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 THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLANT, CITIZENS UNITED

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INTEREST OF THE AMICUS

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Appellant Citizens United.[1]

The Institute is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute litigates First Amendment cases throughout the country and files amicus curiae briefs in important cases nationwide, including this Court's decisions in *Davenport v. Washington Education Association*, ___ U.S. ___, 127 S.Ct. 2372 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). The Institute regularly brings cases on behalf of individuals whose right to speak and associate has been infringed by the actions of the government. In particular, the Institute has represented parties in a number of actions challenging campaign finance regulations. *See Independence Inst. v. Coffman*, ___ P.3d ___, 2008 WL 5006531 (Colo. App. 2008); *Broward Coal. of Condo. v.*

[1] The Institute has received consent from counsel of record pursuant to Sup. Ct. R. 37.3, as submitted with this brief. The Institute affirms, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Browning, __ F. Supp. 2d ___, 21 Fla. L. Weekly 420 (N.D. Fla. 2008); *Sampson v. Coffman*, ___ F. Supp. 2d ___, 2008 WL 4305921 (D. Colo. Sept. 18, 2008); *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008); *McComish v. Brewer*, No. cv-08-1550-PHX-ROS (D. Ariz. Oct. 17, 2008); *San Juan County v. NoNewGasTax.com*, 157 P.3d 831 (Wash. 2007); and *Battaglieri v. Mackinac Ctr. for Pub. Policy*, 680 N.W.2d 915 (Mich. Ct. App. 2004). Further, the Institute has published two recent empirical research studies identifying the burdens and costs of campaign finance disclosure requirements.

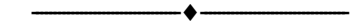
The Institute believes that its legal perspective, experience, and empirical research will provide this Court with valuable insights regarding the impact of mandatory disclosure on political activity.

SUMMARY OF ARGUMENT

Mandatory reporting and disclosure requirements are common features of campaign finance regulations, largely because they are generally accepted as a relatively cost-free means of regulation. Until the Institute researched the issue, however, no one previously attempted to systematically measure the extent to which mandatory disclosure of information about a citizen's political activities (including the widespread dissemination of such information) creates disincentives for the rigorous exercise of First

Amendment rights. The Institute's empirical research demonstrates that mandatory disclosure of the kind sought by the Appellees in this case chill the exercise of First Amendment free speech and association rights because of (i) a reasonable fear of reprisals, and (ii) the burdens of compliance wedded to severe penalties for failing to accurately comply with disclosure rules.

Under strict scrutiny, it is the government's burden to demonstrate – through facts and not mere conjecture – that any harms that disclosure aims to prevent are real and that mandating disclosure actually alleviates those harms. The Institute's empirical evidence shows that the government cannot meet this burden in this case. For this reason, this Court should reject the arguments of the Appellee regarding the constitutional legitimacy of mandatory disclosure of political activity. At the very least, this Court should hold that the government must demonstrate that mandatory disclosure of political activity will *not* result in threats, harassment, or reprisals from either the government or private parties, instead of placing the burden on the speaker to demonstrate such consequences if anonymity is lifted.



ARGUMENT

This Court has previously upheld various mandatory disclosure requirements in the campaign finance context. *See, e.g., McConnell v. FEC*, 540 U.S.

93, 196-99, 231, 321 (2003); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999); and *Buckley v. Valeo*, 424 U.S. 1, 81 (1976). This line of reasoning has prevailed in the lower courts as well. *See, e.g., Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003). Significantly, however, none of these cases actually engaged in an analysis of the factual evidence regarding the effects and impacts of disclosure requirements on the exercise of First Amendment rights. Instead, the cases assume that disclosure had some negative impact on the vigorous expression of First Amendment rights, but that this burden was not significant enough to overcome the government's interest in combating corruption or the appearance of corruption. *See Buckley*, 424 U.S. at 81 (1976) (assumes that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption Congress found to exist").[2] In that regard, neither this Court,

