Indeed, the Court embraced the power of the Internet and its ability to further First Amendment values by making disclosures available to the public rapidly and widely:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."

Id. (quoting *McConnell*, 540 U.S. at 259 (separate opinion of Scalia, J.)).

The Court also noted that it has repeatedly upheld disclosure because it is "a less restrictive alternative to more comprehensive regulations of speech." *Id*. at 915. Thus, the Court noted, even three of the Justices who would have held Section 441b unconstitutional in *McConnell* "nonetheless voted to uphold BCRA's

disclosure and disclaimer requirements." *Id*. (citing 540 U.S. at 321 (separate opinion of Kennedy, J., joined by Rehnquist, C.J. and Scalia, J.)).

B. The Supreme Court Has Long Recognized The First Amendment Values Served By Disclosure.

Indeed, *Citizens United* is among a long line of cases in which the Supreme Court has recognized the importance of disclosure in the election campaign context. For instance, in *Doe v. Reed*, 130 S. Ct. 2811 (2010), the Court upheld the constitutionality of a Washington state law that authorized private parties to obtain the names and addresses of the individuals who had signed a referendum petition placed on the ballot. The Court held that disclosure of this information to the public was justified by the state's interest in "preserving the integrity of the electoral process." *Id.* at 2819. As the Court explained, "[p]ublic disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot." *Id*. at 2820.

Similarly, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court, while striking down a Massachusetts law prohibiting corporations from making expenditures to influence the vote on a referendum proposal, held that the state *could* require disclosure of such expenditures. The Court reasoned that "people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *Id.* at 791-92

(footnotes omitted). Accordingly, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32.

And in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court affirmed a Tenth Circuit decision striking down certain requirements imposed by Colorado law on individuals circulating petitions to place initiative measures on the ballot. But the Court specifically approved the Tenth Circuit's decision to *sustain* the state's requirements for disclosure of the financial supporters of initiative efforts. As the Court explained,"[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for their initiatives," is supported by the "substantial state interest" in "disclosure as a control or check on domination of the initiative process by affluent special interest groups." 525 U.S. at 202-03 (citations omitted).[2]

C. Appellants' Arguments Against Disclosure Are Without Merit.

Thus, there is no merit to appellants' claims that the scope of disclosure mandated by Section 201 raises any serious constitutional issue and that the FEC was therefore warranted in promulgating a rule that limited the required disclosures.

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[2] In a related context, as the Court noted in *Citizens United*, the Court has upheld laws requiring lobbyists to report contributions received or expenditures incurred in attempting to influence legislation. *United States v. Harriss*, 347 U.S. 612 (1954).

Specifically, appellants argue that adjustment of the FEC's disclosure regulation was necessary to take into account the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). This was in fact the basis for the FEC's revised regulation. JA76. According to the FEC, in light of *WRTL*, the new regulation "revised . . . the reporting requirements for corporations and labor organizations funding [electioneering communications]" – which had previously tracked the requirements of Section 201 – so that the disclosure requirements "are narrowly tailored to address . . . individual donor privacy." JA77.

But the Supreme Court in *Citizens United* rejected an analogous argument that the scope of Section 201's disclosure requirements was affected by *WRTL*. Citizens United argued that "the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy," because "*WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent." 130 S. Ct. at 915 (citing *WRTL*, 551 U.S. at 469-76). But the Court disagreed, and instead made clear that the First Amendment limitations on the scope of the independent expenditures that Congress could prohibit has no bearing on the scope of the disclosures constitutionally permissible under Section 201. *Id.*

Along similar lines, appellants and their *amici* argue that *Citizens United* did not dispose of their constitutional claims because the Court did not consider the constitutionality of disclosure of financial supporters as applied to a person who may not have specifically endorsed the message contained in an electioneering communication. Appellants and their *amici* claim that such disclosure infringes their alleged constitutional right to publish anonymously.

