No. 16-743

In The
Supreme Court of the United States

INDEPENDENCE INSTITUTE,
a Colorado nonprofit corporation,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District of Columbia

AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF APPELLANT INDEPENDENCE INSTITUTE

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INTEREST OF AMICUS CURIAE[1]

Amicus has practiced political-speech law, presented many briefs and oral arguments on the constitutionality of such law, and written a law-review article addressing much of what is at issue here. Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016) ("*Triggering*"), *available at* http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v29n1/10_Elf_vol_29_1.pdf.

Although *Triggering* particularly addresses state law, the same First Amendment principles apply to federal law. *Wallace v. Jaffree,* 472 U.S. 38, 48-49 (1985), *quoted in Triggering* at 55 & n.114, 63 n.154.

Since *Triggering* has analysis that applies here, Amicus summarizes and presents it in this brief. Where *Triggering* most efficiently makes points that apply here, this brief quotes *Triggering*. When this brief quotes *Triggering* text, some cites from corresponding *Triggering* footnotes are inserted into the text, and some cites remain in footnotes. *Triggering* cites are converted from law-review style

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[1] Counsel of record for all parties received timely notice of Amicus's intent to file this brief and consent to this filing. No party's counsel wholly or partly authored this brief. No such counsel, party, or other person—other than Amicus or Amicus's counsel—contributed monetarily to preparing or submitting this brief. Amicus has no members. *Cf.* S.CT.R. 37.2(a), 37.6.

to brief style, and many are condensed. Emphases are as they are in *Triggering*.

For all readers' convenience, a *Triggering* draft, with string cites not published in the law review, remains at https://ssrn.com/abstract=2713496.

SUMMARY OF ARGUMENT

The Court has applied constitutional scrutiny and established the two-track system under which government may regulate—i.e., require disclosure of—political speech. *E.g., Buckley v. Valeo,* 424 U.S. 1, 63-64, 79-82 (1976) (per curiam); *Triggering* at 35-37 & nn.1-12.

This action does not address law triggering Track 1, political-committee or political-committee-like burdens. Instead, this action addresses Track 2, non-political-committee disclosure requirements and presents this question: May government regulate genuine-issue speech with Track 2, non-political-committee disclosure requirements?

The answer is "no," and the explanation is simple. Political-speech law derives from government's power to regulate elections, *Buckley,* 424 U.S. at 13 & n.16; *Triggering* at 39 & nn.32-33, including the three government interests in regulating political speech, *Buckley,* 424 U.S. at 66-68, *cited in Triggering* at 50 n.88.

> [I]f anything is beyond what government should regulate with Track 2 law, then

> "genuine issue" speech is. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.) (addressing a speech ban). Track 2 law regulating genuine-issue speech is not tailored to any government interest in regulating elections, much less "substantially related" to a "'sufficiently important' government interest." *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (addressing Track 2 law (quoting *Buckley*, 424 U.S. at 64, 66)).

Triggering at 68-69 n.181 (brackets omitted).

In this action, there is no need to define genuine-issue speech for all time. The Court should instead reaffirm all the elements of the *Wisconsin Right to Life* safe harbor for genuine-issue speech, 551 U.S. at 469-70 (opinion of Roberts, C.J.), except one: The Court should hold that speech need not "urge the public to contact public officials" for speech to be genuine-issue speech, *Triggering* at 69 n.181.

With or without this safe-harbor revision, Appellant Independence Institute's speech is in the safe harbor, so government may not regulate the speech with Track 2, non-political-committee disclosure requirements. Based on this alone, Appellant Independence Institute prevails.

Whether political speech is "unambiguously related to the campaign," "unambiguously campaign related," or "pejorative" does not determine whether Track 2 law regulating the speech is constitutional. *Id.* at 69-70 n.181. Nor does the constitutionality of

political-speech law turn on a speaker's status under the Internal Revenue Code or Internal Revenue Service regulations. *Id.* at 62 n.151.

Furthermore, "the appeal-to-vote test—once known as the 'functional equivalent of express advocacy'—no longer affects whether government may ban, otherwise limit, or regulate speech, and the appeal-to-vote test is vague. It has no place in law." *Id.* at 77.

ARGUMENT

I. The Court has applied constitutional scrutiny and established the two-track system under which government may regulate—i.e., require disclosure of—political speech.

> Recognizing that political speech is at the "core" of what the First Amendment protects, *e.g., Buckley,* 424 U.S. at 44-45, the ... Court has applied constitutional scrutiny and established the two-track system under which government may regulate political speech.[2]

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[2] In other words, require disclosure of, which differs from "ban" or otherwise "limit." *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082 & n.9 (D. Haw.