[2] Many courts find support for mandatory disclosure in *United States v. Harriss*, 347 U.S. 612 (1954). *See, e.g., Buckley*, 424 U.S. at 67 n. 79; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n. 32 (1978); *Getman*, 328 F.3d at 1106. The application of this case beyond its facts is questionable, however. First, *Harriss* concerned a statute narrowly targeting professionals who lobbied members of Congress, in contrast to Citizens United's role in speaking to the public at large. *See Harriss*, 347 U.S. at 620-21 n. 10. Moreover, *Harriss* was issued years before the Internet made campaign-finance data easily available to anyone with access to a computer. In 1954, the cost of accessing information on political activity was relatively high. Now, as discussed below, the Internet has allowed states to create

(Continued on following page)

nor any other court, has analyzed whether mandatory disclosures are, as widely assumed, in reality "the least restrictive means" in comparison to the purported benefits of such regulation.

For the Federal Election Commission ("FEC") to impose the mandatory disclosure regulations at issue before this Court in a manner consistent with the dictates of the First Amendment, it must demonstrate a compelling state interest which the reporting requirements are narrowly tailored to meet. *FEC v. Wisc. Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2664, 168 L. Ed. 2d 329 (2007) ("*WRTL*"). To demonstrate such an interest, the FEC must offer actual evidence of a real problem that the law is designed to remedy. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). This Court has further noted, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) ("*MCFL*").

This case presents the Court with the opportunity to consider, for the first time, the tangible burdens and costs of disclosure requirements using

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government-run databases of political activity that can be accessed with just a few keystrokes. Twenty-first century technology has simply made *Harriss* a vestigial organ of a time when accessing information was difficult and expensive.

empirical information, not mere assumptions or conjecture. While evidence as to the burdens and benefits of mandatory disclosure laws was not previously available, it now exists. Rather than justifying mandatory disclosure laws, this evidence undermines their constitutionality. The FEC may not merely rest on conjecture, it must demonstrate, using actual evidence, that mandatory disclosure of Appellants' donors is narrowly tailored to deter corruption or the appearance of corruption. Now that empirical evidence exists regarding the benefits and burdens of disclosure and reporting requirements, however, the FEC simply cannot meet its burden to justify the reporting requirements at issue. *See* 2 U.S.C. § 434(f)(2); 11 C.F.R. § 104.20.[3]

I. DISCLOSURE REGULATIONS CHILL SPEECH BY BURDENING CITIZENS' RIGHT TO ENGAGE IN ANONYMOUS SPEECH AND BY ENABLING PERSONAL AND ECONOMIC REPRISALS

Despite the widespread use of mandatory disclosure laws by governments regulating political activity, before the Institute's recent studies, "no one [had] analyzed systemically the effects of campaign-finance

[3] The Institute agrees with Citizens United's arguments regarding the constitutionality of all aspects of the FEC's regulations at issue and in particular with its argument at pages 53-57 of the Appellant's Opening Brief, addressing the disclosure requirements in the FEC's regulations.

regulations on freedom of speech or association." Jeffrey Milyo, Ph.D., *The Political Economics of Campaign Finance*, The Independent Review, Vol. 3, Issue 4, 537 (Spring 1999) *available at* http://web.missouri.edu/~milyoj/files/polecon%20article.pdf. Given the push in recent years for increased campaign finance regulations, this lack of analysis is significant because "[i]t is difficult to evaluate the desirability of either current laws or proposed reforms when the potential costs of various policies have been completely ignored by scholars and policy makers alike." *Id.* We now have empirical research into the costs of mandatory reporting and disclosure laws demonstrating the full extent of their chilling effect on First Amendment freedoms.[4]

Under the FEC's rules, Appellant Citizens United, if subject to the reporting requirements at issue in this case, would have to disclose the name and address of each person who contributed $1,000 or more since the beginning of the prior calendar year for the purpose of funding "electioneering communications." 2 U.S.C. § 434(f); 11 C.F.R. § 104.20. Crucially, this data is then made publicly and broadly available by the FEC on public internet websites and

[4] While the particular research studies discussed below were conducted within the context of ballot issue elections, the primary empirical findings are applicable to candidate elections as well and are therefore relevant to this Court's analysis of claims arising in the context of a candidate election.

is easily accessible and searchable. 2 U.S.C. § 434(i)(4). This kind of reporting or disclosure requirement is not unusual in campaign finance regulatory schemes.

