No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF AMICUS CURIAE THE CATO INSTITUTE IN SUPPORT OF APPELLANT

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 218-4600

BENJAMIN D. WOOD
Counsel of Record
GLENN M. WILLARD
KATHRYN BIBER CHEN
CORDELL A. HULL
JOHN C. HILTON
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for political speech and activity, which lies at the very heart of the First Amendment.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Freedom of association is an important independent right under the First Amendment—securing and enabling the Amendment's enumerated rights—and it includes the right to associate anonymously and to control a group's character and message free from government intervention. As applied to groups engaging in political speech, compelled disclosure of contributors' identities infringes their freedom of expressive association, a burden often no less severe than direct restraint on the group's speech. Government curtailment of private expressive association is thus subject to strict constitutional scrutiny. Where that curtailment also inherently burdens the group's political speech, it must survive strict scrutiny or else be held unconstitutional. The district court failed to afford sufficient value to the associational rights of Citizens United contributors and, accordingly, failed to scrutinize appropriately BCRA section 201's unjustified infringement on those rights. The district court's judgment should be reversed.

ARGUMENT

I. The First Amendment Protects Contributors' Freedom of Anonymous Expressive Association.

A. The First Amendment right of association secures contributors' enumerated freedoms of speech, assembly, and petition.

Freedom of association is an important First Amendment right, securing and rendering meaningful the enumerated freedoms of speech, assembly, and petition. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981). And while the concept of freedom of association "is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972). Such primary rights are therefore crucial to the rights of individuals to associate freely with one another, and it is no surprise that the first cases to recognize associational rights "reflected ancillary associational concerns—for example, defending the right of the NAACP to hire a lawyer, and to 'do business' in the Southern States without having to disclose its membership lists." Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of*

Association, 35 U.C. DAVIS L. REV. 821, 837 (2002).[2] Another scholar explains, "Freedom of association at its core is a political right, a right of self-governance. Associations empower citizens to exert political influence and to keep government in check." Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 647 (2002).

In *NAACP v. Alabama ex rel. Patterson*, this Court recognized, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . [and there is a] close nexus between the freedoms of speech and assembly." 357 U.S. 449, 460 (1958). Immunity from state scrutiny of the NAACP's membership lists was "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466.

The Court echoed these concerns in *Citizens Against Rent Control*, noting that through "collective effort individuals can make their views known, when individually, their voices would be faint or lost." 454 U.S. at 294. In *Healy*, a Connecticut college could not prohibit the use of campus facilities to Students for a Democratic Society without infringing the members' associational rights. 408 U.S. at 194. And in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court invalidated a

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[2] *See also* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1010 (2d ed. 1988) (This Court "has repeatedly described" freedom of association "as among the preferred rights derived by implication from the first amendment's guarantees of speech, press, petition, and assembly.").

state statute requiring teachers to file an annual affidavit listing every organization to which the teacher belonged or contributed during the preceding five years. Finally, associational rights are important to political parties because they permit like-minded individuals to band together to address concerns with the government. *See, e.g.*, *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Collectively, these cases stand for the principle that "freedom of association is a necessary precondition to free speech. It is therefore protected in order to safeguard First Amendment speech interests." Mazzone, 77 WASH. L. REV. at 650.

Despite the strong ties to freedom of speech in particular, it is easy to see how freedom of association is joined to rights other than free speech: citizens cannot freely practice their religion, petition the government, operate a free press, or assemble without a robust right to associate with other citizens. Indeed, "in the early Republic it was against the right of assembly and petition that associations were understood. On that score, consistent with the assembly and petition clause, freedom of association is protected under the First Amendment because associations represent instances of popular sovereignty." *Id.* at 647.