Under "Track 1," government may under some circumstances—and subject to further inquiry, *see, e.g.*, *id.* at 74 (addressing "threats, harassment, or reprisals")[3]—trigger political-committee or political-committee-like burdens, *see, e.g.*, *id.* at 63, 79 (addressing "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates or have "the major purpose" under *Buckley*), *followed in FEC v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 252 n.6, 262 (1986), *and quoted in McConnell v. FEC,* 540 U.S. 93, 170 n.64

2010) (distinguishing restrictions, i.e., bans or other limits, from regulation, i.e., disclosure). The umbrella term "disclosure" can cover registration, recordkeeping, reporting, attributions, and disclaimers in all their forms. *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 812-16, 836 (7th Cir. 2014). *Barland* understands the difference between attributions and disclaimers. *Id.* at 815-16. By definition, an "attribution" attributes and says who *is* speaking, while a "disclaimer" disclaims and says who is *not* speaking. *Id.*

Triggering at 35 n.2. *Independence Institute v. Williams,* 812 F.3d 787, 795 & n.9 (10th Cir. 2016), frames this differently by applying the label "disclosure" only to Track 2 law, not Track 1 law. Either way, constitutional principles—not "mere labels"—are what matters. *NAACP v. Button,* 371 U.S. 415, 429 (1963); *Triggering* at 51 n.91; 52-53 n.103.

[3] *Compare Barland*, 751 F.3d at 816, 832 (striking down an attribution and disclaimer requirement), *with Gable v. Patton,* 142 F.3d 940, 944-45 (6th Cir. 1998) (upholding an attribution requirement for a political committee). *Triggering* at 35 n.3.

(2003) (*overruled on other grounds by Citizens United*, 558 U.S. at 365-66); *Sampson v. Buescher,* 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010) (addressing organizations with the *Buckley* major purpose but only small-scale speech). ...

Under "Track 2,"[4] apart from whether government may trigger Track 1, political-committee(-like) burdens, government may—subject to further inquiry, *see, e.g.*, *Citizens United*, 558 U.S. at 370 (addressing "threats, harassment, or reprisals" (quoting *McConnell*, 540 U.S. at 198))—require attributions, disclaimers, and *non*-political-committee reporting for:

- independent expenditures properly understood, *Buckley,* 424 U.S. at 63-64, 79-82;[5] *cf. McIntyre v. Ohio Elections*

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[4] The *terms* "Track 1" and "Track 2" are [Amicus's], yet the *concepts* have been in the case law since the ... Court first distinguished what [Amicus] calls Track 1 law and Track 2 law in *Buckley,* 424 U.S. at 63-64.

Triggering at 36 n.7.

[5] Under the Constitution, "independent expenditure" means *Buckley* express advocacy, *Buckley,* 424 U.S. at 44 & n.52, 80, that is not coordinated with a candidate, *id.* at 46-47, 78. Thus, *non*-coordinated spending for political speech that is not *Buckley* express advocacy is independent *spending* but not an

> *Comm'n,* 514 U.S. 334, 354-56 (1995) (rejecting a Track 2, non-political-committee disclosure requirement for other speech), and
>
> - Federal Election Campaign Act electioneering communications, *Citizens United,* 558 U.S. at 366-71.[6]
>
> The ... Court has allowed government to regulate only these two types of political speech with Track 2 law. *Indep. Inst. v. Williams,* 812 F.3d 787, 791 (10th Cir. 2016) (holding that this Court allows limited Track 2 disclosure for particular speech); *id.* at 795 (holding that Track 2 law may reach *some*

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independent *expenditure. See id.* at 44 & n.52, 80 (addressing express advocacy and thereby independent expenditures).

Triggering at 36 n.9.

[6] Federal Election Campaign Act electioneering communications (1) are broadcast, (2) run in the 30 days before a primary or 60 days before a general election, (3) have a clearly identified candidate in the jurisdiction, (4) are targeted to the relevant electorate, and (5) do not expressly advocate. *McConnell,* 540 U.S. at 189-94. To be a Federal Election Campaign Act electioneering communication, speech about presidential or vice-presidential candidates need not be targeted to the relevant electorate, *id.* at 189-90, yet it must meet the other criteria, *id.* at 189-94.

Triggering at 36 n.10.

> speech beyond *Buckley* express advocacy); *id.* at 793 (addressing independent expenditures properly understood); *id.* at 789-90, 794-95, 797 (addressing Federal Election Campaign Act electioneering communications in state law); *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 836-37, 841 (7th Cir. 2014) (discussing Track 2 disclosure for independent expenditures properly understood and Federal Election Campaign Act electioneering communications). If government, working within Track 2, wants to regulate political speech beyond how current case law allows, government must prove the law survives scrutiny. *See, e.g.*, *Indep. Inst.*, 812 F.3d at 797-98 (addressing overbreadth); *Ctr. for Individual Freedom, Inc. v. Tennant,* 706 F.3d 270, 282-85 (4th Cir. 2013) (addressing underinclusiveness).