A. Disclosure Creates A Disincentive To Engage in Political Activity

In 2007, Dr. Dick Carpenter conducted research to determine whether mandatory disclosure requirements impose burdens that chill political participation. *See* Dick Carpenter, Ph.D., *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* at 5-6, Institute for Justice, March 2007, http://www.ij.org/publications/other/disclosurecosts.html (last visited January 12, 2009). Dr. Carpenter is an Associate Professor at the University of Colorado, Colorado Springs, where he teaches graduate courses in research methods and statistics, and he is the Director of Strategic Research at the Institute for Justice. *Id.* at 22.

Dr. Carpenter's research is the first of its kind to address substantively issues that have long been raised by scholars:

> [M]ore than 30 years ago political scientist Herbert Alexander warned against a "chilling effect" of [campaign finance] laws on free speech and citizen participation. Alexander described a situation in which citizens might be reluctant to participate or speak for fear

> of unintentionally violating laws they knew little about or did not understand.
>
> Brad Smith, former chair of the Federal Election Commission and current chair of the Center for Competitive Politics, also points to the not unheard of possibility of retaliation against citizens whose political activities are disclosed to the public by the state. Smith asks, "What is forced disclosure but a state-maintained database on citizen political activity?"

Id. at 5.

Specifically, Dr. Carpenter's study examined respondents' general opinions about mandatory disclosure requirements in the abstract, as well as when the respondents themselves might be affected personally. Dr. Carpenter found that people generally favor mandatory disclosure – or, at least they favor it until they may be personally affected by these requirements:

> More than 82 percent of respondents agreed or strongly agreed with the idea [of mandatory contribution disclosure requirements]. . . . Yet, support for disclosure wanes considerably when the issue is personalized. . . . [M]ore than 56 percent disagreed or strongly disagreed that their identity should be disclosed, and the number grew to more than 71 percent when disclosure of their personal information included their employer's name.
>
> * * *

> Indeed, when we compared respondents' support for disclosure generally to their support for disclosing their own personal information, we found a very weak statistical relationship, especially if disclosure of one's employer is required. In other words, enthusiastic support for disclosure laws does not translate into a belief that one's own personal information should be released publicly.

Id. at 8 (internal citations omitted). The bottom line? "[E]ven those who strongly support forced disclosure laws will be less likely to contribute to an issue campaign if their contribution and personal information will be made public." *Id.*

In that regard, the desire to engage in anonymous political speech and association was the main factor underlying respondents' concerns with disclosure of personal information:

> When asked, through open-ended probes, why they would think twice if their personal information was disclosed, the reason most often given (54 percent) was a desire to keep their contribution anonymous. Responses such as, "Because I do not think it is anybody's business what I donate and who I give it to," and "I would not want my name associated with any effort. I would like to remain anonymous," typified this group of responses.
>
> * * *

> Respondents also most often cited the issue of anonymity (32 percent) when asked why they would think twice before donating if their *employer's* name were disclosed. In this case, the concern was over revealing where they work. For example, "It's not anybody's business who my employer is and it has nothing to do with my vote," or "My employer's name is nobody's business," most often represented this concern.