No matter the primary First Amendment principle at stake, what becomes clear from the Court's jurisprudence on associational rights is that governmental forces often attempt to infringe other First Amendment freedoms by using the back-door channel of regulating association. This can be accomplished by prohibitively raising the entry bar for

burgeoning groups by saddling them with cumbersome regulatory requirements, or by deterring members from associating in the first place by denying their right to associate privately. *Healy* is in the first category, while *NAACP* and *Shelton* are in the second. BCRA Section 201 implicates both categories.

All such attempts to abridge rights should be rejected. For purposes of this case, "associational rights" in the absence of robust rights to engage in political speech, *anonymous* political speech, and *anonymous* association are "rights" in name only, and vice versa. And lest the breadth of the rule be overlooked, "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 460-61. In short, freedom of association is "highly prized, and need[s] breathing space to survive." *Gibson v. Fla. Legislative Investigation Comm.,* 372 U.S. 539, 544 (1963).

B. Freedom of association includes the right to control an association's character and message.

The Court recently has reiterated the foundational principles of its associational rights jurisprudence. One particularly robust forum for the application of these principles has been a series of cases addressing the associational rights of political parties in the context of state primary election laws. In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), for instance, this Court held that California could not,

consistent with the First Amendment, use a "blanket"[3] primary to determine a political party's nominee for the general election. Examining the associational rights and state interests involved, the Court found a "severe and unnecessary" burden on the rights of political association. *Id.* at 586.

It is axiomatic that "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986). This Court has gone farther and deeper, however, in tying the associational right to something fundamental not only in our Constitution, but also in our Republic:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. . . . Consistent with this tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs . . . .'"

Cal. Democratic Party, 530 U.S. at 574 (quoting *Tashjian,* 479 U.S. at 214-15).

These cases thus capture the instrumental role of associational rights in undergirding other Constitutional rights and democratic processes. They

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[3] In a blanket primary election, any voter may vote for any candidate, regardless of the voters' political affiliation. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1187 n.1 (2008).

are, however, equally important in establishing the prerequisites for the effective and meaningful exercise of associational rights in the first instance. In *Wisconsin ex rel. La Follette*, this Court held, "The freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 122 (internal quotation marks omitted). This is so because "'[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.* at 122 n.22 (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 791 (1978)). Simply put, "a corollary of the right to associate is the right not to associate." *Cal. Democratic Party*, 530 U.S. at 574.

In addition to affirming the foundational principles of the Court's associational rights jurisprudence, these cases further articulate a right, not only affirmatively to associate, but also defensively to define, confine, and control the association as necessary to preserve its character, purpose, and effectiveness. *See, e.g.*, *Ray v. Blair,* 343 U.S. 214, 221-22 (1952) (political parties may protect themselves from "intrusion by those with adverse political principles"). In so doing, these cases dovetail with key pronouncements in the Court's expressive association jurisprudence.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that applying New Jersey's public accommodations law to require the Boy Scouts to admit Dale, an adult whose position as assistant

scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist, violated the Boy Scouts' First Amendment right of expressive association. The Court noted that a group's First Amendment right of expressive association could be unconstitutionally burdened in many ways, including unwanted "intrusion into the internal structure or affairs of an association" such as a "regulation that forces the group to accept members it does not desire." *Id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). The Court concluded that Dale's presence as an assistant scoutmaster interfered with the Scout's "choice not to propound a view contrary to its beliefs," thereby "affect[ing] in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648, 653.[4] Under *Dale*, there are no requirements that the group associate for the purpose of disseminating a certain message in order to be protected, nor for every member of the group to agree on every view for the group's policy to be "expressive association." *Id.* at 655.

The Court's jurisprudence traces a vivid evolution from establishing the foundations for an associational right, to articulating a formidable associational interest in controlling its membership and message as

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[4] The Court relied in part on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574-75 (1995) (holding a parade's exclusion of a homosexual group from marching behind their banner constitutionally protected because the decision to exclude "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control").

against competing state interests. Where a group of people have associated to express or amplify political speech, as Citizens United has, this interest in controlling their group and its message is a significant foundation for their right to express that message anonymously. Furthermore, this Court has stated, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653.