But nowhere in the Supreme Court's opinion is there any indication that the constitutionality of Section 201's required disclosures depend to any degree on the subjective intent of donors. To the contrary, the Court's ruling was based on the *public*'s interest in knowing "about the sources of election-related spending," 130 S. Ct. at 914, so that citizens can "make informed choices in the political marketplace," *id*. (quoting *McConnell*, 540 U.S. at 197), shareholders can determine whether the corporation's donations "advance the corporation's interest in making profits," *id*. at 916 (quoting *McConnell*, 540 U.S. at 259 (opinion of Scalia, J.)), and "the electorate [can] make informed decisions and give proper weight to different speakers and messages," *id*. (quoting *McConnell*, 540 U.S. at 197). None of these important purposes is dependent upon the subjective intent of the donor who contributes to the organization making the electioneering communication.

Moreover, *amici* joining the brief of the Free Speech Coalition are simply wrong in asserting that there is a constitutional right to publish anonymously that has any application to contributions for electioneering communications. *Amici* rely principally on the Supreme Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), which held unconstitutional an Ohio statute prohibiting the anonymous publication of election-related pamphlets. But *McIntyre* does not support the existence of any such constitutional right. Rather, *McIntyre* was based on a careful weighing of both the First Amendment value of the speech at issue and the state interests supporting the required disclosure, and did not create a new right to anonymity in political speech. The Court in *McIntyre* merely found that the state interests underlying disclosure in the handbill context were insubstantial, and expressly distinguished the important purposes served by disclosure in the campaign finance context. *See id.* at 354-56. Indeed, in *Doe v. Reed*, petitioners made a similar argument and the Court implicitly rejected it. In his separate opinion, Justice Stevens – the author of the Court's opinion in *McIntyre* – expressly recognized that there is "no such freewheeling right" to "anonymous speech," 130 S. Ct. at 2831 n.4, and Justice Scalia wrote a concurring opinion explicitly "refut[ing] the claim that the First Amendment accords a right to anonymity," *id.* at 2832-33. In any event, if an organization making electioneering communications truly wanted to protect the anonymity of its donors – and donors

were not in fact seeking to contribute to the electioneering messages – then BCRA and FEC regulations simply require the organization to establish a segregated fund to make such electioneering communications. 2 U.S.C. § 434(f)(2)(E); 11 C.F.R. § 104.20(c)(7).

Rather than recognizing a constitutional right to publish anonymously in the campaign finance context, the Supreme Court in *Citizens United* recognized only one situation where the public's interest in disclosure of the sources of campaign funding might have to give way. As the Court explained, "as-applied challenges would be available if a group could show a 'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" 130 S. Ct. at 914 (quoting *McConnell*, 540 U.S. at 198). To demonstrate this probability, a group must provide "*evidence* that its members may face . . . threats or reprisals." *Id.* at 916 (emphasis added).

But no party here has presented any such evidence, and the District Court correctly observed that "nothing like that has been raised as an issue in this case." JA163. Nevertheless, the *amicus* brief of Senator Mitch McConnell cites several reports purporting to "show a concerted effort to harass and intimidate persons who are using the rights protected by *Citizens United* to engage in protected speech." McConnell Br. at 24. Despite this overheated rhetoric, close examination

of the examples provided by Senator McConnell does not show any conduct even close to meeting the constitutional standard of threats and reprisals required for an as-applied challenge. The leading example cited by Senator McConnell relates to an organization, Media Matters, which has announced that its staff will review independent expenditure reports filed with the FEC and use the information revealed about corporate donors to "create a multitude of public relations challenges" for corporations engaging in political spending. McConnell Br. at 24-25. But this is precisely the conduct that the Supreme Court in *Citizens United* extolled as one of the *benefits* of disclosure, so that citizens "could hold corporations . . . accountable for their positions." 130 S. Ct. at 916.