Id. at 8-9 (emphasis in original). Beyond the desire for anonymous political participation, respondents also had concerns over a variety of potential repercussions, including fears of identity theft, invasion of privacy, and loss of employment:

> Respondents also frequently mentioned a concern for their personal safety or the potential for identity theft. Comments included, "Because I am a female and [it's] risky having that info out there"; "With identity theft I don't want my name out there"; and "I wouldn't donate money because with all the crazy people out there, I would be frightened if my name and address were put out there to the public."
>
> Other participants saw a relationship between disclosure and a violation of their private vote with responses like, "I don't want other people to know how I'm voting," or, "Because that removes privacy from voting. We are insured privacy and the freedom to vote." Still others noted the opportunity for repercussions. "I think it's an opening for

> harassment"; "I don't think my information should be out there for fear of retaliations"; or "My privacy would be invaded by the opposition," illustrate such concerns.
>
> * * *
>
> Respondents also often cited concern for the longevity of their job should their employer, through mandatory disclosure, learn of the employee's beliefs expressed through a contribution. Some simply stated, "I would never want my employer to know who I give money to," or, "I wouldn't want my employer to be informed on what I do." But others explicitly stated their fear: "Because that could jeopardize my job"; "I might get fired for that kind of stuff"; and, "If you were a union member and you vote on another side it would come back at you and hit you in the face."
>
> Still others feared for the negative effect on their own business: "I am self-employed, and I wouldn't want that to be released to the public," or, "Because I own a business and who I support is part of my own internal business practices and should not be public."

Id. at 8-9. As discussed below, however, concerns about economic or personal repercussions are certainly not hypothetical in an age where campaign finance reports are available on the Internet, easily accessible, and are used more frequently to retaliate against political opponents.

B. Fear Of Political Reprisal Is Both Real and Reasonable

In the most recent election cycle, supporters of California's Proposition 8, relating to same-sex marriage, found themselves subject to reprisals in a variety of forms following the proposition's success. *See* Steve Lopez, *A Life Thrown in Turmoil by $100 Donation for Prop. 8*, Los Angeles Times, December 14, 2008 (describing the experience of a restaurant manager who made a personal donation in support of Proposition 8, ultimately resulting in the boycott of her restaurant); John R. Lott, Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, Wall St. J., Dec. 26, 2008 (summarizing examples of individuals who faced economic retaliation for donations in support of Proposition 8); Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, Rocky Mountain News, November 30, 2008 (business picketed and boycotted based on CEO's personal donation). In fact, a website recently appeared providing an interactive map with pinpoint locations, names, addresses, and donation amounts for individuals and entities that supported Proposition 8 – in this circumstance, access to this personal information regarding political activities is even easier. *See* www.eightmaps.com (last visited January 12, 2009).

The experience of Proposition 8 supporters in 2008 is by no means unique. Exacting political retribution for individuals' support or opposition of particular candidates or causes specifically based on data

gleaned from campaign finance reports is becoming a new field of battle in politics. *See* Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. Times, August 8, 2008 (describing the planned campaign of liberal nonprofit group Accountable America, which planned "to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions"); *see also* Associated Press, *John Kerry Grills Belgium Ambassador Nominee Over Swift Boat Donation*, FoxNews.com, February 28, 2007 ("A Senate hearing that began with glowing tributes to a St. Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.").

The rising acceptance of this type of political retribution is already generating anecdotal evidence of a chilling effect on political speech and association. For instance, in West Virginia's most recent race for state attorney general, a newcomer challenged the incumbent, a man described by the Wall Street Journal as "a case study of abuse in office." Kimberley A Strassel, *Challenging Spitzerism at the Polls*, Wall St. J., August 1, 2008. Because of the effect of mandatory reporting requirements, the challenger alleged he faced a significant uphill battle in fundraising:

> [Incumbent Attorney General Darrell McGraw's] other main asset is fear. [Challenger] Mr. Grear admits a big hurdle is fund

> raising, even among a business community that is desperate to throw out Mr. McGraw. "I go to so many people and hear the same thing: 'I sure hope you beat him, but I can't afford to have my name on your records. He might come after me next.'" This is a frightening example of how the power of an attorney general can corrupt even the electoral process.

Id.

Reprisals for political contributions can also come in forms unrelated to the donation itself. Gigi Brienza discovered this when her name and address appeared on the website of an animal-rights organization, which had culled FEC records for donors whose employers perform animal testing. *See* Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, Wash. Post, July 1, 2007 at B03.