C. The First Amendment protects the right of anonymous association.

The freedom to associate is meaningless without a corresponding right to associate anonymously, whether as members of a group, participants in a joint venture, or contributors to a documentary film project. This Court repeatedly has recognized the undeniable "deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *NAACP*, 357 U.S. at 466. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . . [and] [t]his Court has recognized the vital relationship between freedom to associate and privacy in one's associations." *Id.* at 462.

Moreover, a general right to anonymous association is inextricably intertwined with the specific right to *speak* anonymously, especially within groups. "A coming together is often necessary for communication—for those who listen as well as for those who speak." *Gibson*, 372 U.S. at 564 (Douglas,

J., concurring). And "[j]oining a group is often as vital to freedom of expression as utterance itself." *Id.* at 565; *see also Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 309 (1984) ("[T]his Court has recognized that the right to forward views might become a practical nullity if Government prohibited persons from banding together to make their voices heard. Thus, the First Amendment protects freedom of association because it makes the right to express one's views meaningful."). Expressive association in groups, like Citizens United, discussing political issues and qualifications of public officials, thus directly serves and enables political speech that "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *see also Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("First Amendment affords the broadest protection to such political expression").

Given these cherished principles, it is unsurprising that anonymous speech—whether by individuals or groups—is so highly valued in America's marketplace of ideas. The "historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Furthermore, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," and thus a speaker's "decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First

Amendment." *Id*. at 342; *see also McConnell v. FEC*, 540 U.S. 93, 275-76 (2003) (Thomas, J., concurring) (same); *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.").

As the Court explained in *McIntyre*, great works of literature frequently have been produced by authors writing under assumed names, and "[d]espite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity." 514 U.S at 341. Indeed, "even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names." *Id.* at 342.

The freedom to publish anonymously clearly extends beyond works of a strictly literary nature. In *Talley*, for instance, this Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott merchants who were engaging in discriminatory employment practices. *See Talley*, 362 U.S. at 65. In *Buckley v. Valeo*, it further recognized that, under certain circumstances, the disclosure requirements of the Federal Election Campaign Act of 1971 could not be applied to minor political parties, because the threat to First Amendment rights would outweigh the insubstantial interest in disclosure by that entity. 424

U.S. at 71. Asserting that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim," the Court concluded that "[t]he evidence offered need show only 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." *Id.* at 74. The Court affirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee*, exempting the Socialist Workers Party from California state campaign disclosure requirements, and clarifying that the exemption included the disclosure of the names of recipients of disbursements as well as the names of the party's contributors. 459 U.S. 89, 95 (1982). *See also* Fed. Election Comm'n Ad. Op. 1990-13 (renewing Socialist Workers Party's eligibility for reporting exemptions and recounting history of such grants). *Cf. Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 198-200 (1999) (holding that a state badge requirement for petition circulators chilled speech because it exposed circulators to "the recrimination and retaliation that bearers of petitions on 'volatile' issues sometimes encounter").

Although much of the well-known precedent on this topic focuses on groups that apparently fear violence or reprisal, there are multiple valid reasons why speakers or writers may decline to disclose their identities; protected anonymity ought not depend on fear of reprisal.[5] Indeed, "[t]he decision in favor of

[5] The Court previously suggested that "threats, harassment, or reprisals" could be sufficient to outweigh the asserted

anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, *or merely by a desire to preserve as much of one's privacy as possible*." *McIntyre*, 514 U.S. at 341-42 (emphasis added). As this Court has explained:

> On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where the identity of the speaker is an important component of many attempts to persuade, the most effective advocates have sometimes opted for anonymity.

Id. at 342-43.

