No. ________

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Congress may require organizations engaged in the genuine discussion of policy issues, unconnected to any campaign for office, to report to the Federal Election Commission, and publicly disclose their donors, pursuant to the Bipartisan Campaign Reform Act of 2002.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Appellant Independence Institute makes the following disclosure:

The Independence Institute is a nonprofit charitable corporation organized under the Internal Revenue Code and Colorado law. The Independence Institute has no parent corporation, and no publicly-held company owns ten percent or more of its stock.

PARTIES TO THE PROCEEDING

Established May 31, 1985, the Independence Institute ("Institute") is a Colorado nonprofit corporation recognized as tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code. 26 U.S.C. §§ 501(c)(3) (nonprofit status); 170(b)(1)(A)(vi) (public charity status). The Institute conducts research and educates the public concerning various aspects of public policy, including taxation, education, health care, and criminal justice.

The Federal Election Commission ("FEC" or "Commission") is the agency charged with "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act ("FECA") and its amendments, including the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 52 U.S.C. § 30106(b)(1).

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OPINION BELOW

The opinion of the district court, *Independence Institute v. Fed. Election Comm'n*, No. 14-1500 (D.D.C. Nov. 3, 2016) (three-judge court), is reprinted in the appendix ("App.") to this jurisdictional statement. App. 3-36.

JURISDICTION

On November 3, 2016, the three-judge district court entered an Order and Memorandum Opinion denying the Independence Institute's Motion for Summary Judgment and granting the FEC's Motion for Summary Judgment. *Independence Institute v. Fed. Election Comm'n*, Order at App. 1, Mem. Op. at App. 35. The Independence Institute timely filed its notice of appeal on November 10, 2016. App. 37-38; 52 U.S.C. § 30110 note ("[s]uch appeal shall be taken by the filing of a notice of appeal within 10 days").

The three-judge district court had jurisdiction under Section 403(a)(1) of BCRA. 52 U.S.C. § 30110 note ("The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code."); *Independence Institute v. Fed. Election Comm'n*, 816 F.3d 113, 117 (D.C. Cir. 2016) (applying *Shapiro v. McManus*, 577 U.S. ___, ___, 136 S. Ct. 450, 455 (2015)).

This Court has jurisdiction under Section 403(a)(3) of BCRA. 52 U.S.C. § 30110 note ("A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States.").

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are reproduced at App. 88-103 of the appendix to this jurisdictional statement.

INTRODUCTION

At present, confusion as to the proper application of two decisions – *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) and *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) – has led lower courts to "treat[] speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents." *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016). This appeal, which comes to this Court as part of its mandatory docket, presents an opportunity to squarely address whether the genuine discussion of issues, unconnected to any campaign for public office or other electoral contest, may constitutionally trigger mandatory reporting to the government, including the public disclosure of a nonprofit's donors.

Unlike the bulk of this Court's prior precedents, this case does not concern "the ability to denounce public officials by name and call for their ouster." *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., dubitante). It unquestionably concerns the good-faith discussion of a bill pending before Congress that would permit Article III judges greater discretion in sentencing offenders. This Court has previously required regulation of such speech to "meet the strict test established by *NAACP v. Alabama*," under which "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." *Buckley*, 424 U.S. at 64-66.

Moreover, this Court has insisted that for a law to "pass First Amendment scrutiny," it must be "tailored" to the government's "stated interests." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002). This ensures that laws do not "cover[] so much speech" as to undermine "the values protected by the First Amendment." *Id*. at 165-166. In particular, *Buckley* limited disclosure only to groups speaking "unambiguously" about *candidates, Buckley*, 424 U.S. at 80, and acted explicitly to prevent disclosure regulations from swallowing issue speech such as the Institute's. *Id*. at 80 ("This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate").

Citizens United reviewed disclosure requirements as applied to a speaker urging the defeat of then-Senator Hillary Clinton's 2008 campaign for the

Presidency. In doing so, it did not oust *Buckley*, and it did not, *sub silencio*, reverse this Court's unwavering fidelity to the protection of genuine issue speech. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 206 n.88 (2003) ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"). Nevertheless, a distressing number of appellate courts, as well as the three-judge district court below, believe otherwise, routinely upholding virtually any disclosure regime, even those regulating the mere mention of an officeholder in the months before an election.

This case presents an opportunity to reverse this trend and broadly safeguard the right "to pursue [one's] lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958). At a minimum, this Court ought to reaffirm *Buckley*, and declare that the government may only impose reporting and disclosure requirements on speech that is unambiguously campaign related, and not on genuine issue speech that does "not mention an election, candidacy, political party, or challenger; and [that] . . . do[es] not take a position on a candidate's character, qualifications, or fitness for office." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL II*").

STATEMENT OF THE CASE

Appellant Independence Institute is a Colorado nonprofit corporation organized under § 501(c)(3) of

the Internal Revenue Code. Established in 1985, the Institute conducts research and educates the public concerning various aspects of public policy, including taxation, education, health care, and criminal justice. As a § 501(c)(3) entity, the Institute cannot "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). The Institute is not under the control or influence of any political candidate or political party.

In 2014, to further its educational mission, the Institute wished to run a radio advertisement supporting the Justice Safety Valve Act, a bill that would permit federal judges substantial discretion in sentencing nonviolent offenders. The ad would urge viewers to contact both of Colorado's sitting senators and express support for the Act, which was pending before the U.S. Senate. One of Colorado's senators, Mark Udall, also happened to be a candidate for reelection. The proposed ad did not discuss or refer to Udall's candidacy in any way. Nevertheless, as explained below, the Institute's proposed ad would qualify as an electioneering communication under BCRA because it would have mentioned Senator Udall's name within sixty days of the November 2, 2014, general election. 52 U.S.C. § 30104(f)(3)(A).

The Institute's ad is brief, focuses on specific legislation, and asks Colorado's senators to support that legislation. The text of the proposed ad is as follows:

Independence Institute

Radio :60

"*Let the punishment fit the crime*"

Let the punishment fit the crime.

But for many federal crimes, that's no longer true.

Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.

And for what purpose?

Studies show that these laws don't cut crime.

In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.

Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619.

It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.

Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act.

Tell them it's time to let the punishment fit the crime.

> Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

App. 61-62, ¶ 35.

BCRA defines electioneering communications as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 60 days of a general election or 30 days of a primary election. 52 U.S.C. § 30104(f)(3)(A)(i)(I)-(II). The ad must also be "targeted to the relevant electorate," 52 U.S.C. § 30104(f)(3)(A)(i)(III), meaning in practice that it "can be received by 50,000 or more persons" in the relevant jurisdiction. 52 U.S.C. § 30104(f)(3)(C).

Making an electioneering communication triggers a mandatory reporting requirement that the speaker must meet within "24 hours . . . [of] the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000." 52 U.S.C. § 30104(f)(1), (4); 11 C.F.R. § 104.20(b). This report "shall be made under penalty of perjury." 52 U.S.C. § 30104(f)(2).

The report must identify "the custodian of the books and accounts" used to fund the advertisement, and list "[a]ll clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates." 11 C.F.R. § 104.20(c)(3);

Federal Election Commission, Instructions for Preparing FEC FORM 9 (24 Hour Notice of Disbursements for Electioneering Communications) at 5.[1]

For an incorporated speaker, such as the Institute, the report must list "the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).

Because the Independence Institute plans to solicit funds in excess of $1,000 from contributors to support its proposed advertisement, the creation and distribution of its ad would expose those donors to permanent and virtually instant public disclosure on the FEC's web site.[2]

The Institute does not believe it may constitutionally be required to report to the FEC, and violate the privacy of its donors, as a condition of engaging in genuine issue speech unrelated to any electoral campaign or candidacy. Accordingly, the Institute filed suit seeking declaratory and injunctive relief from BCRA's electioneering communications regime. App. 85-86, ¶¶ A-D.

[1] *Available at*: http://www.fec.gov/pdf/forms/fecfrm9i.pdf.

[2] FEC, Electioneering Communications, *available at*: http://fec.gov/finance/disclosure/electioneering.shtml.

PROCEDURAL HISTORY

As a constitutional challenge to a portion of BCRA, this case is brought pursuant to 52 U.S.C. § 30110 note. That statute provides that such suits "shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court" pursuant to 28 U.S.C. § 2284. *Id.*

On September 2, 2014, the Institute filed a verified complaint and motion to convene a three-judge court. App. 9; *see also* 28 U.S.C. § 2284(a-b). Given the proximity of the electioneering communications period for the 2014 election, the Institute moved for preliminary relief two days later.

The single-judge court held a telephonic conference with the Parties. Shortly thereafter, the Parties agreed to stipulate as to the scope of the Institute's allegations and claims and to convert the Institute's motion for preliminary relief into a motion for summary judgment.

The single-judge court initially denied the Institute's application for a three-judge court, but on March 1, 2016, was reversed by the D.C. Circuit "[b]ecause Independence Institute's complaint raises a First Amendment challenge to a provision of BCRA," and it was therefore "entitle[d] . . . to a three-judge district court." *Independence Institute*, 816 F.3d at 115-116 (applying *Shapiro* 136 S. Ct. at 455).

Before the three-judge district court, the Institute and the FEC filed cross motions for summary judgement. The Institute also submitted a statement of undisputed facts, none of which were contested. App. 10 ("Indeed, the Commission did not even respond to the Institute's Statement of Undisputed Material Facts."). The district court held a hearing on September 14, 2016, and, on November 3, 2016, denied the Institute's Motion for Summary Judgment and granted the FEC's Motion for Summary Judgment. App. 1, 35.

Appellant timely filed its Notice of Appeal to this Court on November 10, 2016. App. 37-38.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. The informational interest does not extend to genuine issue speech unconnected to any election.

1. This Court has long held that the First Amendment shields genuine issue speech from most government regulation. *Garrison v. La.*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *see also McConnell*, 540 U.S. at 206 n.88 ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."); *Mills v. Ala.*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that

Amendment was to protect the free discussion of governmental affairs."); *Buckley v. Valeo*, 519 F.2d 821, 873 (D.C. Cir. 1975) (en banc) ("[I]ssue discussions unwedded to the cause of a particular candidate . . . are vital and indispensable to a free society. . . .").

Below, the three-judge court departed from this understanding, and held that genuine issue speakers are required to report to the government, reveal their financial supporters, and submit to a host of federal regulations, because "it is the tying of an identified candidate to an issue or message that justifies [and] gives rise to the voting public's informational interest." App. 24 (citing *McConnell*, 540 U.S. at 197, and *Citizens United*, 558 U.S. at 369). While this statement – and the court's holding – ignores the need for a disclosure requirement to be properly tailored under the "strict test" of "exacting scrutiny," *Buckley*, 424 U.S. at 66, 64, it also misstates and dramatically expands the scope of "the voting public's informational interest." App. 24.

This expansion of the government's role in monitoring public discussion not only undoes this Court's work in *McConnell* and *Citizens United*, but also overrides *Buckley v. Valeo*, the "foundational case" limiting the government's power to regulate political speech and association. *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 5 (D.C. Cir. 2009); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting) (calling *Buckley* this Court's "seminal campaign finance case").

2. *Buckley*, which reviewed the 1974 amendments to the Federal Election Campaign Act ("FECA"), struck down provisions of that statute reaching genuine issue speech. In doing so, this Court observed that laws regulating issue speech inevitably discourage speakers from speaking plainly, and that the First Amendment does not allow speakers to be forced to "hedge and trim" their preferred message. *Buckley*, 424 U.S. at 43 (internal quotation marks omitted). "Such watered-down and cautious discussion is hardly the 'uninhibited, robust and wide-open' debate on public issues which the First Amendment was designed to foster." *Buckley*, 519 F.2d at 877 n.141 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The Court also expressed concern with the harm that overbroad disclosure could work to civic discourse, because "the right of associational privacy . . . derives from the rights of [an] organization's members to advocate their personal points of view in the most effective way." *Buckley*, 424 U.S. at 75.