Quite simply, the easy accessibility of information about one's political leanings, address, employer, and occupation suggests that it is time for this Court to reexamine its conclusions about the cost of mandatory disclosure rules. In 2009, a person wishing to harass citizens with a different viewpoint no longer needs to visit a government office to sift by hand through published data to access political information. Now, data regarding one's political leanings, address, employer, and occupation are searchable from any computer, day or night. In such an environment, it is perfectly understandable that

reasonable individuals fear the implications of publicizing their political positions.

C. The FEC's Regulations Violate the First Amendment

In *McIntyre v. Ohio Elections Commission*, this Court struck down a law that required the disclosure of one's identity on written election communications. 514 U.S. 334, 357 (1995). This Court held that individuals have a right to anonymous speech and that a law requiring them to disclose their views on controversial issues did so in violation of that right. *Id.* "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id*. This Court also emphasized the importance of anonymity in protecting rights to speech and association. "Anonymity is a shield from the tyranny of the majority" which "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*

Disclosure Costs (supra), the first study to question the general presumption that mandatory disclosures are cost-free, demonstrates that this Court's conclusions in *McIntyre* were not only correct, they

may have understated how mandatory disclosure of political activity negatively affects the vibrancy of political discourse in this country. The empirical findings discussed above, as well as the anecdotal evidence from a broad range of sources, demonstrate that mandatory reporting and disclosure requirements unquestionably chill the exercise of fundamental First Amendment freedoms. Chilling the exercise of free speech and associational rights is a substantial burden on the First Amendment.

As noted above, it is the FEC's burden in this case to provide a compelling interest and demonstrate that its mandatory reporting and disclosure regulations are narrowly tailored to meet that interest. *WRTL,* 127 S.Ct. at 2664. This means the FEC must demonstrate through evidence, rather than speculation, that there is an actual harm that the reporting requirements are designed to address. *Turner Broad. Sys.* 512 U.S. at 664. Further, the FEC must demonstrate that, in burdening free speech and association rights, the regulations do not impose more burdens than are absolutely necessary. *MCFL*, 479 U.S. at 265.

The FEC has failed to meet any of these burdens. It has not demonstrated the existence of an actual harm, rather than a speculative one, and even assuming the Court accepts the FEC's speculative harm as real, it has not bothered to provide any evidence that the reporting requirements do anything in the real world to ameliorate that harm. *See* Mot. to Dismiss at

14-22. Thus, the FEC has failed to meet its burden in this case.

II. BURDENSOME REPORTING REQUIREMENTS CHILL SPEECH

The fear of retribution is not the only disincentive created by mandatory disclosure rules. Even in the unlikely event that a candidate or position is so innocuous that there is no chance of retribution, the process of mandatory disclosure creates a significant disincentive to the vigorous exercise of First Amendment rights.

This Court has previously recognized that campaign finance regulations may place significant and unconstitutional burdens on First Amendment rights. *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-56 (1986) (plurality opinion) (analyzing the burdens imposed by Massachusetts campaign finance restrictions). Even state governments have been known to identify the potential burdens they imposed through extensive reporting and disclosure requirements: In 2000, a bipartisan commission appointed to study California's campaign finance laws conducted a number of focus group sessions to assess the public's view of that state's laws. One of its focus groups gave an apt description of the effect of complicated laws:

> The unintended consequence of this is that the price of admission into politics becomes

> too high. People do not want to become candidates or treasurers because of the potential liability. Thus the regulations have injured grassroots democracy and have essentially professionalized politics so that you have to have lawyers and accountants on your campaign staff.

Bipartisan Comm'n on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* at 62, http://www.fppc.ca.gov/McPherson.pdf (last visited January 12, 2009).