Triggering at 35-37 & nn.1-4, 6-12. In upholding Track 2 law,

> *Citizens United* does not hold that all Federal Election Campaign Act electioneering communications, much less other forms of non-express-advocacy spending for political speech, are regulable under Track 2 now and forevermore. Instead, it rejects an as-applied challenge based on what the *Citizens United* plaintiff called the "functional equivalent of express advocacy," 558 U.S. at 368-69, the former name of the appeal-to-vote test, *id.* at 335 (quoting *Wis. Right to Life,* 551 U.S. at 470 (opinion of

> Roberts, C.J.)). The possibility of other as-applied challenges—beyond "threats, harassment, or reprisals"—remains. *Supra* at 6; *see Wis. Right to Life, Inc. v. FEC,* 546 U.S. 410, 411-12 (2006) (per curiam) (holding that *McConnell*'s facial upholding of Federal Election Campaign Act electioneering-communication law does not foreclose as-applied challenges); *Indep. Inst. v. FEC,* 816 F.3d 113, 115-16 (D.C. Cir. 2016) (holding that *Citizens United* leaves the door open for future as-applied challenges and rejects "one particular as-applied challenge" and "one such as-applied challenge" (citing *Citizens United*, 558 U.S. at 368-69)).

Triggering at 37 n.12.

II. The Court distinguishes Track 1 and Track 2 law. This action involves Track 2 law, so Track 2 analysis—not Track 1 analysis—applies.

The Court evaluates Track 1 and Track 2 law differently, *Mass. Citizens for Life,* 479 U.S. at 262; *Buckley,* 424 U.S. at 79, because they are different. Track 1 law can trigger political-committee(-like) burdens, *Citizens United*, 558 U.S. at 338; *Buckley*, 424 U.S. at 63; *Triggering* at 44 & n.62, including registration (including, in turn, treasurer designation, bank-account designation, and termination, i.e., deregistration), recordkeeping, extensive reporting, and ongoing reporting, *see, e.g.*, *Citizens United*, 558 U.S. at 338 (describing such

law); *Mass. Citizens for Life*, 479 U.S. at 253-56 & nn.7-9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same); *Triggering* at 44 & nn.63-65. These are "onerous" burdens. *Citizens United,* 558 U.S. at 339; *Wis. Right to Life,* 551 U.S. at 477 n.9 (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life,* 479 U.S. at 253-55 (opinion of Brennan, J.)); *Triggering* at 44-45 & nn.66-70.[7] By contrast, Track 2, non-political-committee reporting—which *Buckley* and *Citizens United* uphold for particular speech, *supra* at 6-9—includes none of these Track 1 burdens. Instead,

> Track 2 reporting occurs only for reporting periods when the particular speech occurs,[8]

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[7] Law need not trigger all of these burdens to require Track 1 analysis. *See, e.g., Justice v. Hosemann,* 771 F.3d 285, 288-89 (5th Cir. 2014) (addressing law with extensive and ongoing reporting yet not recordkeeping as Track 1 law), *cert. denied*, 136 S.Ct. 1514 (2016); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1013 (9th Cir. 2010) (addressing law with extensive but not ongoing reporting as Track 1 law); *Triggering* at 45-46 & nn.71-72. *But cf. Del. Strong Families v. Att'y Gen. of Del.,* 793 F.3d 304, 312-13 n.10 (3d Cir. 2015) (addressing law with extensive but not ongoing reporting as Track 2 law when the parties did so), *cert. denied*, 136 S.Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal).

[8] This is what "one-time" and "event-driven" mean. *E.g.*, *Barland,* 751 F.3d at 824, 836, 841. It is time to abandon these confusing labels and simply say what one means. It is not clear from these labels what they mean. They do not reveal that "one-time" and "event-driven" mean the same thing.

> and the reports are less burdensome than extensive or ongoing reporting. *See, e.g., Mass. Citizens for Life,* 479 U.S. at 262 ("less than the full panoply of" Track 1 burdens); *Buckley*, 424 U.S. at 63-64 (describing Track 2, *non*-political-committee reporting); 52 U.S.C. 30104(c), (f)-(g) (same).

Triggering at 57 & nn.126-28 (ellipses omitted).[9]

> As for "one-time," some understandably think it means speakers that are not political committees file only one Track 2, non-political-committee report *ever*; others understandably think it means such speakers file one such report every *time* they engage in regulable speech. Neither is right. *See Mass. Citizens for Life,* 479 U.S. at 262 (describing Track 2, non-political-committee reporting); *Buckley,* 424 U.S. at 63-64 (same).
>
> As for "event-driven," it is not precise, because Track 1 reporting is also driven by events; they are just different events. *See Citizens United*, 558 U.S. at 338 (describing Track 1 burdens); *Buckley*, 424 U.S. at 63 (same).