Consequently, performing its duty to save Congressional intent, the *Buckley* Court substantially narrowed the wide-ranging FECA regime to ensure that it did "not reach all partisan discussion," *id*. at 80, much less genuine issue speech. Accordingly, the Court limited the reach of donor disclosure to only reveal the financiers of speech "advocat[ing] a particular election result." *Id*.

As limited, the law was properly tailored because it "serve[d]" the electorate's "informational interest" by

"shed[ding] the light of publicity on spending that is unambiguously campaign related." *Id*. at 81. Disclosure laws that focused on unambiguously election-related speech promoted the constitutionally-permissible purposes of "increas[ing] the fund of information concerning those who support the candidates," and "help[ing] voters to define more of the candidates' constituencies," but would not go so far as to unduly expose the activities of persons simply engaged in civic issue discussions. *Id*. at 80-81; *see also id*. at 66 ("[T]he invasion of privacy of belief may be . . . great when the information sought concerns the giving and spending of money . . . for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' ") (quoting *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)).

3. This narrowing construction limited disclosure to speech about candidates as such – speech with a plain and vested interest in the outcome of a political campaign. Such speech became known as express advocacy. *Buckley*, 424 U.S. at 44, n.52 (defining "express words of advocacy of election or defeat" to include phrases "such as 'vote for' . . . 'support,' [and] 'reject.' "); 11 C.F.R § 100.22(a) (noting that express advocacy includes phrases "such as 'vote for the President' [and] 'Bill McKay in '94' "). After *Buckley*, if an independent ad used language of express advocacy, the ad could trigger disclosure. But if it did not, then it did not.

Over time, "[c]orporations, unions, and political parties," began using this distinction to run communications "which were functionally equivalent to express

advocacy but comfortably skirted FECA's disclosure requirements." *Van Hollen*, 811 F.3d at 489. Such "sham issue ads," *McConnell*, 540 U.S. at 185, were unambiguously campaign related ads, but they were regulated just like genuine issue speech.

Perhaps the paradigmatic example "is an ad that a group called 'Citizens for Reform' sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate." *McConnell*, 540 U.S. at 193 n.78. That advertisement stated:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Id. (internal quotation marks omitted). As this Court noted, "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id*. The ad plainly advocated for the defeat of Bill Yellowtail, a candidate for Congress.

This "abuse" of the *Buckley* precedent was widespread. *Id*. at 196; *see id.* at 185 ("The proliferation of sham issue ads has driven the soft-money explosion."); *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 577 n.104 (D.D.C. 2003) (Kollar-Kotelly, J.) (quoting a National Rifle Association "issue ad" from the

year 2000 invoking the "one mission . . . left undone – winning in November" and the need "to defeat the divisive forces that would take freedom away . . . especially . . . Mr. Gore").

In response to these "sham issue" ads, Congress passed BCRA, which included the current federal electioneering communication regime. A facial challenge to BCRA ensued, *McConnell v. Federal Election Commission*, and the Commission assembled a robust record that demonstrated "that BCRA's application to pure issue ads [was not] substantial," *McConnell*, 540 U.S. at 207, and that "the vast majority of [electioneering communication] ads clearly" discussed candidacies for office, *id*. at 206, not "issues of public importance on a wholly nonpartisan basis," *Buckley*, 519 F.2d at 832. *See also Citizens United*, 558 U.S. at 332 ("That inquiry into the facial validity of the statute was facilitated by the extensive record, which was over 100,000 pages long, made in the three-judge District Court.") (internal quotation marks omitted).

But, even as the *McConnell* Court upheld BCRA facially, it "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206 n.88. In doing so, the Court acknowledged that it only sought the regulation of sham issue ads designed to encourage or defeat candidates, not genuine issue speech about legislation.

4. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"),[3] this Court was confronted with just such a communication. Wisconsin Right to Life, Inc. ("WRTL") did not challenge the scope of BCRA's disclosure regime, but it did challenge the then-existing ban on electioneering communications by corporations as it applied to its ads, which WRTL contended were genuine issue speech. 551 U.S. at 460-461; *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 466 F. Supp. 2d 195, 205 (D.D.C. 2006) (three-judge court).

The *WRTL II* Court agreed, finding that the ads, which are similar in all relevant ways to the Institute's proposed ad, took a position on an issue "and exhort[ed] constituents to contact" both of Wisconsin's U.S. senators "to advance that position." *WRTL II*, 551 U.S. at 470 n.6.

Wisconsin Right to Life's communications were not directed at campaigns or candidacies – and its call to action was not, in context, patently insincere. *See also McConnell*, 251 F. Supp. 2d at 795 (Leon, J., separate opinion) (describing an AFL-CIO advertisement urging viewers to call their congressmen to vote against legislation giving the President more power to

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[3] This case first reached the Supreme Court as *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006) ("*WRTL I*"), where this Court determined that as-applied challenges to the federal electioneering communications regime were not foreclosed by *McConnell*. *Id*. at 411.

shape trade agreements, an ad the FEC's expert "candidly admitted" was a "genuine issue advertisement") (internal quotation marks omitted).

Accordingly, this Court determined that WRTL's ads were not, like the ads placed before the *McConnell* Court, a sham, and therefore they were "not the functional equivalent of express advocacy." *WRTL II*, 551 U.S. at 476; *cf. McConnell*, 540 U.S. at 206 n.88 ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."). It did so for two reasons:

> First, their content is consistent with that of a *genuine issue ad*: The ads 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. Second, their content *lacks indicia of express advocacy*: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL II, 551 U.S. at 470 (emphasis added).[4]

Thus, this Court found that the "interests that justif[ied] the regulation of campaign speech," *McConnell*,

[4] The FEC acted swiftly, and incorporated this new test into its regulations, 72 Fed. Reg. 72899 (Dec. 26, 2007) (implementing *WRTL II*), casting doubt on the district court's contention that it would "blink reality to try and divorce" issue and non-issue speech. App. 25.

540 U.S. at 206 n.88, were not furthered by the regulation of communications focused on legislative issues. *See WRTL II*, 551 U.S. at 476-481.

5. In *Citizens United*, BCRA's disclosure provisions were challenged, and upheld, as applied to three commercial advertisements urging viewers to buy *Hillary: The Movie*, a 90-minute film that this Court unanimously concluded was the functional "equivalent to express advocacy" about then-Senator Hillary Clinton's 2008 campaign for the Democratic nomination for President of the United States. 558 U.S. at 325 ("The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President."). The ads for the movie "f[e]ll within BCRA's definition of" electioneering communications, because "[t]hey referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy." *Id*. at 368.

By their nature, these ads were not genuine issue ads. The focus was not a legislative issue, but Hillary Clinton herself. *Citizens United*, 558 U.S. at 310 ("Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Web site address.").

Rather, the message of Citizens United's advertisements was unmistakable: if viewers wanted to be informed about how to vote regarding then-Senator Clinton, they ought to watch Citizens United's movie. *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 276 n.2 (D.D.C. 2008) ("If you thought you knew

everything about Hillary Clinton . . . wait 'til you see the movie.") (ellipsis in original); *id*. n.3 ("'First, a kind word about Hillary Clinton: . . . She looks good in a pant suit. Now, a movie about the [*sic*] everything else.").

Having determined that "there is no reasonable interpretation of [Citizens United's movie] other than as an appeal to vote against Senator Clinton," 558 U.S. at 326, the Court also rejected Citizens United's contention that ads for the movie were immune from the disclosure requirements of BCRA. The Court described the ads as "contain[ing] pejorative references to her candidacy," but, nonetheless, and without explanation, stated that it rejected Citizens United's contention that "disclosure requirements . . . must be confined to speech that is the functional equivalent of express advocacy." *Id*. at 368; *cf. WRTL II*, 551 U.S. at 470 (speech with "indicia of express advocacy" has content that "mention[s] an election, candidacy, political party, or challenger"). Rather, the Court stated, *ipse dixit*, that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369.

The district court believes that this stray half-sentence permits essentially unlimited compulsory disclosure of personal association so long as public affairs – including genuine issue speech, as opposed to speech unambiguously related to a campaign – is being discussed. *See* App. 24. It does not.

This Court upheld the BCRA disclosure regime for the *Hillary: The Movie*'s ads because they were "speaking about a candidate" *as a candidate* "shortly before an election." *Id*. at 369; *see also id*. at 368 (noting "references to her *candidacy*") (emphasis added); *Buckley*, 424 U.S. at 81 (noting "disclosure helps voters to define more of the candidates' constituencies"). The *Citizens United* ads, which made pejorative references to her candidacy and encouraged the purchase of a film arguing "that the United States would be a dangerous place in a President Hillary Clinton world," are themselves part of a clear electoral effort. *Citizens United*, 558 U.S. at 322 (internal quotation marks omitted).

The district court's decision, by untethering disclosure from any campaign for office, effectively holds that *Citizens United* overruled *Buckley*, which held that compulsory disclosure applied only to expenditures that were made by organizations with a "major purpose of . . . the nomination or election of a candidate," or to "spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 79-80. It is difficult to believe that this Court intended to overrule so foundational a case as *Buckley* without saying so, and with only the most minimal discussion.

Rather, *Citizens United* is best understood as a reaffirmation of *Buckley*, because the informational interest was served by the disclosure of spending on Citizens United's ads. That spending was "unambiguously related to the campaign of a particular federal candidate" – both because it promoted a film the Court

viewed as the equivalent of a political attack piece, and because it funded ads that were incoherent divorced from their obvious connection to Senator Clinton's candidacy. *Buckley*, 424 U.S. at 80; *Citizens United*, 558 U.S. at 369 ("[T]he public has an interest in knowing who is speaking about a candidate shortly before an election.").

This does not mean that the government is now free to regulate genuine issue speech divorced from a candidacy for public office. *See WRTL II*, 551 U.S. at 470 ("The ads 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."); *id*. at 470 n.6 (noting that WRTL's genuine issue ads "instead t[ook] a position on the filibuster issue and exhort[ed] constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters.").

6. This Court's application of *Buckley*'s informational interest in *Citizens United* has been badly distorted, both by the district court below and in circuit courts of appeal throughout the Nation. *See*, *e.g.*, *Independence Institute v. Williams*, 812 F.3d 787, 796 (10th Cir. 2016) (upholding state electioneering communication statute against advertisement encouraging the governor of Colorado to conduct an audit of that state's Health Benefit Exchange because "[t]he logic of *Citizens United* is that advertisements that mention a candidate shortly before an election *are* deemed sufficiently campaign-related to implicate the government's interests")

(emphasis in original); *see also Del. Strong Families v. Denn*, 579 U.S. ___, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of certiorari). Instead of limiting disclosure to speech about candidates *qua* candidates, it is now the case that any speech that mentions a candidate, even a genuine discussion of political issues, is presumed to be election-related spending. This does not serve the informational interest – it swells it beyond all recognition.

Restoration of the proper understanding of the informational interest is vital to ensuring that "groups that do no more than discuss issues of public importance on a wholly nonpartisan basis," *Buckley*, 519 F.2d at 832, as well as those groups' supporters, are not subject to the same rules applied to organizations that serve as financial "constituencies" of candidates for public office, *Buckley*, 424 U.S. at 79-81.

Absent this Court's intervention, the regulation of election-related speech will no longer be limited to disclosure that "increases the fund of information concerning those who support the candidates." *Buckley*, 424 U.S. at 81. Rather, any regulation, even of a genuine issue ad, will be constitutional on the grounds that it might in some way "allow voters to evaluate the message more critically." App. 31. This conception of the informational interest is boundless, for

> [o]n this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the

> registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent. . . .