Similarly, Senator McConnell refers to a magazine article that used mild "epithets like 'the pyramid schemer' and 'the tax dodger'" to describe the donors to one organization. McConnell Br. at 25. This is not nearly enough to support an as-applied challenge. As Justice Scalia explained in his concurring opinion in *Doe v. Reed*: "There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." 130 S. Ct. at 2837 (Scalia, J., concurring). *See also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254 n.7 (1986) (although reporting and disclosure requirements may

"deter some individuals who otherwise might contribute, this is a burden that is justified by substantial Government interests") (internal citation and quotation marks omitted).

Finally, appellants and their *amici* argue that the purpose of Section 201 – to inform voters about who is supporting a political message – is not served (and indeed, is "defeated") if they are required to disclose all of their contributors over $1,000 instead of those who contribute to support a particular message. CFIF Br. at 20; *see also* McConnell Br. at 21. But this argument is based on a false premise. Most, if not all, of the contributors to organizations making electioneering communications (and especially those who contribute in large amounts) *do* support the general thrust of the organization's messages, whether or not they affirmatively contributed to support a particular communication. And to the extent that the disclosures required by Section 201 may reveal support from publicly held corporations, *Citizens United* makes clear that both shareholders and ordinary citizens have an interest in learning about such support, "to hold corporations and elected officials accountable for their positions and supporters." 130 S. Ct. at 916. If a corporation (or individual) truly wanted to disassociate itself from a political message with which it disagreed, obviously public disclosure would give it an opportunity to reconsider or redirect its support for the organization making the electioneering communication.

III. THE FEC'S RULE CREATED A GAPING LOOPHOLE IN CAMPAIGN DISCLOSURE REQUIREMENTS.

Thus, the FEC's 2007 regulation is inconsistent with the clear text of Section 201 of BCRA, and cannot be justified by any First Amendment concerns. In addition, by adding a subjective test based on the "purpose" of the donor into the regulations, the FEC has created a gaping loophole in BCRA's disclosure regime, which – contrary to the clear intent of Congress – has as a practical matter virtually eliminated disclosure of the sources of funding for electioneering communications.

Campaign spending this year has reached unprecedented levels,[3] and financial disclosure of donors is therefore more critical than ever to ensure that voters can make informed decisions on Election Day. Yet by introducing a subjective purpose test into the regulations, the FEC has impermissibly narrowed disclosure requirements for electioneering communications, and promulgated a rule that effectively allows anonymous groups with generic names to completely avoid disclosing their donors. This is precisely the problem that led Congress to enact BCRA in the first place, as the Supreme Court in both *McConnell* and

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[3] With more than three months remaining in the 2012 election cycle, outside groups other than candidates' campaign committees – including independent expenditure committees (colloquially known as "super PACs"), political parties, corporations, unions, section 501(c) groups and individuals – have already spent a staggering total of $202,994,747 (as of July 23, 2012), far outpacing the total outside spending of $71,074,292 as of the same date in the 2008 election cycle. *See* Center for Responsive Politics, *Outside Spending*, http://www.opensecrets.org/outsidespending/index.php (as visited July 23, 2012).

Citizens United recognized. *See Citizens United*, 130 S. Ct. at 914 (citing *McConnell*, 540 U.S. at 197).

The Supreme Court has repeatedly acknowledged the truism that when it comes to campaign finance, candidates, donors, and parties will inevitably "test the limits" of the law, *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001), and Congress may therefore permissibly take steps to prevent circumvention of its mandates. *Id.*; *see also McConnell*, 540 U.S. at 177, 182; *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (recognizing that campaign regulations "would be eroded if inducement to circumvent them were enhanced"). Similarly, in its rulemaking, the FEC is required to carry out the intent of Congress, and not to create opportunities for evasion that Congress did not intend. Yet here the FEC has promulgated a regulation that has permitted widespread evasion of congressionally mandated disclosure requirements.