Triggering at 57 n.127.

> [9] Track 1 law
>
> focuses on the organization's major purpose, *i.e.,* the nature of the speaker, not the speech. *Mass. Citizens for Life*, 479 U.S. at 262 (citing *Buckley,* 424 U.S. at 79). Meanwhile, Track 2 attributions, disclaimers, and non-political-committee reporting are "based on the communication, not the organization," *i.e.,* the nature of the speech, not the speaker. *N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 290 (4th Cir. 2008).

Triggering at 62 n.151.

Thus, it contradicts *Buckley*, *Massachusetts Citizens for Life, Wisconsin Right to Life,* and *Citizens United* to believe—as *SpeechNow.org v. FEC,* 599 F.3d 696, 690-92, 697-98 (D.C. Cir. 2010) (en banc), and opinions following it do—that Track 1 burdens are not that much greater than Track 2 reporting, *Triggering* at 58 n.131 (collecting authorities).

This action involves 52 U.S.C. 30104(f) (JURISDICTIONAL STATEMENT at 5-7, *available at* http://www.campaignfreedom.org/wp-content/uploads/2014/09/11/II-v-FEC-Jurisdictional-Statement-12.5.16.pdf), which is Track 2 law, not Track 1 law, because it has neither registration, recordkeeping, extensive reporting, nor ongoing reporting.

Thus, Track 2 analysis—not Track 1 analysis—applies. *Supra* at 6-9.

III. Substantial-relation exacting scrutiny applies to Track 2 law. Because this action does not involve Track 1 law, the Court should expressly avoid ruling on the constitutionality of law triggering Track 1 burdens, including what scrutiny level applies to such law.

Citizens United addresses Track 2 law and holds that substantial-relation exacting scrutiny applies. 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). Such scrutiny "is more than a rubber stamp," *Minn. Citizens Concerned for Life, Inc. v. Swanson,*

692 F.3d 864, 876 (8th Cir. 2012) (en banc) (citing *Buckley,* 424 U.S. at 64, 66), "is not a loose form of judicial review," *Barland*, 751 F.3d at 840, and, though not strict scrutiny, is a "strict test" and a "strict standard," *Buckley*, 424 U.S. at 66, 75. *Triggering* at 79 n.247.[10]

Just as the tests for the constitutionality of law triggering Track 1 burdens go to the tailoring part of constitutional scrutiny, not the government interest part, *e.g., Barland*, 751 F.3d at 841-42; *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1032-34 (9th Cir. 2009); *Buckley v. Valeo,* 519 F.2d 821, 869 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd on other grounds*, 424 U.S. 1 (1976) (per curiam); *Triggering* at 49-50 & nn.87-89, 64 & nn.155-56 (collecting competing authorities), what government may regulate with Track 2 law goes to tailoring, not the government interest, *see, e.g., Indep. Inst.,* 812 F.3d at 792-93, 797-98 (addressing overbreadth); *Tennant,* 706 F.3d at 282-85 (addressing underinclusiveness); *Triggering* at 50 n.87.[11] The Court does "not look to a government

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[10] As *Iowa Right to Life Committee, Inc. v. Tooker,* 717 F.3d 576, 590-91 (8th Cir. 2013), understands, this Court since *Buckley* has separated strict scrutiny from exacting scrutiny. *Triggering* at 80 n.247.

[11] *But see, e.g.*, *Human Life of Wash.,* 624 F.3d at 1016-19 (overlooking that under tailoring, *Buckley/Citizens United* reach only independent expenditures/Federal Election Campaign Act electioneering communications, while creating an express-advocacy strawman). *But cf. Van Hollen v. FEC,* 811 F.3d 486, 501 (D.C. Cir. 2016) (addressing Track 2 law and

interest and truncate this tailoring test at the outset." *McCutcheon v. FEC,* 134 S.Ct. 1434, 1450 (2014) (addressing another tailoring test). "Thus, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny." *Triggering* at 50 & n.89, 64.

Circuits are split over whether strict scrutiny or substantial-relation exacting scrutiny applies to law triggering Track 1 burdens, *id.* at 77-80 & nn.236-56 (explaining the split and collecting competing authorities), and whether *Citizens United* pages 366-71 allow government to trigger Track 1 burdens, *id.* at 51-52 & nn.97-103, 56-57 & nn.123-28 (same). However, no Track 1 law is at issue in this action, so the Court should expressly avoid ruling on the constitutionality of law triggering Track 1 burdens, including what scrutiny level applies to such law, because Track 1 law and Track 2 law are different. *Supra* at 9-12.

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stating incorrectly that this Court treats speech and transparency as equivalents). *Triggering* at 50 n.87.