United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135, 1142 (2d Cir. 1972) (footnote omitted) (rejecting position that group could be required to "register, file reports, [and] disclose its contributors" for criticizing President Nixon's position on the Vietnam War, "a principal campaign issue"). And it would effectively obliterate the privacy and associational interests recognized in *Buckley*, as well as in *Talley v. California*, 362 U.S. 60 (1960), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and a host of other cases.

II. The district court applied exacting scrutiny in name only, continuing a nationwide trend.

Even if the government did have a legitimate interest in the regulation of genuine issue speech, BCRA's disclosure provisions would nevertheless need to survive exacting scrutiny as applied to the Institute's specific advertisement. In order to meet that test, there must be a "substantial relation" between the information demanded and the government's properly understood informational interest. *Citizens United*, 558 U.S. at 366-367 (citation and internal quotation marks omitted); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___, 134 S. Ct. 1434, 1456 (2014) ("In the First Amendment context, fit matters."). While the means need not be "the least restrictive" method of achieving the state interest, it nonetheless must be "narrowly

tailored to achieve the desired objective." *Id*. at 1456-1457 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Yet the Commission, despite bearing the burden of proof, chose not to introduce any evidence whatsoever.

More troublingly, the district court failed to undertake any meaningful discussion of tailoring. Instead, it asserted a number of governmental interests, and dedicated a single, conclusory paragraph to the purported "fit" between the statute's demands and the government's legitimate aims. App. 31. This analysis was in no way "exacting," but it is in keeping with a nationwide trend whereby disclosure regimes are given a free pass by the courts, despite this Court's repeated recognition of the important First Amendment issues at stake. This case, which comes to the Court under its mandatory appellate jurisdiction, presents an opportunity to reverse that trend and require robust judicial review of statutes burdening core First Amendment activity.

1. As this Court has long recognized, associational privacy is vital to a vibrant and healthy civil society. *NAACP*, 357 U.S. at 460-461 ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). In particular, "compelled disclosure imposes . . . significant encroachments on First Amendment rights." *Buckley*, 424 U.S. at 64; *Van Hollen*, 811 F.3d at 488 ("Disclosure chills speech."). This is so even where "[t]he record is

barren of any claim . . . [a speaker] will suffer any injury whatever" from such publicity. *Talley*, 362 U.S. at 69 (1960) (Clark, J., dissenting).

Accordingly, this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). Instead, it has insisted upon exacting scrutiny, the "strict test established by *NAACP v. Alabama*." *Buckley*, 424 U.S. at 66. This stringent standard requires the government to demonstrate "a 'sufficient relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-367 (quoting *Buckley*, 424 U.S. at 64, 66). This is "not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014).

Exacting scrutiny protects the citizenry from efforts, both well-meaning and otherwise, to overzealously audit civil society in the name of tangential or overstated governmental interests. *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and governmental purpose by mere assertion. . . ."). This is true even if the threat to speech and association is inchoate. *NAACP*, 357 U.S. at 461 ("The fact that Alabama . . . has taken no direct action . . . to restrict the right of petitioner's members to associate freely does not end inquiry. . . . In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such

rights, even though unintended, may inevitably follow from varied forms of governmental action.") (internal citation omitted). And the First Amendment protects the freedom to associate in private regardless of the claimed governmental interest, whether "an adjunct of [its] power to impose occupational license taxes," *Bates*, 361 U.S. at 525, or a legislature's "power to conduct investigations," *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 545 (1963) (citation and internal quotation marks omitted), or a state's right to manufacture rules for out-of-state corporations operating within its jurisdiction, *NAACP*, 357 U.S. at 451-452.

The constitutional right for individuals, in association with one another, to privately "pursue . . . [a] collective effort to foster beliefs which they admittedly have the right to advocate" is fundamental. *NAACP*, 357 U.S. at 463. This associational liberty derives from the ability to discuss, advocate, and criticize the particulars of American government. *Buckley*, 424 U.S. at 65 ("[G]roup association is protected because it enhances 'effective advocacy.' ") (quoting *NAACP*, 357 U.S. at 460, punctuation altered); *Knox v. Serv. Empl. Int'l Union, Local 1000*, 567 U.S. ___, 132 S. Ct. 2277, 2288 (2012) ("And the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."). Accordingly, as this Court determined nearly 60 years ago, the right of individuals to collectively "pursue their lawful interests privately and to associate freely with others in so doing" is itself protected by the Constitution. *NAACP*, 357 U.S. at 466; *but see Ctr. for Competitive Politics v. Harris*, 784 F.3d

1307, 1312 n.3 (9th Cir. 2015) (limiting the *NAACP* line of cases to their facts).

Exacting scrutiny is the mechanism by which the judiciary polices this right. And that mechanism has fallen out of favor in campaign finance cases, to be replaced in the lower courts by a simple presumption that any type of political disclosure, no matter how poorly connected to a particular electoral campaign, is presumptively appropriate. This is wrong. *See Uphaus v. Wyman*, 360 U.S. 72, 104 (1959) (Brennan, J., dissenting) ("It is anomalous to say . . . that the vaguer the State's interest is, the more laxly will the Court view the matter and indulge a presumption of the existence of a valid subordinating state interest.").

2. Exacting scrutiny requires a fact-intensive analysis of the burdens imposed, and whether those burdens *actually* advance the government's interest. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.") (internal citations omitted).

As discussed *supra*, *Buckley* upheld disclosure only "concerning those who support the candidates." 424 U.S. at 81. To ensure FECA remained tailored to the informational interest, the Court limited disclosure to groups whose "major purpose" was expressly advocating specific electoral outcomes, or to those individuals who earmarked funds for speech supporting or

opposing candidates. 424 U.S. at 79-81. Such "campaign related" disclosure bore "a sufficient relationship to a substantial governmental interest." *Id*. at 79, 80. Likewise, *McConnell* and *Citizens United* applied *Buckley*'s informational interest to speech unambiguously related to political campaigns, and did not allow the government unbridled discretion in defining the scope of its informational interest in revealing the financial constituencies of the candidates.

3. But it has become routine in the lower courts to ignore the tailoring part of the exacting scrutiny analysis, and simply assume that *any* disclosure advances the informational interest – even if it is patently overbroad, unrelated, or otherwise poorly tailored. Often courts have not even felt the need to *explain* how something is reasonably tailored.[5] *Compare Elrod v. Burns*,

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[5] In contrast, in the PAC status context, the Tenth Circuit properly applied this Court's instruction in *Coalition for Secular Government v. Williams*, 815 F.3d 1267, 1275-1276 (10th Cir. 2016) ("*CSG*"), where the panel used this Court's recent articulations of the exacting scrutiny standard to examine the Colorado issue committee disclosure provisions. *Id*. (quoting and applying *Citizens United*, 558 U.S. at 366-367); *cf. Buckley*, 424 U.S. at 64, 66. Importantly, the *CSG* court recognized this Court's holding from *Doe v. Reed* that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010) and *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008)) (internal quotation marks omitted). Therefore, the *CSG* court "perform[ed] an independent examination *of the whole record* in order to ensure that the judgment protects the rights of free expression." *Coal. for Secular Gov't*, 815 F.3d at 1275 (quoting *Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1196 (10th Cir. 2005)) (internal quotation marks omitted, brackets and emphasis added).

427 U.S. 347, 362 (1963) (to survive exacting scrutiny "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest . . . it is not enough that the means chosen in furtherance of the interest be rationally related to that end.") (emphasis added).

For example, in *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 307 (3d Cir. 2015),[6] the Third Circuit upheld an electioneering statute as applied to a neutral and nonpartisan voter guide, on the grounds that it mentioned – but did not favor – any candidate. In doing so, the Third Circuit claimed the statute fit the informational interest because the law demanded "one-time, event-driven disclosures," 793 F.3d at 313, ignoring that it demanded publication of virtually all donors from the past four years, regardless of their reason for giving, based on a single production of genuine issue speech that scrupulously avoided urging support or opposition to any candidate.

Similarly, the Ninth Circuit has applied a standard that it refers to as "exacting scrutiny," but merely requires that the government assert a not-wholly-irrational explanation of how the State's demand furthers a governmental interest. *Ctr. for Competitive Politics*, 784 F.3d at 1317 ("The reasons that the Attorney

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[6] *Cert. denied sub. nom., Del. Strong Families v. Denn*, 579 U.S. ___, 136 S. Ct. 2376 (2016).

General has asserted for the disclosure requirement . . . are not wholly without rationality.”).

Another example of this epidemic of lax tailoring is highlighted by *Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016), wherein the Eighth Circuit did not even afford *de novo* review of the district court’s handling of exacting scrutiny. While acknowledging universal agreement that Mr. “Bennie’s speech was protected by the First Amendment,” the Eighth Circuit concluded that it had no duty to independently review “the deterrent effect of the state regulators’ actions.” *Id*. at 398 n.3. The Eighth Circuit’s error caused substantial harm because the standard of review was dispositive. *See Bennie*, 822 F.3d at 398 (noting choice of standard of review “likely is dispositive”); *cf*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 237-238 (1991) (noting that the difference between standards of review “is much more than a mere matter of degree” where independent review is required and the standard of review would be dispositive) (internal citation and quotation marks omitted).

Other circuits, when confronted with narrow challenges to disclosure laws, have taken to converting as-applied challenges into facial ones. While these cases apply “exacting scrutiny,” they provide further indicia that the courts of appeal are forfeiting their obligation to require governments to demonstrate tailoring. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475-476 (7th Cir. 2012); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242 n.2 (11th Cir. 2013); *Justice v. Hosemann*, 771 F.3d 285, 292-295 (5th Cir. 2014).

The above cases are examples of this Court's discretionary docket. But Congress provided direct appeal to this Court for challenges to the federal campaign finance disclosure system under BCRA. 52 U.S.C. § 30110 note. Indeed, it is the only means for review of the three-judge court's decision below. *Id*. ("A final decision in the action shall be reviewable *only* by appeal directly to the Supreme Court of the United States.") (emphasis added). Given the procedural posture of this challenge to BCRA, if this Court chooses not to hear the merits of the Institute's challenge, it will in effect ratify this trend.

4. Below, the FEC failed to demonstrate that the Institute's advertisement spoke about Mark Udall's candidacy for office, and the lower court did not consider this failure dispositive. The Institute's ad "focus[es] on a legislative issue, take[s] a position on the issue, exhort[s] the public to adopt that position, and urge[s] the public to contact public officials with respect to the matter." *WRTL II*, 551 U.S. at 470. It does not demonstrate any "indicia of express advocacy: [It does] not mention an election, candidacy, political party, or challenger; and [it does] not take a position on a candidate's character, qualifications, or fitness for office." *Id*. Thus, disclosure here does not "help viewers make informed choices in the political marketplace." *Citizens United*, 558 U.S. at 369. If anything, BCRA, as applied here, only serves to confuse voters, because disclosure could lead voters to believe that the Institute and its donors support or oppose Colorado's Senators, where it in fact does not and cannot.

But these facts did not matter to the district court, which simply picked up the informational interest – and a number of other governmental interests never blessed by this Court in the disclosure context – and deemed that effort sufficient to meet exacting scrutiny. App. 31-33.

For instance, the district court claimed that the Institute's independent, nonpartisan speech implicated the government's interest in ferreting out corruption. App. 32-33. This undoes the rationale behind the *Citizens United* decision, which noted that truly independent expenditures, as in this case, are not a form of "corruption" sufficient to overcome the First Amendment interests involved. Similarly, to defend another of its proffered interests, the three-judge court invoked a joint statement from the Office of the Director of National Intelligence and the Department of Homeland Security finding that the Russian government hacked emails of a number of Democratic targets in the run-up to the 2016 election. App. 32 n.11. Strikingly, the decision is wholly lacking in any evidence whatsoever that the Independence Institute's advertisement somehow risks the trading of "dollars for political favors," *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985), or that it conceals active measures conducted by Moscow.