There are two fundamental reasons why the FEC's regulation has created such a gaping loophole in the disclosure regime. First, by making disclosure turn on the *donor*'s purpose, the regulations empower a recipient organization to decline to disclose its donors because it can plausibly claim that it does not know the purpose of the donation – and it can easily avoid knowledge of the donor's purpose simply by not asking. In the FEC's Explanation and Justification ("E&J") for the new rule, the FEC explained that "[d]onations made for the purpose of

furthering an EC [electioneering communication] include funds received in response to solicitations *specifically* requesting funds to pay for ECs as well as funds *specifically* designated for ECs by the donor." JA87 (emphases added). But under this definition, the organization can avoid disclosure simply by soliciting funds to support the organization's mission generally, without "specifically requesting" funds to pay for electioneering communications.

Second, three of the six current FEC Commissioners have interpreted the FEC regulation to require disclosure only if the donor expressly made a contribution for a specific advertisement rather than to support electioneering communications generally. These Commissioners have taken the position that donor disclosure is required "only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report" being filed.[4] Since enforcement action by the FEC requires the affirmative vote of at least four of its six members, 2 U.S.C. § 437g(a)(2), the interpretation adopted by these Commissioners effectively blocks the FEC from taking any other enforcement position. As a result, even an organization that does nothing but make electioneering communications can take the position that none of its donors made a

[4] Statement of Reasons of Chairman Matthew S. Peterson, Commissioner Caroline C. Hunter, & Commissioner Donald F. McGahn, *In re Freedom's Watch, Inc.*, MUR 6002, at 5 (2010), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf.

donation for any particular advertisement, and therefore that no disclosure is required. Indeed, the standard proposed by these Commissioners is nearly impossible to meet, since most fundraising is done well before specific advertisements are created – it is difficult to imagine how a donor would designate a contribution for a specific ad that does not yet exist – and in any event, donors rarely, if ever, earmark contributions in this way for a particular advertisement.

The predictable result has been an unprecedented lack of transparency in the financing for electioneering communications. In the period between 2007, when the FEC adopted 11 C.F.R. § 104.20(c)(9), and March 2012, when it was struck down by the District Court, the disclosure of donors on electioneering communication reports filed with the FEC plummeted. According to The Campaign Legal Center, in 2004 before the rule was promulgated, 71 percent of all electioneering communication reports filed with the FEC disclosed the names of donors funding the group releasing the ads. But in 2010, after promulgation of the rule, only 15 percent of all electioneering communication reports filed with the FEC disclosed the names of their donors.[5]

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[5] The Campaign Legal Center, *A Guide to the Current Rules for Federal Elections: What Changed in the 2010 Election Cycle*, http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59 (last visited July 26, 2012).

Viewed in terms of the dollar amount of contributions for which there was disclosure of donors, according to data compiled by *amicus* The Center for Responsive Politics, electioneering communication reports filed in 2004 disclosed the donors of approximately $100 million in donations to groups making the ads, while listing only $218,000 in expenditures for which donors were undisclosed. But in 2008, the majority of the dollars spent on electioneering communications were funded by undisclosed donors – the reports filed with the FEC disclosed the donors for approximately $50 million in expenditures for such ads, while the donors for approximately $68 million in spending went undisclosed. And by 2010, electioneering communication reports disclosed the donors for only about $8 million in spending, while $67 million went undisclosed.[6]

Thus, the FEC's promulgation of the Rule at issue here literally turned disclosure patterns upside down. This is readily confirmed simply by viewing the electioneering communication reports displayed on the FEC's website, which include a column in which the filer is required to record the number of donors disclosed on each report. Most reports filed before the FEC's adoption of the Rule

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[6] *See* Center for Responsive Politics, *Outside Spending*, http://www.opensecrets.org/outsidespending/index.php (last visited July 26, 2012) (composite of data from the "By Groups" section – selecting "Electioneering Communications" and "by Disclosure of Group" for each election cycle).