IV. Political-speech law derives from government's power to regulate elections. Track 2 law regulating genuine-issue speech is not tailored to any government interest in regulating elections. Based on this alone, Appellant Independence Institute prevails.

Political-speech law derives from government's power to regulate elections, *Buckley,* 424 U.S. at 13 & n.16; *Triggering* at 39 & nn.32-33, including the three government interests in regulating political speech, *Buckley,* 424 U.S. at 66-68, *cited in Triggering* at 50 n.88.

> *Citizens United* holds the appeal-to-vote test does not prevent regulating speech with Track 2 law. 558 U.S. at 368-69. However, if anything is beyond what government should regulate with Track 2 law, then "genuine issue" speech is. *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.) (addressing a speech ban). Track 2 law regulating genuine-issue speech is not tailored to any government interest in regulating elections, much less "substantially related" to a "'sufficiently important' government interest." *Citizens United*, 558 U.S. at 366-67 (addressing Track 2 law (quoting *Buckley*, 424 U.S. at 64, 66)). Moreover, genuine-issue speech presents an easy case, because it is at the opposite end of the issue-advocacy spectrum from appeal-to-vote speech, once known as "the functional equivalent of express advocacy." *Id.* at 335 (quoting *Wis.*

> *Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.)). *See generally McConnell*, 540 U.S. at 206 n.88 (referring to regulation of genuine-issue speech but meaning a ban).
>
> *If* genuine-issue speech *were* the perfect complement of appeal-to-vote speech, then *Citizens United*'s appeal-to-vote-test holding on Track 2 law would similarly foreclose a genuine-issue-speech test. One would be just the flipside of the other: Saying that speech *is* genuine-issue speech would be the same as saying it is *not* appeal-to-vote speech, and *vice versa*. Then, since the appeal-to-vote test is *not* a boundary between what is and is not regulable with Track 2 law, *Citizens United*, 558 U.S. at 368-69, a genuine-issue-speech test would also not be a boundary.
>
> However, genuine-issue speech is *not* the perfect complement of appeal-to-vote speech. Whatever the appeal-to-vote test may have meant, some speech is neither genuine-issue speech nor appeal-to-vote speech—some speech is in-between. *See Wis. Right to Life*, 551 U.S. at 469-70 (opinion of Roberts, C.J.) (defining the appeal-to-vote test pre-*Citizens United*, and establishing a safe harbor among genuine-issue speech), *quoted in Indep. Inst.*, 812 F.3d at 793 n.5. Therefore, *Citizens United* does not foreclose a genuine-issue-speech test.

Triggering at 68-69 n.181 (brackets omitted).

Yet what about the *Wisconsin Right to Life* safe harbor for genuine-issue speech? The *Wisconsin Right to Life* ads are in the safe harbor, because they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter" and neither "mention an election, candidacy, political party, or challenger" nor "take a position on a candidate's character, qualifications, or fitness for office." 551 U.S. at 470 (opinion of Roberts, C.J.). However, urging the public to contact public officials does not affect whether speech is genuine-issue speech, so there is no need to make future speakers jump through the hoop of urging the public to contact public officials just to make sure speech is in the genuine-issue-speech safe harbor. *Triggering* at 69 n.181. The Court should revise the safe harbor by eliminating any requirement that speech "urge the public to contact public officials" for the speech to be in the safe harbor. *Id.*

With or without this safe-harbor revision, Appellant Independence Institute's speech is in the safe harbor (*see* JURISDICTIONAL STATEMENT at 6-7), so government may not regulate the speech with Track 2, non-political-committee disclosure requirements. Based on this alone, Appellant Independence Institute prevails.

Because Appellant Independence Institute's speech is in the safe harbor, there is no need to define, here for all time, what speech beyond the safe harbor is genuine-issue speech.

Meanwhile, the clarity of the safe harbor's boundaries resolves for now the district court's concern that the genuine-issue-speech test is "entirely unworkable." (JURISDICTIONAL STATEMENT at App.24.)

As an aside, the foregoing does not mean that government may *never* regulate genuine-issue speech. Rather, it means that government may not regulate genuine-issue speech with Track 2 law, the only type of law at issue here. However, Track 1 law is different, because

> [o]nce it *is* constitutional to trigger Track 1 burdens for an organization, government may—subject to further inquiry, *supra* at 5—require disclosure of *all* income and spending by the organization, *see Citizens United,* 558 U.S. at 338 (describing Track 1 burdens); *Buckley,* 424 U.S. at 63 (same),

Triggering at 61 n.149, including genuine-issue speech. Whether government may trigger such burdens for an organization in the first place is a separate question. *Supra* at 5-6.

A. Appellant Independence Institute prevails regardless of the *Buckley* phrases "unambiguously related to the campaign" and "unambiguously campaign related" or the *Citizens United* word "pejorative."