Dr. Jeffrey Milyo observed similar reactions when he conducted an experiment in 2007 using 255 subjects who attempted to comply with disclosure laws from three states regulating ballot issue committees. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate* at 27, Institute for Justice, October 2007 http://www.ij.org/publications/other/campaign-finance-red-tape.html (last visited January 12, 2009). Dr. Milyo is a professor in the Truman School of Public Affairs and the Department of Economics at the University of Missouri in Columbia. *Id.* He has taught and written extensively on campaign finance laws and conducted research and statistical analysis of the effects of political regulations and institutions. *Id.* Dr. Milyo's research has been recognized and supported by the National Science Foundation and is frequently cited in the national media. *Id.*

To analyze the potential difficulties of complying with mandatory reporting and disclosure laws, Dr. Milyo used a simple hypothetical scenario involving the formation of a ballot issue committee and scored only basic tasks:

> The scenario include[d] only one expenditure item and a handful of small and large contributions, including non-monetary and anonymous donations . . . . This scenario was given to 255 experimental subjects, who were asked to complete the disclosure forms for a particular state, using the actual instructions and handbooks. Subjects had 90 minutes to complete the forms and were paid for their participation. To give participants an incentive to fill out their forms correctly, subjects were paid $20 for participating and up to an additional $20 based on their performance.
>
> The experimental subjects in this study were recruited primarily from graduate students in political science, public affairs and economics at the University of Missouri and from non-student adults (age 25-64) in Columbia, Mo.; a few undergraduate students, mostly graduating seniors in economics or political science and all at least 20 years old, also participated.

Id. at 5-6. *Not one subject completed all of the tasks correctly*; on average they managed to correctly complete 41% of the tasks, and no one completed more than 80% correctly. *Id.* at 8. As Dr. Milyo noted,

"It is particularly disconcerting that subjects could not complete half of the disclosure tasks that were scored . . . ; after all, the subject pool was composed of mostly college-educated people, many of whom were pursuing advanced degrees in political science and public affairs." *Id.*

After making some adjustments "to account for subject characteristics that could affect performance (such as age, voter registration status, education and whether the subject completed the form)" it became clear "that there are few differences across subject types; all subjects had difficulties across the board and regardless of their background." *Id.* As Dr. Milyo explained, "it is telling that ordinary people without special expertise struggle to follow these procedures. . . . [T]he effect of campaign finance regulations should not be to reserve politics to a professional elite; the political process should be open to all citizens." *Id.* at 10.

The inability of *every single subject* to complete even basic campaign finance reporting tasks is significant because failure to perfectly comply with reporting requirements leads to potentially devastating consequences.

> A ballot issue committee that omits or misreports even one transaction is subject to fines that can cumulate with each oversight. For even a very small group with just a few contributors and expenditures, missing one filing deadline might generate hundreds of thousands of dollars in fines, or more.

> California hit a political committee that spent just over $100,000 with $808,000 in fines, even though the maximum fine was $2,000 per violation: The state tallied each missing name, address and employer name as a separate violation.

Id. at 3. Based on this experience, the subjects had little doubt that the burdens of compliance, particularly when combined with the potential for severe penalties, would chill participation in the political process:

> Subjects were sincerely frustrated in their attempts to complete the disclosure forms – and believed these difficulties would deter political activity. . . . About two-thirds of respondents agreed that the disclosure requirements would deter many people from engaging in independent political activity. That figure rose to 85% to 89% when the specter of fines and punishment for incorrect compliance was raised. Also, about a quarter to one-half of the respondents expressed strong reluctance about making contributions to political groups because of public disclosure.

Id. at 14-16.

To ensure a full understanding of subjects' feelings about their experience, they were given a voluntary opportunity to comment. 94 subjects chose to provide comments, and by a ratio of more than 20 to one, the comments were negative. Some examples typifying these comments are:

> "A lawyer would have a hard time wading through this disclosure mess and we read legal jargon all the time."
>
> "Good Lord! I would never volunteer to do this for any committee."
>
> "Worse than the IRS!"
>
> "Seriously, a person needs a lawyer to do this correctly."
>
> "This is horrible!"
>
> "This was awful. I feel bad for anyone who encounters these forms in real life."