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governmental interests supporting BCRA Section 201 when subjected to as-applied constitutional scrutiny. *McConnell*, 540 U.S. at 198. It has not, however, held that violence or reprisal is *required* to demonstrate the initial burden on freedom of association that triggers constitutional scrutiny in the first instance. Whether that burden is unconstitutional depends on the governmental interest against which it is weighed, and while probable reprisal may be required to overcome certain government interests it might be far more than is required to overcome others. Because the FEC can demonstrate no government interest served by disclosing contributors to Citizens United—a group neither engaged in express advocacy nor its functional equivalent—a burden far less draconian than violence or reprisal is sufficient to render BCRA Section 201 unconstitutional as applied here.

There are few arenas in which this maxim holds truer than politics and governmental affairs. Citizens are inclined to adopt or reject opinions due in large part to the speaker delivering the message: Keith Olbermann's opinions are unlikely to sway conservatives, as Rush Limbaugh's are unlikely to sway liberals. Likewise, it is entirely foreseeable that a well-known but highly controversial individual may have something valuable to say—but is unable to communicate effectively, other than anonymously, because of his reputation.

Citizens United contributors may well believe that their message is best delivered by the group, without identifying individuals who contributed. They may fear reprisal. They may simply prefer to maintain privacy for themselves and their families, or believe their message will be more readily consumed without disclosure. All of these rationales are protected by the Constitution. In parsing these questions, the Fourth Circuit suggests the best method of determining whether a speaker is entitled to anonymity is to ask whether anonymity served as a "catalyst" for the speech in question. *See Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007). That Citizens United sought a preliminary injunction to maintain its contributors' anonymity answers that question in the affirmative, and the anonymity of their political speech should be protected vigorously.

This Court and several lower courts have implied that the basis for protecting anonymous speech does not apply as clearly to groups as it does to individuals, because a group as a whole somehow lacks the same "'personal' interest in its 'thoughts.'" *ACLU v. Heller*,

378 F.3d 979, 990 (9th Cir. 2004) (quoting *McIntyre*, 514 U.S. at 355). Nonetheless, the fact that *individuals* in a group, or an individual cooperating with a group, "have shared their political thoughts with the members of the group does not mean that they have *no* privacy interest in concealing from the general public their endorsement of those beliefs." *Id.* This observation has particular force when the group is "small enough that [recipients of its message] will associate individual members with the thoughts conveyed. Exposing the identity of the group publishing its views, or of an individual publishing the views of a group, thus infringes to some degree on the privacy interests of the individuals affiliated with the group." *Id.* Here, BCRA specifically compels disclosure of the identities of individual contributors, directly threatening their individual rights to free expressive association.

In sum, Citizens United's contributors have a constitutionally-protected right to expressive association. They also have the right to associate and to speak anonymously. Their reasons for desiring to do so need not be based in fear of reprisal; contributors may simply wish to maintain their privacy. The particular reasoning behind their decision should not determine the bounds of their constitutional freedom.

II. BCRA Section 201's Compelled Disclosure Requirements Infringe Contributors' Freedom of Anonymous Expressive Association, Warranting Strict Scrutiny.

Infringement on freedom of association deserves no less rigorous scrutiny than violations of the

enumerated rights that freedom secures. Accordingly, government action that curtails expressive association—thereby restricting the speech of those seeking to associate—should be subject to the same strict scrutiny as direct burdens on speech.

A. Disclosure provisions that burden associational rights are subject to strict scrutiny.

Because compelled disclosure of contributors' identities "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court in *Buckley* subjected the challenged FECA disclosure provisions to "exacting scrutiny." 424 U.S. at 64 (citing *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) and *Gibson*, 372 U.S. at 546). The Court held that where First Amendment freedoms are at issue, "the subordinating interests of the State must survive exacting scrutiny." *Id.*; *see also Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008) ("[W]e have closely scrutinized disclosure requirements . . . the governmental interest must survive exacting scrutiny.") (quotation omitted). Though using different terminology, exacting scrutiny ultimately equates to the "strictest standard of review." *McIntyre*, 514 U.S. at 348.