in December 2007 include information on donor disclosure, but the vast majority of reports filed since 2008 simply list the number of donors disclosed as zero (0).[7]

The impact of the FEC's unduly narrow rule is most apparent, and most problematic, with respect to tax-exempt groups organized under Section 501(c) of the Internal Revenue Code, 26 U.S.C. § 501(c), as "social welfare" organizations under Section 501(c)(4), labor organizations under Section 501(c)(5), or trade associations under Section 501(c)(6).[8] These Section 501(c) organizations typically are not registered with the FEC as political committees, because they theoretically do not have a "major purpose" of influencing elections. *See Buckley*, 424 U.S. at 79; *see also* FEC, Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). Although these Section 501(c) organizations must file annual information returns with the Internal Revenue Service ("IRS"), they are *not* required to publicly disclose their donors under the tax law.

Under IRS rules, these Section 501(c) organizations have long been permitted to engage in some political activity in support of candidates for office, as

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[7] *See* FEC, *Electioneering Communication Reports*, http://www.fec.gov/finance/disclosure/ec_table.shtml (last visited July 26, 2012) (reports since 2004 available).

[8] Charitable organizations organized under Section 501(c)(3) are not permitted to engage in political activity in support of candidates for election. *See* 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(d).

long as the group – if organized under Section 501(c)(4) – is "primarily engaged in promoting in some way . . . the general welfare of the people of the community."[9] However, under federal election laws, until *Citizens United*, these organizations (other than organizations coming within the narrow exception recognized by the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)) were prohibited from spending general treasury funds on independent expenditures in support of political candidates or electioneering communications. *Citizens United* has now freed such organizations to spend money on advertisements in support of political candidates, but they may remain tax exempt only as long as such political activity does not call into question the group's stated primary tax-exempt purpose. As a result, the donor disclosure requirements imposed by the FEC on the electioneering communications of Section 501(c) organizations are particularly important if there is to be any transparency at all that would permit the public to understand who is supporting these organizations.

After *Citizens United*, some people predicted that corporate money would flood into "independent-expenditure-only political committees" (commonly known

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[9] *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2); *see also* IRS Exempt Organizations Continuing Professional Education Program, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations* (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicl03.pdf. Groups organized under Sections 501(c)(5) and 501(c)(6) are subject to similar restrictions. *See* IRS Gen. Counsel Mem. 34233 (Dec. 30, 1969); *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, *supra*.

as "super PACs"),[10] but by and large that has not happened, and it is wealthy individuals rather than corporate contributions that have provided most super PAC funds. Instead, corporations are reportedly pouring money into Section 501(c) tax-exempt groups, precisely because these groups do not have to publicly disclose their donors and corporations relish the anonymity. *See* Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Business*, N.Y. Times, July 7, 2012.[11]

Indeed, of approximately $5 million spent on electioneering communications by 501(c) groups in the 2012 election cycle thus far, $4.4 million was recorded without any disclosure of donors.[12] Moreover, according to the *Washington Post*, "[p]olitically active nonprofit groups that do not reveal their funding sources have

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[10] "Independent expenditure-only political committees" must register with the FEC as "political committees" and must disclose to the FEC all of their receipts and disbursements, identifying every donor who contributes more than $200. *See* 2 U.S.C. § 434(b)(3)(A); *see also* FEC Advisory Op. 2010-11 (July 22, 2010) (Commonsense Ten), *available at* http://saos.nictusa.com/aodocs/AO%202010-11.pdf; *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir.) (en banc), *cert. denied*, 131 S. Ct. 553 (2010).

[11] http://www.nytimes.com/2012/07/08/us/politics/groups-shield-political-gifts-of-businesses.html?pagewanted =all.