Bluntly, this is not tailoring, but rational basis review. If all that governments must do to survive exacting scrutiny is impose a donor disclosure threshold, App. 31, or create a temporal window under which

communications are regulated,[7] but may otherwise regulate genuine issue speech,[8] then *Buckley* itself no longer has force in the federal courts.

5. Finally, the Institute's status as a § 501(c)(3) – and the district court's dismissal of that fact, App. 33-35 – further demonstrates the lower court's failure to conduct a searching review of the facts.

Unlike the plaintiffs in *Citizens United* and nearly all of the cases before the Courts of Appeals, the Institute is a § 501(c)(3) organization and is prohibited by law from engaging in political campaign intervention. Forcing the Institute to become a member of the FEC's

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[7] This is especially true since electioneering communication windows are already expanding in the states. While one state has expanded the temporal window for disclosure to include the whole year, it is not alone in reaching beyond the 60-day period chosen by BCRA. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 938.3 (2016) (lobbyist disclosure law applied 365 days a year, including non-election years, and applied to appointed as well as elected officials); CODE OF ALA. § 17-5-2(a)(6) (120 days before *any* election); MASS. GEN. LAWS ch. 55, § 1 (90 days before *any* election). Given the scale of modern political campaigns, the district court's loose reasoning would presumably justify regulation at almost any point.

[8] Anticipating the need for tailoring in as-applied contexts, Congress provided a backup definition for electioneering communications in BCRA that this Court could apply going forward, so that BCRA's definition of an electioneering communication may not apply to speech which "promotes," "supports," "attacks," or "opposes" a candidacy or campaign – the so-called "PASO standard." 52 U.S.C. § 30104(f)(3)(A)(ii). This would both protect genuine issue speech and provide an opportunity for the government to promulgate regulations going forward that demonstrate proper tailoring.

regulated community might threaten that status, which provides certain tax and organizational benefits to the Institute and its donors. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 597 (1983). A § 501(c)(3) organization that ventures into political activity faces severe punishments including an initial 10 percent tax on the amount of the political expenditure, 26 U.S.C. § 4955(a)(1), with a further penalty of up to *100 percent* if the violation is not corrected during the tax year, 26 U.S.C. § 4955(b)(1). The organization itself would be subject to taxation at the highest corporate rate under 26 U.S.C. § 527(b). Individual managers and employees are also personally liable for substantial monetary penalties. 26 U.S.C. §§ 4955(a)(2), (b)(2), (c)(1), and (c)(2).

The district court's ruling suggests that the Institute is seeking to influence elections, which it does not and may not do. The Institute – a think tank with a particular philosophical bent – and organizations like it then face the real risk of ideologically opposed organizations filing complaints against them with the FBI, the Department of Justice, and the IRS for failure to report "political activity," as mandated by the FEC or state laws, on IRS Form 990, Schedule C.[9] In the real

[9] This has happened to other organizations, yet the three-judge court below showed no concern for the reputational harm that accompanies being branded a scofflaw in the public press. *See*, *e.g.*, CREW, Complaints Against American Dream Initiative, Arizona Future Fund, Jobs and Progress Fund, Inc., Michigan Citizens for Fiscal Responsibility, Mid America Fund, Inc., and Rule of Law Project, at 4-5 (June 15, 2016), *available at*: http://www.citizensforethics.org/file/PDFs/Omnibus%20DOJ%20complaint%206-15-16.pdf.

world, defending against such complaints is costly. These burdens must be taken into account when a court reviews whether a statute is substantially related to a sufficiently important governmental interest.

Simply put, exacting scrutiny must be exacting – and it was not here. Reversal is therefore both appropriate and necessary.

III. The district court had jurisdiction below, and this case is plainly capable of repetition yet evading review.

The district court held that it had jurisdiction to hear this case, App. 18, and justiciability was not an issue raised by the Parties.[10] Nevertheless, the district

[10] In its Answering Brief before the D.C. Circuit, despite having earlier conceded (in its motion for summary affirmance before that Court of Appeals) that the Independence Institute's challenge remained live even though the 2014 election had concluded, the FEC argued for the first time that Plaintiff's case had been mooted by that event. The Institute moved to supplement the record with a press release it issued on November 3, 2014, that conclusively demonstrated the "Institute's intention, in future years, to run substantively similar advertisements to the one at issue here." App. at 46 ¶ 6 (citing Declaration of Jon Caldara and the Independence Institute's Press Release, App. 49-52). The FEC abandoned its mootness objection at oral argument before the Court of Appeals, which admitted the Declaration and Press Release into the record. Order, *Independence Institute v. Fed. Election Comm'n*, No. 14-5249 (D.C. Cir. Oct. 13, 2015) (Doc. No. 1577832). When the case returned to the district court, the three-judge court inquired as to mootness. Counsel for the Institute pointed the district court to relevant portions of this Court's analyses in *WRTL II*, and *Davis*. At the end of the hearing, the district court

court dedicated pages of dicta to a discussion of mootness. App. 11-18. It argues that as-applied relief may be unavailable for any advertisement not specifically before a court, no matter how similar – the mere substitution of a new incumbent senator's name, for instance. But that is not the law, and this case remains appropriate for resolution.

In *WRTL II*, this Court warned the FEC that the "capable of repetition, yet evading review doctrine" guaranteed space for "as applied challenges as well as . . . facial attacks." *WRTL II*, 551 U.S. at 463 (internal citation and quotation marks omitted). Indeed, this Court explicitly noted the unreasonableness of expecting groups like WRTL and the Institute – groups that advocate only about issues – to "predict what issues will be matters of public concern" in the future, so that they could maintain standing to defend their rights in court. *Id*. at 462. Only after rejecting such arguments, telling the FEC that it "ask[ed] for too much," did this Court go on to hold that under *WRTL II*'s facts there was no question of justiciability. *Id*. at 462-463 (noting that case "fit comfortably within the established exception").

The circumstances here are almost indistinguishable. In *WRTL II*, the plaintiff "credibly claimed that it planned on running materially similar future targeted broadcast ads mentioning a candidate within the

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ordered the Institute to file a supplemental declaration elaborating on its position that the challenge at issue is not moot. Counsel supplied the district court with a Supplemental Declaration of Jon Caldara. App. 40-43.

blackout period." *Id*. at 463 (internal citation and quotation marks omitted). Here, the Institute provided both the D.C. Circuit and the three-judge court with a press release and declaration from the Institute's president on the organization's desire to run similar ads in the future. App. 50 (declaration citing to the press release stating an intent to run "ads very much like [this one] in the future") (bracket in original); *Davis*, 554 U.S. at 736 ("Davis subsequently made a public statement expressing his intent [to self-finance another campaign]. As a result, we are satisfied that Davis' facial challenge is not moot.") (citation omitted); *see also* Statement of Undisputed Facts, App. 46 ¶ 6 ("It is the Independence Institute's intention in future years to run substantively similar advertisements to the one at issue here."). And, even if that were not enough, the Institute provided, at the district court's invitation, a sworn statement that the "Institute wishes to run advertisements materially similar to the one described in the Verified Complaint and the briefing before" the three-judge court. Supp. Decl., App. 41 ¶ 5.[11]

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[11] Of course, forcing parties to plead their intention to run "materially similar" advertisements to survive mootness would risk undermining the notice pleading of the Federal Rules of Civil Procedure with a magic words test. *See, e.g.*, *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 418 (4th Cir. 2014) (noting magic words tests incompatible with pleading rules, and collecting cases); *compare also* Fed. R. Civ. P. 8(d)(1) ("Each allegation must be simple, concise, and direct. *No technical form is required.*") (emphasis added), *with* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").

Accordingly, this case "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *WRTL II*, 551 U.S. at 462.

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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Dated: December 5, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	))))))))	Case No. 14-cv-1500

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Independence Institute's Motion for Summary Judgment [36] be, and hereby is DENIED. It is further

ORDERED that the Federal Election Commission's Motion for Summary Judgment [42] be, and hereby is GRANTED.

This is a final, appealable Order.

Signed on this 3rd day of November, 2016.

/s/ Patricia A. Millett
Hon. Patricia A. Millett
United States Court of Appeals
for the District of Columbia Circuit

/s/ Colleen Kollar-Kotelly
Hon. Colleen Kollar-Kotelly
United States District Court
for the District of Columbia

/s/ Amit P. Mehta
Hon. Amit P. Mehta
United States District Court
for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	))))))))	Case No. 14-cv-1500

Before: Millett, *Circuit Judge*; Kollar-Kotelly and Mehta, *District Judges*.

Opinion for the Court filed by *Circuit Judge* Millett.

MEMORANDUM OPINION

Millett, *Circuit Judge*:

Independence Institute, a Colorado-based non-profit organization, filed suit against the Federal Election Commission seeking a declaratory judgment that the Bipartisan Campaign Reform Act's disclosure provision, 52 U.S.C. § 30104(f), is unconstitutional as applied to a radio advertisement that it desired to run during the time leading up to the 2014 and 2016 general elections. Both Independence Institute and the Federal Election Commission move for summary judgment.[1] For the reasons discussed below, we DENY

[1] Indep. Inst. Mot. for Summ. J. and Mem. in Supp., ECF No. 36; FEC's Mot. for Summ. J., ECF No. 42.

Independence Institute's Motion for Summary Judgment and GRANT the Federal Election Commission's Motion for Summary Judgment.

I

Congress passed the Bipartisan Campaign Reform Act of 2002 ("Act"), Pub. L. No. 107-155, 116 Stat. 81 (codified in various parts of Title 52 of the U.S. Code), to address "[t]hree important developments" in the role of money in federal elections: "[T]he increased importance of 'soft money,' the proliferation of 'issue ads,' and the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections," which revealed some "elected officials' practice of granting special access in return for political contributions." *McConnell v. FEC*, 540 U.S. 93, 122, 129 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (upholding the Act's disclosure provision against Citizens United's as-applied challenge, but invalidating other provisions of the Act). Title I of the Act addresses the use of "soft money" – that is, donations made by individuals through political parties to benefit candidates. *See* 52 U.S.C. §§ 30101, 30104, 30116-30117, 30125. Title II, which is at issue here, regulates paid communications by outside organizations that could have the effect of "influencing the outcome of federal elections." *See id.* at 132; *see also* 52 U.S.C. §§ 30101, 30104, 30116-30118.

As relevant here, Section 30104 of the Act imposes a large-donor disclosure requirement on organizations that engage in candidate-referencing communications in the run up to a federal primary or general election. Specifically, the Act provides that:

> Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

52 U.S.C. § 30104(f)(1). Paragraph 2, in turn, requires the disclosure of "[t]he identification of the person making the disbursement"; "[t]he principal place of business of the person making the disbursement"; "[t]he amount of each disbursement of more than $200 during the period covered by the statement"; "the identification of the person to whom th[at] disbursement was made"; "[t]he elections to which the electioneering communications pertain"; "the names (if known) of the candidates identified or to be identified"; and "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more" for the purpose of disseminating the electioneering communication. *Id.* § 30104(f)(2); *see* 11 C.F.R. § 104.20(c)(9) (requiring disclosure of qualifying donors only if the donation "was made for the purpose of furthering electioneering communications"); *see also Van Hollen, Jr. v.*

FEC, 811 F.3d 486, 501 (D.C. Cir. 2016) (upholding the specific-purpose requirement in 11 C.F.R. § 104.20(c)(9)).