Id. at 17. Interestingly, one subject turned out to be a campaign treasurer for a political action committee in Missouri and was generally sympathetic to the concept of disclosures. Even she did not successfully complete the tasks in the study. In her post-experiment comments she noted,

> Even with [my] limited experience I found this exercise to be complicated and mentally challenging. I took nearly the alloted [sic] amount of time to complete the forms and still made two major errors. The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC . . . for a number of years.

Id. at 18. Dr. Milyo concluded:

> There should be no doubt that state disclosure laws for ballot measure committees are

> indeed "overly burdensome and unduly complex"; the compliance experiment demonstrates that ordinary citizens, even if highly educated, have a great deal of difficulty deciphering disclosure rules and forms.

Id. at 21.

Professor Elizabeth Garrett of the University of Southern California Gould School of Law, who specializes in the legislative process and the study of democratic institutions, has also recognized that "[d]isclosure is not costless. It imposes burdens on those who must comply with complex laws," it "may place a heavy penalty on groups that face retaliation when their support for unpopular positions becomes public, and it may undermine the ability of disliked or distrusted groups to influence policy in ways consistent with their interests." Elizabeth Garrett, *Commentaries on Bruce Ackerman and Ian Ayres's Voting with Dollars: A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 U. Rich. L. Rev. 1011, 1011 (May 2003). Professor Garrett, having recognized that the potential for costs exists, also acknowledged the lack of systematic research up to that point examining the issue of costs: "[t]hese costs may be worth paying if the benefits of disclosure are substantial. But before we can reach that conclusion, we must have a better sense of costs and benefits." *Id.*[5]

[5] Moreover, the empirical data demonstrates that, in the ballot issue context at least, citizens do not pay attention to the

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Here, the FEC requests that, in order to run a television commercial promoting a movie about Hillary Clinton, Citizens United should compile and disclose the names and addresses of all individuals who have donated, in the aggregate, $1,000 or more toward the airing of the commercials since the first day of the preceding year. This means that Citizens United must track every single donation it receives (just in case they later add up to the trigger amount), it cannot accept any anonymous donations (because how would it otherwise be able to track the aggregates), and it faces penalties if a clerical or mathematical error occurs in the aggregation of donations. What may seem on paper an innocuous regulation is in reality a considerable burden that carries with it the potential for sizeable penalties.

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data compiled and disseminated from disclosures (except perhaps for purposes of retaliation). *See Disclosure Costs* at 11-12. Further, the availability of this information has not improved journalists' reporting on issues such as potentially improper contributions. *See* Raymond LaRaja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 Election L. J. 236 (2007) (comparing print news coverage of campaign finance in states with disclosure requirements to those without requirements). If neither journalists nor citizens tend to access and use this information, certainly there is no need for the information to be made publicly available. Conceivably the government could address its enforcement needs by accumulating this data without widespread dissemination. This would not solve the problem of burdensome compliance, however.

III. THE GOVERNMENT SHOULD CARRY THE BURDEN TO DEMONSTRATE THE NEED FOR DISCLOSURE INSTEAD OF SPEAKERS BEARING THE BURDEN TO PROVE THE NEED TO REMAIN ANONYMOUS

Despite the burdens on First Amendment rights created by mandatory disclosure requirements, the FEC nonetheless argues in favor of extremely broad mandatory disclosures: "legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence occurs outside the election context," Mot. Dismiss at 19, and that "compelled disclosure of financing information may be permissible even when the disbursements in question have *nothing* to do with any candidate election." Mot. Dismiss at 20. The First Amendment demands more than that the government should get the information because the government wants it.

It is well-established in the First Amendment context that the government always bears the burden of justifying its intrusion into the rights of free speech and association. Yet, in this one area, the courts have routinely reversed that burden to rest on citizens' shoulders. This Court has previously held that minor parties may avoid mandatory disclosure rules because of their small contributor base and the fact that small fringe parties may have little influence on policy. *See McConnell,* 540 U.S. at 198; *Brown v. Socialist Workers' '74 Campaign Comm.,* 459 U.S. 87, 94 (1982); *Buckley,* 424 U.S. at 74. Such parties, this

Court has held, may avoid disclosure if they are able to show "a reasonable probability that the compelled disclosure of a party's contributors names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley,* 424 U.S. at 74.