In *Buckley*, the Court reiterated, "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny . . . [and] insisted that there be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." 424 U.S. at 64 (footnotes and quotation marks

omitted). This "exacting scrutiny" is "necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

Exacting scrutiny both protects and promotes effective advocacy by citizen groups and their members. *See Buckley*, 424 U.S. at 66 ("[G]roup association is protected because it enhances '[e]ffective advocacy.'") (quoting *NAACP*, 357 U.S. at 460). Contributors to such groups have a protected right to associational privacy; a freedom the Court has recognized "may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id.* (quoting *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) (association's contributors are motivated "in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction").

Though using an "exacting scrutiny" label, the Court in *Buckley* adhered to *NAACP*'s "strict test," noting that it "is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." 424 U.S. at 66. The Court's associational rights precedents, both before and after *Buckley*, employ the

traditional strict scrutiny lexicon, establishing that "exacting" scrutiny, in this context, is equivalent to strict scrutiny. *See, e.g.*, *NAACP*, 357 U.S. at 460-61 (government action curtailing freedom of association "is subject to the closest scrutiny"); *Bates*, 361 U.S. at 524 (when compelled disclosure abridges associational freedom "the State may prevail only upon showing a subordinating interest which is compelling"); *Roberts*, 468 U.S. at 623 (infringement on the right of expressive association must "be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Dale*, 530 U.S. at 657-58 (freedom of expressive association must be weighed against "a compelling state interest").

In *Dale*, the Court specifically rejected the appellee's contention that "intermediate" scrutiny was the appropriate standard of review, ultimately finding even the compelling government interest in eliminating discrimination insufficient to justify the law's intrusion on freedom of expressive association. *Id.* Similarly, in *Buckley*, the Court discussed the "least restrictive means" test, yet another indication that exacting scrutiny is tantamount to strict scrutiny. 424 U.S. at 68; *see also id.* at 64 ("significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest"). Finally, in *McIntyre*, the Court directly equated the two standards, clarifying that in applying "'exacting scrutiny,' . . . we uphold the restriction only if it is narrowly tailored to serve an overriding state

interest." 514 U.S. at 347 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). Whether denominated "exacting" or "strict" scrutiny, these precedents establish that BCRA Section 201 is unconstitutional, as applied to Citizens United, unless the FEC can demonstrate that it is narrowly tailored to serve a compelling government interest.[6]

B. BCRA's compelled disclosure provisions are subject to strict scrutiny here because, by burdening expressive association, they also burden political speech—the "core" of First Amendment protection.

The FEC discounts the burdens of disclosure. *See* FEC Mot. Dismiss Affirm at 14-17 (U.S., filed Oct. 17, 2008) ("FEC J.S. Br."); FEC Mem. Supp. Mot. Summ. J. at 25-30 (D.D.C., filed June 6, 2008). But this Court and numerous lower courts have "long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003) (citing *Buckley* and *NAACP*); *see also Buckley*, 424 U.S. at 64 ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."); *United States v. Rumely*, 345 U.S. 41

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[6] Though beyond the scope of this brief, we agree with the Appellant that applying BCRA's disclosure requirements to Citizens United serves no recognized governmental interest, compelling or otherwise, and thus cannot survive any level of constitutional scrutiny. *See* Appellant's Br. at 42-45, 51-56.

(1953) (compelled disclosure of group membership lists infringes members' rights of associational privacy).