The Act defines an "electioneering communication" that triggers such donor disclosure as "any broadcast, cable, or satellite communication" that:

> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within –
>
> > (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> >
> > (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. § 30104(f)(3). When, as here, an electioneering communication refers to a Senate candidate, it is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons" in "the State the candidate seeks to represent[.]" *Id.* § 30104(f)(3)(C).

II

Independence Institute is a non-profit organization that conducts research and seeks to educate the

public on a variety of policy issues, including healthcare, justice, education, and taxation. Indep. Inst.'s Statement of Undisputed Material Facts, ECF No. 36-2 ("Indep. Inst. SUMF") ¶ 1.[2] The Institute is a 501(c)(3) tax-exempt organization, 26 U.S.C. § 501(c)(3), based in Colorado. Indep. Inst. SUMF ¶ 2. As a part of its educational mission, the Institute produces advertisements that "mention the officeholders who direct" the policies of interest to the Institute. Compl. ¶ 2.

United States Senator Mark Udall of Colorado was a candidate for reelection in the November 4, 2014 general election. In the sixty days preceding that election, Independence Institute sought to run a radio advertisement that urged Coloradoans to call Senator Udall, as well as Senator Michael Bennet, to express support for the Justice Safety Valve Act, S. 619, 113th Cong. (2013) (reintroduced as S. 353, 114th Cong. (2015)). Indep. Inst. SUMF ¶¶ 3-5. The content of the advertisement is as follows:

> Let the punishment fit the crime.
>
> But for many federal crimes, that's no longer true.
>
> Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.

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[2] Because we are at the summary judgment phase, our ruling construes all demonstrated facts in favor of the nonmovant. *See Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015).

> And for what purpose?
>
> Studies show that these laws don't cut crime.
>
> In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.
>
> Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619.
>
> It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.
>
> Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act.
>
> Tell them it's time to let the punishment fit the crime.
>
> Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

Id. ¶ 5. Independence Institute planned to spend at least $10,000 on the advertisement, which would have reached at least 50,000 persons in the Denver metropolitan area. *Id.* ¶ 4.

The Institute, however, declined to run the advertisement during the 2014 election cycle because it was concerned that doing so would subject the Institute to the Bipartisan Campaign Reform Act's large-donor disclosure provision. Indep. Inst. SUMF ¶ 3 (noting

that the Institute "wished to broadcast" the advertisement during the 2014 election season). Instead, in September 2014, the Institute filed suit against the Federal Election Commission asserting that application of the Act's disclosure provision to the specific Justice Safety Valve Act advertisement described above violated the First Amendment. The Institute also asked that its case be heard by a three-judge district court, as authorized by the Act, 52 U.S.C. § 30110 note. *See* Mot. to Convene Three-Judge Court, ECF No. 3. A single district court judge denied that motion on the ground that the Institute's challenge did not raise a substantial question, and granted summary judgment on the merits to the Commission. *Independence Inst. v. FEC*, 70 F. Supp. 3d 502, 506, 516 (D.D.C. 2014).

The court of appeals reversed, holding that the Institute was "entitled to make its case to a three-judge district court." *Independence Inst. v. FEC*, 816 F.3d 113, 117 (D.C. Cir. 2016); *see Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) ("'Constitutional claims will not lightly be found insubstantial for purposes of' the three-judge-court statute.") (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 147-148 (1980)); *see also Shapiro*, 136 S. Ct. at 456 (stating that the three-judge-court statute presents a "low bar"). The court of appeals' majority did not address the merits of the Institute's claim. Judge Wilkins dissented, explaining that he would have affirmed the denial of the Institute's Motion for a Three-Judge District Court on the ground that the "immaterial factual distinctions that the Institute offers to distinguish its

challenge from that in *Citizens United v. FEC*" do not present "a substantial constitutional question." *Independence Inst.*, 816 F.3d at 117-118 (Wilkins, J., dissenting).

On remand, this three-judge district court panel was designated to hear the Institute's as-applied challenge to the Act's disclosure provision. Designation of Judges to Serve on Three-Judge District Ct., ECF No. 30. The parties filed cross-motions for summary judgment. Neither party requested an expedited decision.

III

A party is entitled to summary judgment "only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *See, e.g.*, *Johnson v. Perez*, 823 F.3d 701, 705 (D.C. Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). " 'If material facts are at issue, or, though undisputed, are susceptible to divergent inferences, summary judgment is not available.' " *Moore v. Hartman*, 571 F.3d 62, 66 (D.C. Cir. 2009) (quoting *Kuo-Yun Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994)). The parties have not identified any material factual disputes. Indeed the Commission did not even respond to the Institute's Statement of Undisputed Material Facts. Accordingly, we are tasked only with determining if the Institute or the Commission is entitled to judgment as a matter of law.

A. Mootness

The first thing we must decide is whether we can decide this case. Article III of the Constitution imposes important limits on the jurisdiction of federal courts. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Of most relevance here, Article III's case-or-controversy requirement means that, "[t]o qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Id.* at 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "There is thus no case or controversy, and a suit becomes moot, 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *See, e.g.*, *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)). When, as here, the complaint seeks only injunctive and declaratory relief, the plaintiff must demonstrate an enduring dispute or a material risk that the controversy will recur. "In general, a case becomes moot where the activities for which an injunction is sought have already occurred and cannot be undone." *Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 109-111 (1983) (failure to show that repetition of a past dispute is "realistically threatened" requires denial of "an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice"); *Larsen v. United States Navy*, 525 F.3d 1, 4 (D.C. Cir.

2008) (case is moot when "any injunction or order declaring [the policy] illegal would accomplish nothing amounting to exactly the type of advisory opinion Article III prohibits").

The question of mootness arises in this case because the Institute's complaint expressly seeks only to run a single advertisement during the 2014 general election season when Mark Udall was a candidate for the United States Senate from Colorado. The complaint, moreover, is quite explicit that the only constitutional challenge it raises and the only relief it seeks is with respect to the particular Justice Safety Valve Act advertisement. *See* Compl. ¶ 3 ("The Independence Institute plans to produce *an issue advertisement*, to be aired on broadcast radio, which will discuss federal sentencing guidelines. *The advertisement* will mention Senators Mark Udall and Michael Bennet and ask that they support the Justice Safety Valve Act.") (emphasis added); *id.* ¶¶ 30-38 (describing the content of the communication under the heading "[t]he advertisement"); *id.* ¶ 30 ("As part of its mission, the Independence Institute wishes to run an advertisement discussing federal sentencing guidelines."); *id.* ¶¶ 30-35 (detailing the proposed Justice Safety Valve advertisement); *id.* ¶¶ 36-37 (alleging that the Institute wants to raise funds for "this specific advertisement"); *id.* ¶ 105 ("In this case, the Independence Institute presents *a* genuine issue advertisement[.]") (emphasis added); *id.* ¶¶ 105-111, 113, 116-117, 119, 128-129 (alleging causes of action in terms of "this specific advertisement," "the proposed advertisement," and the "advertisement"); *id.*

(Prayers for Relief) (seeking relief only as to the Institute's "proposed advertisement") (emphasis added).

Needless to say, the 2014 election is long since over. Mark Udall lost, and is no longer a candidate whose naming in the advertisement could trigger the Act's disclosure requirement. Nevertheless, it is well settled that a case is not moot if the alleged harm is "capable of repetition, yet evading review," in that "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

With respect to the first prong of that test, a case or controversy generally is considered "too short to be fully litigated prior to its cessation or expiration" if the lifespan of the dispute is less than two years. *See, e.g.*, *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) ("We have previously held that a period of two years is too short to complete judicial review[.]"); *cf. Turner*, 564 U.S. at 440 (twelve months is a sufficiently short duration).

With respect to the second prong, the expectation that the same litigant will come before the court with the same issue again must be more than theoretical or a mere possibility; it must be "reasonable" to expect. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187-188 (1979) (case was moot

because there was "no evidence creating a reasonable expectation that the Chicago Board w[ould] repeat its purportedly unauthorized actions in subsequent elections"); *see also American Bar Ass'n v. FTC*, 636 F.3d 641, 645-647 (D.C. Cir. 2011) (holding a case moot because an intervening legislative change made the prospect of the issues arising again "nothing more than possibilities regarding regulations and enforcement policies that do not presently exist").

The Supreme Court, moreover, has found that challenges to campaign-finance and electoral-communication regulations can often fit the capable-of-repetition mold given the generally time-sensitive nature of both the desired communications and the governmental limitations. In particular, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Supreme Court held that, even though the election had passed, Wisconsin Right to Life's challenge to the Bipartisan Campaign Reform Act's restrictions on corporate speech was not moot because the group "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period," *id.* at 463; *see also id.* at 459-460 (specifically discussing a series of similar advertisements that Wisconsin Right to Life sought to run during the blackout period).[3]

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[3] *See also Norman v. Reed*, 502 U.S. 279, 288 (1992) (passage of election did not moot the case because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990"); *First*

In response to the court's order for briefing on the question of mootness in this case, *see* Scheduling Order, ECF No. 35 at 2, the Institute submitted a declaration that says simply that it "inten[ds] in future years to run substantively similar advertisements to the one at issue here," Indep. Inst. SUMF ¶ 6. *See also id.* (citing a pre-2014 election declaration and press release, and a 2015 declaration submitted to the D.C. Circuit that simply described and quoted the 2014 press release). The Institute did not attempt to amend or to supplement its complaint. Nor did it seek to clarify the contours of its as-applied constitutional challenge to the extent it went beyond the specific Justice Safety Valve Act advertisement on which the complaint exclusively focused.

The Institute argues that its single, unelaborated allegation precludes a determination of mootness under *Wisconsin Right to Life.* That may be. But it bears noting that this case differs from *Wisconsin Right to Life* in some potentially material respects. First, unlike the complaint in *Wisconsin Right to Life*, the Institute deliberately confined its complaint, its prayer for relief, and its constitutional arguments to the single question of whether applying the Act's large-donor disclosure rule to the Justice Safety Valve Act violated the First Amendment. Despite having ample opportunity to

Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774-775 (1978) (case was not moot even though the election had passed because there was no "serious doubt that there [was] a 'reasonable expectation' " that appellants would be "subject to the threat of prosecution" again).

amend its complaint to add allegations identifying the additional speech to which its as-applied challenge should be applied or to request *some* form of relief that goes beyond the one single advertisement, the Institute has steadfastly declined to do so. Indeed, comparing the complaint in *Wisconsin Right to Life* to the Institute's complaint here reveals how narrowly the Institute framed its as-applied claim in this case. *Compare* Am. Compl. Prayer for Relief, *Wisconsin Right to Life v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) (No. 04-1260) (seeking declaratory judgment as to any "electioneering communications by WRTL that constitute grass-roots lobbying"), *with* Indep. Inst. Compl. Prayer for Relief (seeking declaratory and injunctive relief only for the Institute's single "proposed advertisement").[4] Given that the mootness question has arisen

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[4] *Compare also* Am. Compl. ¶ 6, *Wisconsin Right to Life* ("This case challenges the prohibition as applied to grass-roots lobbying on the facts of this case, which involves broadcast advertisements (true and accurate transcripts of current versions of the ads are attached as Exhibit[s] A, B, and C) that are paid for by WRTL and that encourage Wisconsin listeners to contact their U.S. Senators (Sen. Russell Feingold and Sen. Herb Kohl)"), *with* Indep. Inst. Compl. ¶ 3 ("The Independence Institute plans to produce *an issue advertisement*, to be aired on broadcast radio, which will discuss federal sentencing guidelines. *The advertisement* will mention Senators Mark Udall and Michael Bennet and ask that they support the Justice Safety Valve Act.") (emphasis added); and *compare* Am. Compl. ¶ 14, *Wisconsin Right to Life* (during the Act's large-donor disclosure period, "the current ads (Exhibits A, B, and C) and materially similar ads will become electioneering communications as to Wisconsin Senatorial candidate Russell Feingold, and WRTL will be prohibited from running these ads"), *with* Indep. Inst. Compl. ¶¶ 105-111, 113, 116-117, 119, 128-129

at the earliest stages of this case in district court – and not after entry of a final district court judgment as occurred in *Wisconsin Right to Life* – the Institute's unwillingness to amend its complaint to avoid a potential Article III problem, or even to clarify what its as-applied challenge is applied to, seems to be a deliberate choice.