The Institute respectfully suggests that it is time to bring this area in line with the rest of First Amendment jurisprudence by switching this burden from the speaker to the government and requiring the agency seeking to collect and post information regarding a citizen's political activity and personal information to prove that such disclosure and dissemination will *not* result in threats, harassment, or reprisals. There are three compelling reasons demonstrating the need for this change.

First, as discussed above, the Internet allows such information to be disseminated around the world for almost no cost. It is simply impossible for a speaker to identify the potential sources of threats, harassment, or reprisals, regardless of whether they are reasonable or unreasonable. It should be enough for a speaker to identify that they are speaking about a controversial topic – such as abortion, affirmative action, same-sex marriage – or a controversial political figure to create a presumption that their speech should remain anonymous.

Second, this Court's current test requires a speaker to experience, or have a reasonable fear of experiencing, threats, harassment, or reprisals before

they may be relieved of mandatory disclosure requirements. Quite frankly, by the time such threats, harassment, or reprisals occur, or by the time a speaker can reasonably expect them to occur, it is already too late and the harm to First Amendment rights has already probably happened. Certainly for speakers who are new to public discussions, the safe harbor discussions of *Buckley, Brown,* and *McConnell* provide no comfort because they assume the speaker is already controversial.

Finally, placing the burden on the speaker to prove the need for the protections of the First Amendment is profoundly in tension with this Court's First Amendment jurisprudence, which requires the *government* to prove the need for a regulation that interferes with First Amendment rights.

Before opening the floodgates to ever-increasing reporting and disclosure requirements, reaching, as the FEC argues, well beyond any election or campaign context, courts should ensure the burden for justifying such requirements rests squarely where it should: on the government. In this particular area, First Amendment jurisprudence has been turned on its head, with courts requiring citizens whose rights are infringed to bear the burden of proving – with ever-increasing degrees of particularity – harm. This is exactly wrong. It is the government's job to justify its intrusion into the speech and associational rights of the citizens.

Too many legislatures and courts discount entirely the chilling effect that compelled disclosure has on political speech. But the Institute's empirical data indicates that, for grassroots political groups, disclosure is often the *most* burdensome aspect of campaign-finance regulation. At the same time, the benefits of disclosure – often of information increasingly attenuated from anything this Court has recognized as corruption[6] – appear vastly oversold. Accordingly, this Court should provide appropriate guidance to the lower courts that takes account of this new empirical data and the modern realities of online disclosure, and examine disclosure with the same level of scrutiny applied to all other burdens on core political speech. At the very least, this Court should require the FEC to prove that disclosure of Citizen United's donors has some impact on deterring corruption or the appearance of corruption.

[6] Indeed, there have even been recent calls for "grassroots lobbying disclosure," which would require disclosure of donors and compelled registration for anyone assisting citizens in their efforts to contact and organize other citizens. *See* Stephen M. Hoersting and Bradley A. Smith, *Policy Primer: Grassroots Lobbying Proposals Seem Not to Further Congress' Interest in Correcting Lobbying Abuses* at 1, *available at* http://www.campaignfreedom.org/docLib/20060607_PolicyPrimer.pdf.

CONCLUSION

The First Amendment was intended to limit the government's authority to infringe on the rights of American citizens to only the most compelling of circumstances, and even then in only the most narrow of ways. This long-standing basis of First Amendment jurisprudence dictates that the FEC must bear the burden in this case, and must provide actual data to meet that burden. The Institute's empirical data, however, definitively demonstrates that, contrary to broad, previously unchallenged assumptions by legislatures, the FEC, and many courts, mandatory disclosure and reporting requirements constitute a significant infringement on the First Amendment rights of free speech and association. The FEC's burden is indeed a high one and arguably insurmountable in the face of the conclusions derived from the Institute's empirical research.

Respectfully submitted,

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