BCRA's compelled disclosure provisions inevitably burden the associational rights of groups like Citizens United and its contributors. *See, e.g.*, *Buckley*, 424 U.S. at 68 ("It is undoubtedly true that public disclosure of contributions . . . will deter some individuals who otherwise might contribute."); *NAACP*, 357 U.S. at 463 (compelled disclosure of members' identities "may induce members to withdraw . . . and dissuade others from joining"). In so burdening advocacy groups' expressive association right, the disclosure provisions also inherently burden their political speech—and do so based upon the content of that speech. A recent study by the Institute for Justice quantifies this burden in the campaign finance context, showing how disclosure both chills association and diminishes associational speech. *See* Dick M. Carpenter II, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM (Institute for Justice, 2007)[7] ("IJ Study").[8]

The IJ Study examined public opinion among 2221 respondents stratified across "six states with ballot

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[7] *Available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf (last visited Jan. 13, 2009).

[8] The IJ Study is particularly useful because, as has been noted in the academic commentary, "[t]here is very little empirical evidence to determine how often or how much the prospect of disclosure discourages would-be campaign contributors." William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 21 & n.106 (2003) (citing unpublished manuscripts).

issues" in the November 2006 election. IJ Study at 2, 6. The study was conducted across geographically and ideologically diverse states with laws that "require disclosure of issue campaign contributors," including "name, address, contribution amount and name of employer." *Id.* at 6.

The study found that "mandatory disclosure appears to enjoy support among citizens—until the disclosed information includes their own personal information." *Id.* The majority of respondents opposed disclosure when their personal information is made publicly available. *See id.* ("More than 56 percent of respondents opposed disclosure when it includes their name, address and contribution amount."). That number increased even further when the respondent's employer is disclosed. *See id.* ("Opposition rose to more than 71 percent when an employer's name must be disclosed."). "This opposition," the study concludes, "translates into a lower likelihood of becoming involved in political activity through donations, meaning that mandatory disclosure 'chills' citizens' speech and association." *Id.*

The IJ Study shows empirically the chilling effect disclosure has on people's willingness to exercise First Amendment rights of association and speech. For example, nearly 60% of survey respondents agreed that "[i]f by contributing to a ballot issues campaign my name and address were released to the public by the state, I would think twice about donating money." *Id.* at 7, Table 1. "When asked why they would think twice, respondents cited, among other things, privacy and safety concerns, fear of retribution, and the

revelation of their secret vote." *Id.* at 2; *see also* Steve Simpson, *If You Wanna Speak, You Better Have a Lawyer*, NAT'L REVIEW ONLINE (Mar. 27, 2007) ("[C]itizens themselves admit disclosure laws have a chilling effect on their free-speech rights, making them less likely to exercise those rights by contributing to a cause they believe in.").

Moreover, BCRA's disclosure and reporting requirements—complex, time-sensitive, and carrying potential civil and criminal liability—impose additional burdens on groups, like Citizens United, whose speech qualifies under the broad definition of electioneering communications.[9] To comply, groups

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[9] Entities making electioneering communications that aggregate more than $10,000 in the calendar year must file a "24 Hour Notice of Disbursements/Obligations for Electioneering Communications" (FEC Form 9) with the Commission within 24 hours of the disclosure date. *See* 11 C.F.R. § 104.20(b). The form must be received by the Commission by 11:59 p.m. on the day following the disclosure date. *See id.* As the FEC's own guidance proclaims, this 24-hour rule "requires continuous reporting." FEC Electioneering Communications Brochure (updated Apr. 2008), *available at* http://www.fec.gov/pages/brochures/electioneering.shtml (last visited Jan. 13, 2009). Similarly, the reports' required content is burdensome. The Form 9 requires that the entity list: (1) the identity of the person making the disbursement; (2) the identity of any person exercising control over the activities of the person making the disbursement; (3) the identity of the custodian of books and accounts from which the disbursement was made; (4) the amount of each disbursement or amount obligated in excess of $200 during the period covered by the statement, the date of the disbursement, and the person who received the funds; (5) the identity of the candidates mentioned in the communication and the elections in which they are candidates; (6) the disclosure date; and, most pertinent, (7) the name and address of each donor who, since the first day of the

are compelled to dedicate significant time and resources, and thus must "abandon or alter" other First Amendment-protected activities. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987). That compulsion not only infringes their right of expressive association, *see id.*, but also reduces the quantity and quality of political speech as some groups are forced to divert resources to compliance and other smaller groups are precluded from forming altogether. *See Mass. Citizens for Life*, 479 U.S. at 254 ("Detailed recordkeeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear").