Second, there is a substantial question whether the constitutional dispute over the Institute's Justice Safety Valve Act advertisement will evade review. The Institute acknowledges that, after the 2016 election cycle concludes, neither of the Colorado Senators that its advertisement targets will be up for election before the 2020 primary season, and thus that the Act will not apply to this advertisement for roughly another four years. Four years would provide the Institute with sufficient time to litigate its challenge before the next election.

Fortunately, we need not decide whether the Institute's decision not to amend its complaint or otherwise to seek relief for its as-applied claim to any anticipated communications beyond this single advertisement renders this case moot. That is because the other Senator referenced in the advertisement – Senator Michael Bennet – is up for election this Fall, and the Institute made clear at oral argument that it still desires to run this particular advertisement during the 2016 general

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(alleging causes of action in terms of "this specific advertisement," "the proposed advertisement," and the "advertisement").

election cycle (notwithstanding its failure to seek expedition):

> Court: You're telling us you're going to run this ad again, even though you didn't say that in your declaration? That's now the representation on the record?
>
> Mr. Dickerson: Yes, that's the representation on the record.

See Oral Arg. Tr. 22:17-22. Accordingly, the case before us is not moot.

B. Merits

There is no dispute that the Institute's advertisement meets the statutory definition of an electioneering communication under the Act. The advertisement mentions a Senate candidate by name; it would air within the sixty days preceding a general election; it is targeted to reach at least 50,000 persons in Colorado; and it would cost at least $10,000. *See* 52 U.S.C. § 30104(f). Accordingly, if the Institute were to run the advertisement as intended, the Institute would have to disclose the names of those donors that contributed at least $1,000 for the purpose of funding the advertisement. *See* 11 C.F.R. § 104.20(c)(7) & (9); *Van Hollen, Jr.*, 811 F.3d at 501-502.

The Institute argues that the Act's large-donor disclosure requirement, as applied to this particular advertisement, violates its First Amendment right to free speech in two ways. First, the Institute argues that

the Justice Safety Valve Act advertisement is "genuine issue advocacy" that the Constitution mandates must be exempted from the disclosure of large donors. *See* Inst. Mot. for Summ. J. at 26-39. Second, the Institute contends that, because its status as a non-profit under Section 501(c)(3) of the Internal Revenue Code precludes it from engaging in political activity, this advertisement on a legislative matter must constitutionally be exempted from the large-donor disclosure requirement. *See id.* at 19-26. Both arguments founder on Supreme Court precedent, and the institute's proffered distinctions make no constitutional difference.

1. Issue Advocacy

The Supreme Court has twice considered and twice upheld the Bipartisan Campaign Reform Act's large-donor disclosure provision, and in doing so has rejected the very type of issue-centered exception for which the Institute argues. In *McConnell*, the Court first addressed the Act's restrictions on corporate speech and, in so doing, specifically "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." 540 U.S. at 196. Turning to the large-donor disclosure provision that is at issue in this case, the Supreme Court rejected the plaintiffs' *facial* challenge on the ground that that [sic] drawing a line between express advocacy and issue advocacy was just as untenable for the Act's disclosure provision as it was for the Act's other provisions. *See id.* at 195. The Supreme Court also ruled that the disclosure provision serves

"important state interests," such as "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions[.]" *Id.* at 196.

In *Citizens United*, the Supreme Court found no merit in Citizens United's *as-applied* challenge to the large-donor disclosure requirement. 558 U.S. 310, 366-371. Citizens United argued that the provision was unconstitutional as applied to both a movie about Hillary Clinton and three advertisements for the movie because such speech was not a form of "express advocacy." *Id.* at 368. In language that speaks directly to the Institute's proposed issue-advocacy exception, the Supreme Court ruled that the First Amendment does not require limiting the Act's large-donor disclosure requirements to "speech that is the functional equivalent of express advocacy." *Id.* at 369. The Supreme Court explained that its holding in *Wisconsin Right to Life*, 551 U.S. at 469-476, which limited restrictions on independent expenditures to express advocacy and its functional equivalent, cannot be imported into the Act's disclosure requirements. *Citizens United*, 558 U.S. at 368-369. That is so, the Court reasoned, because "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.

The Court also emphasized that its precedents have consistently upheld the constitutionality of disclosure requirements, even while calling into question other campaign finance-related restrictions. *See Citizens United*, 558 U.S. at 369 (describing *Buckley v.*

Valeo, 424 U.S. 1 (1976), where "the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures;" *McConnell*, where "three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold [the Act's] disclosure and disclaimer requirements"; and *United States v. Harriss*, 347 U.S. 612, 625 (1954), where "the Court * * * upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself"). The Court concluded by underscoring the constitutionally permissible reach of the Act's disclosure provision, explaining that, "[e]ven if the ads only pertain[ed] to a commercial transaction, the public ha[d] an interest in knowing who is speaking about a candidate shortly before an election." *Id.*[5]

The Institute nevertheless contends that the constitutional rules demand a different result in this case

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[5] Unlike Citizens United, the Institute does not claim that disclosure could expose its donors to threats, harassment, or reprisals, and it does not argue that we should overturn the disclosure requirement on that basis. *Compare Citizens United*, 558 U.S. at 370 ("In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed."), *with* Joint Stipulation and Order, ECF No. 14 ("The Independence Institute's challenge does not rely upon the probability that its donors will be subject to threats, harassments, or reprisals as a result of the Institute's filing of an Electioneering Communications statements pursuant to 52 U.S.C. § 30104(f)(1)-(2)[.]"). *See also Citizens United*, 558 U.S. at 370 ("Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation.").

because its advertisement identifies specific political candidates as part of "issue" advocacy focused on pending legislation.

Before addressing the Institute's specific arguments, the First Amendment issue it raises must be set in context. The Bipartisan Campaign Reform Act's disclosure provision does not purport to regulate issue advocacy per se. It only regulates those communications that (i) clearly identify an electoral candidate (ii) in the sixty days preceding a general election and the thirty days preceding a primary election. *See* 52 U.S.C. § 30104(f). The Institute thus is free to run its advertisement outside that electioneering window. And it may speak freely through its advertisement during the election cycle as well, as long as it does not either clearly identify a candidate for office in the process or rely upon donations of over $1000 that are specifically dedicated to running that candidate-referencing advertisement, *see Van Hollen, Jr.*, *supra*.[6]

The constitutional question then is whether the First Amendment immunizes from large-donor disclosure the Institute's issue advertisement that explicitly references an electoral candidate by name in the run up to an election. The answer is "no" for three reasons.

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[6] Although the Justice Safety Valve Act has remained under legislative consideration for the last three years, the Institute has chosen for its own reasons not to run its proposed advertisement at all, even during the many months unregulated by the Act's electioneering restriction. *See* Justice Safety Valve Act, S. 619, 113th Cong. (2013) (reintroduced as S. 353, 114th Cong. (2015)).

First, the Supreme Court and every court of appeals to consider the question have already largely, if not completely, closed the door to the Institute's argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate. In *McConnell*, the Supreme Court concluded that First Amendment precedent "amply supports application of [the Act's] disclosure requirements to the *entire range of 'electioneering communications*.'" 540 U.S. at 196 (emphasis added). In so doing, the Court specifically "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy[.]" *Id.* at 194. Likewise, in *Citizens United*, the Supreme Court ruled that advocacy – even if it takes the form of commercial speech – falls within the constitutional bounds of the donor-disclosure rule precisely because that advocacy points a finger at an electoral candidate. *See Citizens United*, 558 U.S. at 369.[7]

[7] *See also Center for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *National Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011) ("We find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure

Under *McConnell* and *Citizens United*, then, it is the tying of an identified candidate to an issue or message that justifies the Bipartisan Campaign Reform Act's tailored disclosure requirement because that linkage gives rise to the voting public's informational interest in knowing "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369; *see McConnell*, 540 U.S. at 197 ("'Plaintiffs' argument for striking down BCRA's disclosure provision * * * ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.'") (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)). Indeed, it is telling that, in defining a "genuine issue ad" in *Wisconsin Right to Life*, the Supreme Court stated that such an advertisement would *not* "mention[] * * * candidacy" or a "challenger." 551 U.S. at 470. Accordingly, it is hard to see any constitutional daylight between the Institute's issue advertisement and the issue advocacy to which the Supreme Court has already held that the Act's disclosure requirements can permissibly be applied.

Second, the Institute's proposed constitutional exception for "genuine" issue advocacy is entirely unworkable as a constitutional rule. The Institute itself has offered no administrable rule or definition that

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requirements cannot constitutionally reach issue advocacy is unsupportable."). *Cf. Independence Institute v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016) ("It follows from Citizens United that disclosure requirements can, if cabined within the bounds of exacting scrutiny, reach beyond express advocacy to at least some forms of issue speech.").

would distinguish which types of advocacy specifically referencing electoral candidates would fall on which side of the constitutional disclosure line, or how the Commission could neutrally police it. The Institute emphasizes that the advertisement at issue here focuses on pending legislation, not candidates. Yet it would blink reality to try and divorce speech about legislative candidates from speech about the legislative issues for which they will be responsible. After all, the Institute's advertisement discusses a proposed bill designed to address inequities in the criminal justice system, which is a topic of substantial debate and interest in this electoral cycle. And it takes little imagination to envision the electoral impact that could arise from linking candidates with proposed legislation in others areas of Institute interest, such as healthcare, educational programs, and taxes.

The Institute further contends that its advertisement does not take a position for or against the identified Senate candidate. That is debatable. After all, the advertisement plainly seeks to persuade listeners that the Justice Safety Valve Act addresses an issue of such preeminent importance that prospective voters should inquire into the candidate's position on the legislation during the critical thirty- or sixty-day period leading up to an election. *See* Indep. Inst. SUMF ¶ 5 ("Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it's time to let the punishment fit the crime."). The advertisement also at least implies that the Senate candidate is not already on board as a

committed supporter of the bill. Otherwise there would be no reason to ask Coloradoans to solicit the electoral candidate's support for the proposed law. *See* Oral Argument at 23:50, *Independence Institute v. FEC*, 816 F.3d 113 (D.C. Cir. 2016) (No. 14-5249) (Judge Wilkins' [sic] raises the question whether the advertisement impliedly communicates that the Colorado Senators do not currently support the Justice Safety Valve Act). And if the Senate candidate has already taken a position against the bill, the advertisement could very well be understood by Coloradoans as criticizing the Senate candidate's position. *See Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016) ("The advertisement here does not say much about Governor Hickenlooper, but it does insinuate, at minimum, that he has failed to take action on an issue that the Institute considers important. That could bear on his character or merits as a candidate.").