Because government may not regulate genuine-issue speech with Track 2 law, and Appellant Independence Institute's speech is in the safe harbor, Appellant prevails regardless of two additional phrases from *Buckley,* 424 U.S. at 80-81 ("unambiguously related to the campaign" and "unambiguously campaign related"), or one additional word from *Citizens United,* 558 U.S. at 320, 368 ("pejorative").

The Court should anchor the genuine-issue-speech test in the Constitution without using these extra phrases or this extra word. They are unnecessary. *See supra* at 15.

Thus, it does not diminish the victory to which Appellant Independence Institute is due to hold that

> the phrases "unambiguously related to the campaign" and "unambiguously campaign related" in *Buckley*, 424 U.S. at 80-81, are *not* a test for constitutionality of Track 2 law. ... *Indep. Inst.*, 812 F.3d at 796 (incorrectly rejecting a genuine-issue-speech test after correctly declining to define genuine-issue speech in this way). "The difficulty of reliably distinguishing between campaign-related speech and non-campaign-related speech is

> why courts must look only to whether the specific statutory definitions before them are sufficiently tailored to the government's compelling or sufficiently important interests." *Id.* Besides, these phrases are vague. How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech is "unambiguously related to the campaign" or "unambiguously campaign related"? *Buckley*, 424 U.S. at 80-81; *cf. Triggering* at 49 n.84 (rejecting "campaign related" under Track 1).

Triggering at 69 n.181 (brackets omitted) (collecting competing authorities). Nor does it diminish the victory to which Appellant Independence Institute is due to hold that

> [t]he word "pejorative" in *Citizens United* would fare no better as a constitutional-law standard even if the word were not dictum. 558 U.S. at 320, 368, *quoted in Del. Strong Families v. Denn,* 136 S.Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (denial of certiorari). How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech is pejorative?

Triggering at 69-70 n.181.

B. Appellant Independence Institute prevails regardless of its tax-law status.

Holding for Appellant Independence Institute is consistent with its following the law for tax-exempt organizations (*see* JURISDICTIONAL STATEMENT at 5, 33-35), yet its tax-law status is not the reason that it prevails (*see id.* at App.33-35).

> A speaker's status under statutory or regulatory law, such as the Internal Revenue Code or the Internal Revenue Service regulations, does *not* determine whether Track 1 law or Track 2 law, or other political-speech law, survives a challenge under constitutional law. *See Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308-09 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal). That would be like the statutory or regulatory tail wagging the constitutional dog.

Triggering at 62 n.151.

V. The appeal-to-vote test—once known as the "functional equivalent of express advocacy"—no longer has any place in law.

The parties and the district court have mentioned the appeal-to-vote test (*e.g.*, JURISDICTIONAL STATEMENT at 13-14, 17-19, App.20), so it is important to understand *why* the appeal-to-vote test no longer has any place in law.

Under constitutional law, express advocacy—including independent expenditure—means *Buckley* express advocacy, i.e., "communications that in express terms advocate the election or defeat of a clearly identified candidate"—or the passage or defeat of a ballot measure—using terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley,* 424 U.S. at 44 & n.52; *see Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1102-04 & n.18 (9th Cir. 2003) (addressing "express ballot-measure advocacy"). To be *Buckley* express advocacy, speech need not include the specific *Buckley* words. Synonyms suffice. That is what "such as" means. *Buckley*, 424 U.S. at 44 n.52; *Elections Bd. v. Wis. Mfrs. & Commerce,* 597 N.W.2d 721, 730-31 (Wis. 1999). Nevertheless, *Buckley* express advocacy requires "explicit words of advocacy." *Buckley,* 424 U.S. at 43; *Wis. Mfrs. & Commerce,* 597 N.W.2d at 737.

Under constitutional law, the *Wisconsin Right to Life* "'appeal to vote' test"—once known as "the functional equivalent of express advocacy," *Citizens United,* 558 U.S. at 335 (quoting *Wis. Right to Life,* 551 U.S. at 470 (opinion of Roberts, C.J.))[12]—*cannot*

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[12] *Citizens United* "re-labels 'the functional equivalent of express advocacy' as the 'appeal to vote' test." *Wis.*

be a form of express advocacy. Rather, "as explained in" and "consistent with the lead opinion in" *Wisconsin Right to Life, Barland*, 751 F.3d at 834, 838, the appeal-to-vote test reached beyond *Buckley*'s words and synonyms for them, *id.* at 820.[13] It applied when there were no explicit words of advocacy and asked whether the *only reasonable interpretation* of Federal Election Campaign Act electioneering communications was as an appeal to vote for or against a clearly identified candidate. *Wis. Right to Life*, 551 U.S. at 469-70 (opinion of Roberts, C.J.) (holding pre-*Citizens United* that "a court should find that an ad is the

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Right to Life, Inc. v. Barland, No. 10-C-0669, at 5 n.23, 2015 WL 658465 (E.D. Wis. Jan. 30, 2015, as amended Feb. 13, 2015) (quoting *Citizens United,* 558 U.S. at 335) (declaratory judgment and permanent injunction following *Barland,* 751 F.3d at 844), *available at* http://gab.wi.gov.