The IJ Study shows that compelled disclosure, by infringing freedom of expressive association, also burdens the underlying expression for which the individuals sought to associate. This content-based burden on political *speech*, "the core of the protection afforded by the First Amendment," *McIntyre*, 514 U.S. at 346, requires that, as applied to advocacy groups like Citizens United, BCRA's disclosure requirements must survive strict scrutiny. *See, e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (a statute that "burdens the exercise of political speech" is constitutional only if "narrowly tailored to serve a compelling state interest"); *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) (when a content-

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preceding calendar year, has donated in the aggregate $1000 or more to the person making the disbursements, or to the segregated bank account if the disbursements were paid exclusively from that bank account. *See* 11 C.F.R. § 104.20(c).

based provision "burdens political speech, it is subject to strict scrutiny").

C. Lower courts need unambiguous direction that disclosure provisions infringing freedom of expressive association must survive strict scrutiny.

Reconciling or distinguishing strict scrutiny and exacting scrutiny has proven problematic for lower courts reviewing compelled disclosure provisions. For example, the Fourth Circuit recently held that North Carolina campaign disclosure provisions were subject to a relaxed standard of scrutiny. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) ("Reporting and disclosure requirements in the campaign finance realm must survive exacting scrutiny. The plaintiffs argue that 'exacting scrutiny' in this context is equivalent to strict scrutiny (requiring narrow tailoring to a compelling state interest), but this argument is inconsistent with *Buckley* and subsequent cases."). Examining *Buckley*, the Fourth Circuit erroneously concluded that "the Court did not engage in the type of narrow tailoring analysis that the plaintiffs ask us to apply to the disclosure requirements at issue in this case," ultimately upholding the North Carolina regulations using a less strict standard of review.

By contrast, the Tenth Circuit applied traditional strict scrutiny to a Colorado disclosure law. *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000). After reviewing this Court's freedom of association jurisprudence, the court of

appeals concluded, "Strict scrutiny is employed where the quantum of speech is limited due to restrictions on . . . the anonymity of [ ] supporters [of a candidate or initiative]." *Id.* at 1197 (quotation marks omitted). The court upheld the challenged provisions, but only after finding them "supported by three compelling governmental interests." *Id.*

Most recently, the U.S. District Court for the District of Columbia, regarding lobbying disclosure provisions, specifically equated "exacting scrutiny" with strict scrutiny. *See Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 51-52 (D.D.C. 2008) ("[A]s Defendants correctly argue, neither *Buckley* nor *McConnell* utilized the traditional language of the strict scrutiny standard. However, in other contexts, the Supreme Court has indicated that 'exacting' and 'strict' scrutiny are one and the same."). Quoting *McIntyre*, the court agreed that "'[w]hen a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.'" *Id.* at 51. The court upheld the disclosure provision, but only after "appl[ying] strict scrutiny." *Id.* at 52.

The lower federal courts have been inconsistent in reconciling the exacting scrutiny and strict scrutiny standards when reviewing compelled disclosure provisions. This Court should clarify that when such provisions infringe on First Amendment rights of expressive association, as does BCRA Section 201 when applied to Citizens United, strict scrutiny is the appropriate standard of review.

CONCLUSION

BCRA Section 201 is unconstitutional as applied to Citizens United; the district court's judgment should be reversed.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 218-4600

BENJAMIN D. WOOD
Counsel of Record
GLENN M. WILLARD
KATHRYN BIBER CHEN
CORDELL A. HULL
JOHN C. HILTON
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

Counsel for Amicus Curiae The Cato Institute

January 14, 2009