In any event, the First Amendment is not so tightfisted as to permit large-donor disclosure only when the speaker invokes magic words of explicit endorsement. That would make the constitutional balancing of interests turn on form not substance. The Institute, in fact, exposed the untenability of its proposed "genuine" issue advocacy line when it acknowledged that a similarly designed Institute advertisement addressing health insurance "suggested [the candidate's] position on the issue being discussed." Indep. Inst. Reply Br. at 7. In *Independence Institute v. Williams*, the Institute challenged as unconstitutional a Colorado state law donor-disclosure requirement (which is virtually

identical to the Bipartisan Campaign Reform Act's large-donor disclosure rule) as applied to "pure[ ]" issue advocacy. 812 F.3d at 789.[8] The Institute advertisement at issue there stated:

> Doctors recommend a regular check up to ensure good health.
>
> Yet thousands of Coloradoans lost their health insurance due to the new federal law.
>
> Many had to use the state's government-run health exchange to find new insurance.
>
> Now there's talk of a new $13 million fee on your insurance.
>
> It's time for a check up for Colorado's health care exchange.
>
> Call Governor Hickenlooper and tell him to support legislation to audit the state's health care exchange.
>
> Independence institute is responsible for the content of this advertising.

Id. at 790.

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[8] *See Independence Institute*, 812 F.2d at 789-790 ("Colorado requires any person who spends at least $1000 per year on 'electioneering communications' to disclose the name, address, and occupation of any person who donates $250 or more for such communications," and defines " 'electioneering communication' " as " 'any communication broadcasted by television or radio' that 'unambigously refers to any candidate' sixty days before a general election' and targets 'an audience that includes members of the electorate for such public office.' ") (quoting 1 Colo. Const. Art. XXVIII, § 2(7)(a)).

As noted, the Institute's briefing and argument in this court now acknowledge that its advertisement that (i) discusses a legislative issue of concern to the Institute, and (ii) asks constituents to contact a candidate about supporting the legislation can "suggest [the candidate's] position on the issue being discussed," Indep. Inst. Reply Br. at 7. Yet that implication triggers the exact same concerns for voter information that the Supreme Court held sustained the Act's disclosure provisions in *McConnell* and *Citizens United.*

The Institute nonetheless argues that the particular advertisement at issue here is constitutionally different because both Senators are mentioned in the Justice Safety Valve advertisement (only one of whom was running for office), and not just "a single candidate" as in the health insurance advertisement. *See* Indep. Inst. Reply Br. at 7. The Institute also suggests that advertisements addressing "a general category of executive power," rather than "a specific bill being advanced in the legislative body," should receive different constitutional treatment. Oral Arg. Tr. 24:3-5.[9]

Neither of the Institute's proposed distinctions makes constitutional sense. The voting public's interest in information about electioneering communications applies with equal force to candidates for multimember bodies as to single officeholders. Either way,

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[9] The Institute's finely drawn distinctions underscore the difficulty that could accompany any effort to determine the as-applied constitutionality of the donor disclosure provision to other unidentified Institute advertisements. *See* Section III.A, *supra* discussing mootness).

disclosure "permits citizens * * * to react to the speech * * * in a proper way," and such "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. Nor does the Institute's attempted distinction between pending and proposed legislation hold up. Promises to introduce legislation or executive regulations are as common a form of appeal to voters as commitments to support existing bills and regulatory programs.[10]

In short, whatever difference the Institute may discern between express candidate advocacy and the Institute's proposed candidate-referencing issue advertisement, it is not a distinction of constitutional magnitude.

Third, and in any event, application of the large-donor disclosure requirement to the Institute's proposed Justice Safety Valve Act advertisement passes constitutional muster. The Supreme Court subjects regulatory burdens imposed on campaign-related

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[10] *See, e.g.*, Republican Party Platform of 1860, THE AMERICAN PRESIDENCY PROJECT, ¶ 8, http://www.presidency.ucsb.edu/ws/?pid=29620 ("That the normal condition of all the territory of the United States is that of freedom: That, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that 'no persons should be deprived of life, liberty or property without due process of law,' it becomes our duty, *by legislation, whenever such legislation is necessary*, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.") (emphasis added).

speech to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-367 (quoting *Buckley*, 424 U.S. at 74.).

The Supreme Court has already held that the Bipartisan Campaign Reform Act's large-donor disclosure rule advances substantial and important governmental interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *see Citizens United*, 558 U.S. at 369 (upholding the disclosure provision against Citizens United's as-applied challenge based on the government's important informational interest). The Institute's advertisement triggers those same informational interests because it links an electoral candidate to a political issue – pending federal legislation addressing unjust sentencing of criminal defendants – and solicits voters to press the legislative candidate for his position on the legislation in the run up to an election. *See Citizens United*, 558 U.S. at 369 (concluding that such would "help viewers make informed choices in the political marketplace"); *McConnell*, 540 U.S. at 196 ("The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public.") (quoting *McConnell*, 251

F. Supp. 2d at 237); *see also SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc) ("But the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."). Providing the electorate with information about the source of the advertisement will allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments.

Moreover, the large-donor disclosure requirement is tailored to substantially advance those interests. It "'impose[s] no ceiling on campaign related activities,' * * * and 'do[es] not prevent anyone from speaking.'" *Citizens* United, 558 U.S. at 366 (quoting *McConnell*, 540 U.S. at 201). In addition, disclosure is limited to only those substantial donors who contribute $1000 or more, and do so for the specific purpose of supporting the advertisement. *See* 11 C.F.R. § 104.20(c)(9); *Van Hollen, Jr.*, 811 F.3d at 501.

As in *Citizens United*, that informational interest alone is sufficient to uphold the disclosure provisions against the Institute's as-applied challenge. *See* 558 U.S. at 369 ("[T]he informational interest alone is sufficient to justify application of § 201 to these ads[.]"). That the Act's disclosure provisions advance additional governmental interests simply reinforces the constitutionality of the Act's application to the Institute's advertisement. For instance, disclosure will assist the public, the Federal Election Commission, and Congress

in monitoring those who seek to influence the issues debated during peak election season and to link candidates in the voters' eyes with specific policy matters. *See McConnell*, 540 U.S. at 129-133. Additionally, large-donor disclosures help the Commission to enforce existing regulations and to ensure that foreign nationals or foreign governments do not seek to influence United States' elections. *See Buckley*, 424 U.S. at 67-68 ("[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations[.]"); 52 U.S.C. § 30121(a)(1)(C) ("It shall be unlawful for a foreign national, directly or indirectly to make an expenditure, independent expenditure, or disbursement for an electioneering communication[.]"); *SpeechNow*, 599 F.3d at 698 ("[R]equiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.").[11]

Disclosure will also "deter actual corruption and avoid the appearance of corruption by exposing large

[11] The vital importance of determining if foreign nationals are supporting candidates has been underscored in this election. *See* Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security, Director of National Intelligence (Oct. 7, 2016), https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement ("The U. S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations.").

contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. Arming voters with information about "a candidate's most generous supporters," whether direct or indirect, makes it easier "to detect any post-election special favors that may be given in return." *Id.* Indeed, given the information that the institute's advertisement can convey to voters, a challenger's supporters could embrace the advertisement as a means of highlighting a point of difference with the incumbent or criticizing the incumbent's stance on or lassitude concerning an issue.

2. Section 501(c)(3) Status

The Institute's argument that its status as a Section 501(c)(3) tax-exempt non-profit makes a constitutional difference fares no better. The First Amendment permits disclosure provisions that, as the Act does, regulate speech based on its reference to electoral candidates, and not on the speaker's identity or taxpaying status. *See McConnell*, 540 U.S. at 194 (explaining that the Act's definition of electioneering communications is constitutionally permissible in part because the term, and its regulations, "appl[y] only (1) to a broadcast (2) *clearly identifying a candidate for federal office*, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners.") (emphasis added). Indeed, it is the institute's proposed speaker-specific exemption that could stir up constitutional trouble. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("The government's

power to impose content-based financial disincentives on speech does not vary with the identity of the speaker."); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected.").

The Institute notes that the Commission once considered an exemption for 501(c)(3) organizations. Indep. Inst. Mot. for Summ. J. at 21 n. 12. But that attempted distinction was struck down as arbitrary and capricious, which underscores the frailty of the Institute's argument. *See Shays v. FEC*, 337 F. Supp. 2d 28, 124-128 (D.D.C. 2004), *aff'd on other grounds*, 414 F.3d 76 (D.C. Cir. 2005); *see also Delaware Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 308-309 (3d Cir. 2015) (rejecting a 501(c)(3) organization's challenge to Delaware's BCRA analogue, and holding that "it is the conduct of an organization, rather than an organization's status with the Internal Revenue Service, that determines whether it makes communications subject to the [Delaware] Act"); *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 289-290 (4th Cir. 2013) (invalidating the 501(c)(3) exemption in West Virginia's BCRA analogue because that exemption materially undermined the government's asserted "interest in informing the electorate").

Lastly, the Institute cites to the D.C. Circuit's decision striking down as void for vagueness a disclosure provision in the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Title II, § 208(a), 88 Stat. 1279 *repealed by* Federal Election

Campaign Act Amendments of 1976, Pub. L. No. 94-283, Title 1, § 105, 90 Stat. 481 (1976). *See Buckley v. Valeo*, 519 F.2d 821, 870-879 (D.C. Cir. 1975), *rev'd on other grounds*, 424 U.S. 1 (1976). That disclosure provision, however, was materially different from the one at issue here because it (i) did not limit disclosure to large donors, and (ii) applied to publications and not just broadcasting. *Id.* at 869. Nailing the coffin shut on the Institute's argument, the Supreme Court specifically held in *McConnell* that the definition of electioneering communications in the Bipartisan Campaign Reform Act, and the disclosure provision to which those communications are subject, "raise[] none of the vagueness concerns that drove our analysis in *Buckley.*" *McConnell*, 540 U.S. at 194.

IV

In conclusion, the Institute's arguments that the Act's large-donor disclosure provisions are unconstitutional as applied to its Justice Safety Valve Act advertisement all fail. If the Institute chooses to run that advertisement during the balance of this election cycle or in future elections, it will have to comply with the Bipartisan Campaign Reform Act's disclosure provision, 52 U.S.C. § 30104(f).

A final, appealable order DENYING the Institute's Motion for Summary Judgment and GRANTING the Federal Election Commission's Motion for Summary Judgment accompanies this Opinion.

Signed on this 3rd day of November, 2016.

/s/ Patricia A. Millett
Hon. Patricia A. Millett
United States Court of Appeals
for the District of Columbia Circuit

/s/ Colleen Kollar-Kotelly
Hon. Colleen Kollar-Kotelly
United States District Court
for the District of Columbia

/s/ Amit P. Mehta
Hon. Amit P. Mehta
United States District Court
for the District of Columbia

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:14-cv-1500-CKK-PAM-APM

NOTICE OF APPEAL

Notice is given that Plaintiff Independence Institute appeals to the United States Supreme Court from this Court's Order and Memorandum Opinion filed November 3, 2016. ECF Nos. 52 and 53 (denying Plaintiff's Motion for Summary Judgment and granting Defendant's Motion for Summary Judgment). This notice is timely submitted within ten days of the aforementioned order and opinion.

Direct appeal is taken pursuant to Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002. 52 U.S.C. § 30110 note.

Respectfully submitted,

s/ Allen Dickerson
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Counsel for Plaintiff
Independence Institute

Dated: November 10, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Notice of Appeal using the court's CM/ECF system. All participants in the case are represented by counsel of record who are registered CM/ECF users. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

For the Federal Election Commission:

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Gregory Mueller
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For *Amici Curiae* Free Speech Defense and Education Fund, et al.

William Olson
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For *Amici Curiae* Campaign Legal Center, et al.

Joseph Hebert
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Dated: November 10, 2016

s/ Allen Dickerson
Allen Dickerson

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:14-cv-1500-CKK-PAM-APM

SUPPLEMENTAL DECLARATION OF JON CALDARA

Jon Caldara states as follows:

1. I am President of the Independence Institute, the Plaintiff in this action.
2. As President, I oversee strategic planning and operations for the Independence Institute, including all broadcast advertisements.
3. When this lawsuit was filed, the Independence Institute wished to run an issue advertisement on broadcast radio, discussing the Justice Safety Valve Act.
4. The advertisement is reproduced in the Verified Complaint and briefing before this Court. The planned advertisement mentioned Senators Mark Udall and Michael Bennet and ask [sic] that they support the Justice Safety Valve Act.