Triggering at 67 n.172.

[13] Thus, *Wisconsin Right to Life* asked not whether speech was "express advocacy" but whether it was "the functional equivalent of express advocacy." 551 U.S. at 469 (opinion of Roberts, C.J.). Indeed, *Wisconsin Right to Life*'s repeatedly referring to "express advocacy" and its "functional equivalent" illustrated that the latter reached beyond the former. *Id.* at 465, 471, 476, 477 n.9, 479, 482 (opinion of Roberts, C.J.).

Triggering at 67 n.174.

functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). This test applied only to Federal Election Campaign Act electioneering communications, *id.* at 474 n.7 (opinion of Roberts, C.J.) (holding that "this test is only triggered if the speech" is a Federal Election Campaign Act electioneering communication "in the first place"),[14] which by definition are not express advocacy, because they are not expenditures or independent expenditures, *Del. Strong Families,* 793 F.3d at 311 (quoting 52 U.S.C. 30104(f)(3)(B)(ii)).[15] Only expenditures/independent expenditures are express advocacy. *Buckley,* 424 U.S. at 44 & n.52, 80. Indeed, one point of regulating Federal Election Campaign Act electioneering communications was for Track 2 law to reach beyond express advocacy. *McConnell,* 540 U.S. at 189-94.

Furthermore, after *Citizens United,* the appeal-to-vote test no longer even affects

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[14] *N.C. Right to Life,* 525 F.3d at 282; *Colo. Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1257-58 (Colo. 2012); *see also Barland*, 751 F.3d at 819-21, 823 (addressing the appeal-to-vote test). *Triggering* at 68 n.176.

[15] *But see Indep. Inst.,* 816 F.3d at 116 (implicitly and incorrectly believing that Federal Election Campaign Act electioneering communications can be express advocacy (citing *Citizens United*, 558 U.S. at 368-69)). *Triggering* at 68 n.177.

> whether government may ban, otherwise limit, or regulate speech. *See Citizens United,* 558 U.S. at 324-26, 365-66, 368-69 (holding that government may *not ban or otherwise limit* Federal Election Campaign Act electioneering communications even when they *are* the functional equivalent of express advocacy, and holding that government may *regulate* Federal Election Campaign Act electioneering communications even when they are *not* the functional equivalent of express advocacy).[16] *Citizens United* thereby "eliminated the context in which the appeal-to-vote test has had any significance" under the Constitution. *Nat'l Org. for Marriage, Inc. v. McKee,* 649 F.3d 34, 69 (1st Cir. 2011).

Triggering at 67-68 & nn.168-81 (ellipsis omitted).

Nevertheless, *Barland*—based on the premise that *Citizens United* pages 3[68-]69 have appeal-to-vote-test dictum, 751 F.3d at 836—believes the

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[16] *Accord Indep. Inst.,* 812 F.3d at 793 n.4, 794-95 (reviewing *Citizens United's* Track 2 holding while mistakenly conflating express advocacy and the appeal-to-vote test); *Del. Strong Families*, 793 F.3d at 308 (rejecting the plaintiff's contention that the appeal-to-vote test remains valid post-*Citizens United* (quoting *Citizens United*, 558 U.S. at 368)); *Vt. Right to Life Comm., Inc. v. Sorrell,* 758 F.3d 118, 132 (2d Cir. 2014) (agreeing with a plaintiff's contention that the appeal-to-vote test is invalid post-*Citizens United* (quoting *Citizens United*, 558 U.S. at 369)), *cert. denied*, 135 S.Ct. 949 (2015). *Triggering* at 68 n.180.

appeal-to-vote test remains in constitutional law. *Id.* at 838.[17] However,

> *Citizens United* pages 368-69 have no appeal-to-vote-test dictum. *Barland* incorrectly concludes that they do by crucially believing *Citizens United* (1) holds, on pages 324-26, that *all* the speech at issue—a Federal Election Campaign Act electioneering-communication movie *and Federal Election Campaign Act electioneering-communication ads for it*—is the functional equivalent of express advocacy, i.e., is appeal-to-vote speech, *id.* at 823 (discussing *Citizens United,* 558 U.S. at 324-26), and (2) allows, on pages 368-69, Track 2, non-political-committee reporting of Federal Election Campaign Act electioneering communications even when they are not the functional equivalent of express advocacy, i.e., are not appeal-to-vote speech, *id.* at 824-25, 836 (discussing *Citizens United,* 558 U.S. at 368-69). Point 2 is correct. If Point 1 were entirely correct, Point 2 would be dictum. *Id.* at 836. But Point 1 is *incorrect*: Only the movie was the functional equivalent of express advocacy, i.e., was appeal-to-vote speech, so Point 2 is not dictum. *Indep. Inst.,* 812 F.3d at 794-95

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[17] *Accord State ex rel. Two Unnamed Petitioners v. Peterson,* 866 N.W.2d 165, 192-93 & n.23 (Wis. 2015) (holding that the appeal-to-vote test remains valid post-*Citizens United*), *cert. denied,* 137 S.Ct. 77 (2016). *Triggering* at 70 n.183.