[12] Center for Responsive Politics, *2012 Outside Spending, By Groups*, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=E (last visited July 26, 2012).

spent $28.5 million on advertising related to the November presidential matchup, or about 90 percent of the total through [April 2012]."[13]

According to data collected by the Center for Responsive Politics, Section 501(c) groups spent over $120 million on candidate-election-related ads during the mid-term elections in 2010. One of the principal spenders was the U.S. Chamber of Commerce, a Section 501(c)(6) organization that represents the interests of business. During the 2010 election cycle, the Chamber of Commerce spent nearly $33 million on election-related advertisements, without disclosing any of its donors.[14] Similarly, a Section 501(c)(4) group, the American Action Network ("AAN"), spent approximately $19 million on election-related advertisements in 2010, also without disclosing its donors.[15] Another example is Patriot Majority USA, a liberal-leaning Section 501(c) organization, which has spent more than $2.5 million on independent expenditures to date and disclosed no donors.[16]

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[13] Dan Eggen, *Most Independent Ads for 2012 Election Are from Groups that Don't Disclose Donors*, Wash. Post, Apr. 24, 2012, *available at* http://www.washingtonpost.com/politics/most-independent-ads-for-2012-election-are-from-groups-that-dont-disclose-donors/2012/04/24/gIQACKkpfT_story.html.

[14] http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001101&cycle=2010 (last visited July 26, 2012).

[15] http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Action+Network&cycle=2010 (last visited July 27, 2012).

[16] http://www.opensecrets.org/outsidespending/detail.php?cmte=Patriot+Majority+USA&cycle=2012 (last visited July 26, 2012).

Indeed, some organizations have established parallel entities to facilitate the desire of major donors who wish to remain anonymous. One of the most salient examples is the American Crossroads organization, established by a number of Republican strategists. American Crossroads itself is an independent expenditure-only political committee, or super PAC, which is required to disclose its donors. But to accommodate donors seeking anonymity, American Crossroads' founders established a parallel organization, Crossroads GPS, under Section 501(c)(4).[17] According to a recent report in *The Huffington Post*, "Crossroads GPS has spent $85.9 million on advertising campaigns since the beginning of 2011 without disclosing its donors or the spending itself."[18]

While not all of the money discussed above has been spent on advertisements classified as electioneering communications, a substantial percentage has been. The spending of untold millions of dollars on electioneering communications without disclosing information about the donors of this money is the direct consequence of the FEC regulation at issue here. The District Court

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[17] *See* K. Vogel, "*Rove-tied Group Raises $2 Million*," Politico, Aug. 21, 2010, http://www.politico.com/news/stories/0810/41327.html.

[18] Paul Blumenthal, *DISCLOSE Campaign Spending Act Blocked By Senate Republicans*, Huffington Post, July 16, 2012, http://www.huffingtonpost.com/2012/07/16/disclose-act-senate-campaign-spending_n_1678055.html?ncid=edlinkusaolp00000009#slide=893705.

correctly concluded that the FEC regulation was contrary to the clear mandate of Section 201 requiring disclosure of donors, and therefore invalid.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision.

Respectfully submitted,

HOGAN LOVELLS US LLP

By: /s/ Ira M. Feinberg
Ira M. Feinberg
875 Third Avenue
New York, NY 10022
ira.feinberg@hoganlovells.com
T 212.918.3000
D 212.918.3509
F 212.918.3100

Chantell Taylor
One Tabor Center, Suite 1500
1200 Seventeenth Street
Denver, CO 80202
chantell.taylor@hoganlovells.com
T 303.899.7300
D 303.454.2466
F 303.899.7333

Mary Helen Wimberly
555 Thirteenth Street, NW
Washington, DC 20004
maryhelen.wimberly@hoganlovells.com
T 202.637.5600
D 202.637.5790
F 292.637.5910

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), as well as Circuit Rule 32(a), because the brief contains 6,946 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because the brief has been has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Ira M. Feinberg

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2012, the foregoing Brief was filed through the Court's ECF system, and accordingly was served electronically on all parties.

/s/ Ira M. Feinberg