> & nn.8-9, 798 n.13 (recognizing that the *Wisconsin Right to Life* ads were not the functional equivalent of express advocacy, holding that *Citizens United* has no appeal-to-vote-test dictum without mentioning *Barland,* and addressing Track 2 disclosure while acknowledging the difference between Track 1 and Track 2 disclosure); *Indep. Inst. v. FEC,* 70 F.Supp.3d 502, 507-08, 515 (D.D.C. 2014) (recognizing that the *Wisconsin Right to Life* ads were not the functional equivalent of express advocacy, holding that *Citizens United* has no appeal-to-vote-test dictum while disagreeing with *Barland,* and addressing Track 2 disclosure without acknowledging either the difference between Track 1 and Track 2 disclosure or the correct *Barland* holdings on Track 1 disclosure), *vacated on other grounds*, 816 F.3d 113, 115-17 (D.C. Cir. 2016) (remanding for a three-judge district court).

Triggering at 70-71 & nn.185-89 (brackets omitted).[18]

> Moreover, under *Wisconsin Right to Life*, the appeal-to-vote test is vague as to speech other than Federal Election Campaign Act electioneering communications. *See* 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (answering a charge that "our test" is

[18] For further explanation of how *Barland* is mistaken on this point, please see *Triggering* at 71 n.189.

impermissibly vague partly by saying "this test is only triggered if the speech" is a Federal Election Campaign Act electioneering communication "in the first place"). Elsewhere the test "might create an unwieldy standard that would be difficult to apply" and unconstitutionally chill political speech. *Colo. Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248, 1258 (Colo. 2012) (citing *Wis. Right to Life*, 551 U.S. at 468-69 (opinion of Roberts, C.J.)).[19]

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[19] Please recall that the appeal-to-vote test applied only to Federal Election Campaign Act electioneering communications, *supra* at 24, one part of the definition of which is that speech—other than speech about presidential or vice-presidential candidates—must be "targeted to the relevant electorate," *supra* at 7 n.6, meaning it can be received by a certain number of people, *McConnell,* 540 U.S. at 190. When speech is broadcast—which Federal Election Campaign Act electioneering communications are, *supra* at 7 n.6—government knows with precision how many people can receive it, because government licenses broadcasters for particular signal strength. Government cannot know this for non-broadcast speech. *See The Electioneering Communications Database*, FED. COMMC'NS COMM'N (Feb. 28, 2016), *available at* http://apps.fcc.gov/ecd (addressing broadcast speech). Hence the Federal Election Campaign Act electioneering-communication definition is vague as to non-broadcast speech.

It may be tempting to resolve this vagueness as to non-broadcast speech by removing the targeted-to-the-relevant-electorate requirement. But then the law would be overbroad, as applied and facially: When

> And after *Citizens United,* what remains from *Wisconsin Right to Life* regarding the test is the conclusion that the test is unconstitutionally vague, even vis-à-vis Federal Election Campaign Act electioneering communications. *Wis. Right to Life,* 551 U.S. at 492-94 (Scalia, J., concurring).
>
> How was anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech has no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate?

Triggering at 72-73 & nn.190-92 (brackets and ellipsis omitted).

Therefore, "the appeal-to-vote test—once known as the 'functional equivalent of express advocacy'—no longer affects whether government may ban, otherwise limit, or regulate speech, and the appeal-

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> spending for political speech is *not* for *Buckley* express advocacy or for speech that is targeted to the relevant *electorate*, Track 2 law regulating the speech is not tailored to any government interest in regulating *elections, supra* at 15; *cf. supra* at 18 (addressing Track 1 law, which is different), much less "substantially related" to a "'sufficiently important' government interest," *Citizens United,* 558 U.S. at 366-67 (addressing Track 2 law (quoting *Buckley,* 424 U.S. at 64, 66)).

Triggering at 72 n.191 (brackets omitted).

to-vote test is vague. It has no place in law." *Triggering* at 77.[20]

CONCLUSION

The Court should reverse the district-court order and remand this action with instructions to enter judgment for Appellant Independence Institute.

Respectfully submitted,

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[20] For replies to five sets of possible responses to the foregoing, please see *Triggering* at 73-76.