5. In the future, the Independence Institute wishes to run advertisements materially similar to the one described in the Verified Complaint and briefing before this Court.

6. Like the advertisement in the Verified Complaint, the Institute's future advertisements will focus on public policy and mention federal office holders who may also be candidates for federal office in future elections.

7. These advertisements will likewise be run during future electioneering communication windows, when citizens are most aware of public policy.

8. As a nonprofit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, the Independence Institute may make only limited grassroots lobbying communications – advertisements, such as the one in the Verified Complaint, asking elected representatives to take official action (e.g., vote for a specific piece of legislation).

9. The Independence Institute plans to use part of its limited ability to engage in grassroots lobbying to air advertisements materially similar to the one in the Verified Complaint in future years, including during the electioneering communications window.

Pursuant to 28 U.S.C. § 1746 and LCvR 5.1(f), I hereby declare under penalty of perjury that the

foregoing is true and correct. Executed on September 20, 2016.

/s/ Jon Caldara
Jon Caldara, President
Independence Institute

STATE OF COLORADO)
)
) ss.
)
COUNTY OF DENVER)

SUBSCRIBED and sworn to before by Jon Caldara, President of the Independence Institute, this 20th day of September, 2016.

[SEAL] SALLY A KLINE
NOTARY PUBLIC
STATE OF COLORADO
Notary ID 19904010715
My Commission
Expires 07/31/2018

/s/ Sally A. Kline
Notary Public

My Commission Expires: 07/31/2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Supplemental Declaration of Jon Caldara using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

For the Federal Election Commission:

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echlopak@fec.gov

Gregory Mueller
gmueller@fec.gov

For *Amici Curiae* Free Speech Defense and Education Fund, et al.

William Olson
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For *Amici Curiae* Campaign Legal Center, et al.

Joseph Hebert
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s/ Tyler Martinez
Dated: September 21, 2016 Tyler Martinez

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:14-cv-1500-CKK-PAM-APM

INDEPENDENCE INSTITUTE'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to LCvR 7(h), the Independence Institute presents this statement of material facts as to which there is no genuine issue.

1. The Independence Institute is a Colorado nonprofit corporation, established on May 31, 1985. The Institute conducts research and educates the public on a number of public policy issues, including taxation, education, health care, and criminal justice. V. Compl. at 5, ¶ 18.

2. The Independence Institute is organized for federal tax purposes under 26 U.S.C. § 501(c)(3). Accordingly, the Institute elects to file under 26 U.S.C. § 501(h). V. Compl. at 5, ¶ 18, *id.* at 6 ¶ 28.

3. Within the sixty days before the November 4, 2014 general election, the Institute wished to broadcast a radio advertisement, approximately 60 seconds

in length, via local broadcast radio in Colorado on major AM radio stations. V. Compl. at 9, ¶ 41; *id.* at 7 ¶ 32.

4. The Institute intended to spend more than $10,000 on the advertisement, which would have reached more than 50,000 persons in the Denver metropolitan area. Accordingly, this communication would have been an "electioneering communication" within the meaning of 52 U.S. [sic] 30104(f)(3). V. Compl. at 7, ¶ 34; *id.* at 7, 1132-33; *id.* at 11 ¶ 48-49.

5. The script of the proposed advertisement is:

   Independence Institute
   Radio :60
   "*Let the punishment fit the crime*"

   Let the punishment fit the crime.

   But for many federal crimes, that's no longer true.

   Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.

   And for what purpose?

   Studies show that these laws don't cut crime.

   In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.

   Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619.

   It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.

> Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act.
>
> Tell them it's time to let the punishment fit the crime.
>
> Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

V. Compl. at 7-8, ¶ 35.

6. It is the Independence Institute's intention in future years to run substantively similar advertisements to the one at issue here. Exhibit A, Decl. of Jon Caldara and Independence Institute Press Release (Nov. 3, 2014); *Indep. Inst. v. FEC*, No. 14-5249, Order (D.C. Cir. Oct. 13, 2015) (Doc. No. 1577832) (per curiam) (admitting the Declaration of Jon Caldara and Independence Institute Press release into record before the D.C. Circuit).

Respectfully submitted,

s/ Allen Dickerson
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(D.C. Bar No. 1003781)
Tyler Martinez
(D.C. Bar No. 1022937)

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Counsel for Plaintiff
Independence Institute

Dated: June 17, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:14-cv-1500-CKK-PAM-APM

INDEPENDENCE INSTITUTE'S EXHIBIT A

ORAL ARGUMENT SCHEDULED
OCTOBER 22, 2015, 9:30 AM

No. 14-5249

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On appeal from the United States District Court for the District of Columbia, No. 1:14-cv-1500 (CKK)

DECLARATION OF JON CALDARA

Jon Caldara states as follows:

1. I am President of the Independence Institute.
2. As President, I oversee strategic planning and operations for the Independence Institute, including all broadcast advertisements.
3. The District Court issued its Memorandum Opinion and Order in this case on October 6, 2014. The Independence Institute filed its Notice of Appeal on October 8, 2014. Election Day followed a few weeks later, on November 4, 2014.
4. On November 3, 2014, the Institute issued a press release to its Colorado media contacts list. This is a normal method the Independence Institute uses to circulate information to the public and press.
5. To the best of my knowledge, the Independence Institute's press release was not referenced by any media outlet in Colorado or elsewhere.
6. A true and accurate copy of the press release is appended to this declaration as Attachment A.
7. The press release stated the Independence Institute's intent to appeal the ruling of the District Court below. In so doing, the release noted that the briefing schedule before this Court would not conclude before Election Day. The Independence

> Institute stated its desire to continue its present challenge to run the specific ad at issue as well as future ads "very much like [this one] in the future."

Pursuant to 28 U.S.C. § 1746, 1 hereby declare under penalty of perjury that the foregoing is true and correct. Executed on September 24, 2015.

/s/ Jon Caldara
Jon Caldara, President
Independence Institute

ATTACHMENT A

FOR IMMEDIATE RELEASE

November 3, 2014

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Independence Institute Announces Intent to Continue Free Speech Fight

DENVER – Earlier this year, the Independence Institute challenged federal and state laws, which would force the Institute to disclose its donors to the government in exchange for exercising its First Amendment speech rights. But two federal judges – one in the District of Columbia and one here in Colorado – denied the Institute the unfettered right to speak about critical issues facing our state and our country.

The Institute sought to run a television ad in Colorado urging Gov. John Hickenlooper to audit Colorado's

Obamacare exchange, as well as a radio ad urging Coloradans to tell U.S. Senators Mark Udall and Mark Bennet to support a proposed criminal justice reform, the Justice Safety Valve Act. But running these advertisements would come at a steep price – sacrificing the privacy of the Independence Institute's donors.

Because Governor Hickenlooper and Senator Udall happen to be up for re-election, the Institute's proposed ads were covered by both federal and Colorado election law – even though the proposed ads neither support nor oppose either official. These laws, unless overturned, would mandate that the Institute turn over the names and addresses of many of its donors to the federal and state governments, which in turn would publicize those names and addresses on easily-accessed websites.

Although the U.S. Supreme Court has never allowed such invasive disclosure to be triggered by speech such as the Institute's, both federal judges upheld the disclosure regimes. The Independence Institute is a 501(c)(3) organization, whose donors are kept secret, even by the Internal Revenue Service.

"It's outrageous," said Independence Institute president Jon Caldara. "The Independence Institute wants the Obamacare exchange audited for waste and fraud. And because the Institute would like both Colorado senators to stand for better sentencing laws, all of a sudden the federal government gets to publicize donor information that even the IRS doesn't get to disclose?"

The Institute will appeal both rulings. But the federal appeals court in D.C. has already issued a filing schedule for the Institute's challenge to the federal law. This schedule ensures that the Institute's case will not be resolved for months – well after the 2014 election. Nevertheless, the Institute will continue to fight for its First Amendment freedoms – all the way to the Supreme Court, if necessary.

"No matter what, we're going to keep fighting," Caldara said. "We want to run these ads – and want to run other ads very much like them in the future. If the appeals courts rule for us, we will do so. We ought to be free to run issue ads right before an election – right before an election is when people actually pay attention. What the voters and elected officials do with our ads is their business – but we'd just like the right to have them hear our message."

"All these two judges have really done," Caldara added, "is ensure that Coloradans will be less informed about the Obamacare exchange and how federal sentencing laws actually work."

The Independence Institute is a non-partisan, nonprofit public policy research organization based in Denver.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation, 727 E. 16th Avenue Denver, Colorado 80203	)	
Plaintiff,	)	Civil Action No. _______________
v.	)	**Three-Judge Court Requested**
FEDERAL ELECTION COMMISSION, 999 E Street, N.W. Washington, D.C. 20436	)	
Defendant.	)	

VERIFIED COMPLAINT

NATURE OF ACTION

1. This case challenges the definition of electioneering communications as applied to specific advertisements and the disclosure provisions for electioneering communications as applied to the Independence Institute. Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. L. No. 107-155 § 201, 116 Stat. 81, 88-89 (2002) (once codified at 2 U.S.C. § 434(f), now codified at 52 U.S.C. § 30104(f)).

2. Plaintiff Independence Institute is a nonprofit corporation organized under the Internal Revenue Code

and under Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public); COLO. REV. STAT. §§ 6-16-103(1) (defining "charitable organization"); 7-21-101 *et seq.* ("Colorado Revised Nonprofit Corporation Act") (2013). The Independence Institute conducts research and educates the public on various aspects of public policy – including taxation, education policy, health care, and justice policy. Occasionally, its educational endeavors include advertisements that mention the officeholders who direct such policies. Sometimes, these officeholders are also candidates for office.

3. The Independence Institute plans to produce an issue advertisement, to be aired on broadcast radio, which will discuss federal sentencing guidelines. The advertisement will mention Senators Mark Udall and Michael Bennet and ask that they support the Justice Safety Valve Act.

4. The Independence Institute believes that the issue advertisement will qualify as an "electioneering communication" under 2 U.S.C. § 434(f)(3) (now codified at 52 U.S.C. § 30104(f)(3)). Thus, the Independence Institute will be required to report and disclose its donors' names and addresses, pursuant to 2 U.S.C. § 434(f)(1)-(2) (now codified at 52 U.S.C. § 30104(f)(1)-(2)).

5. The Independence Institute reasonably fears that failure to disclose its donors under 2 U.S.C. § 434(f)(1)-(2) (now codified at 52 U.S.C. § 30104(f)(1)-(2)) will

result in enforcement actions, investigations, and penalties levied by the Defendant and its agents.

6. BCRA's regulation of electioneering communications chills discussion of public policy issues by forcing would-be speakers – including the Independence Institute – to comply with unconstitutional regulatory burdens should it merely mention a candidate for office, even if its speech neither promotes nor disparages that candidate.

JURISDICTION

7. This Court has jurisdiction because this action arises under the First Amendment to the United States Constitution. 28 U.S.C. § 1331 (federal question).

8. This Court has jurisdiction to grant relief under The Declaratory Judgment Act. *See* 28 U.S.C. §§ 2201 and 2202.

9. Because this is a constitutional challenge to a provision of BCRA, this Court has jurisdiction under BCRA § 403 to convene a three-judge court. BCRA §§ 403(a)(1) (jurisdiction of this Court) and (d)(2) (actions brought after Dec. 31, 2006), 116 Stat. at 113-14 (once codified at 2 U.S.C. § 437h note, now codified at 52 U.S.C. § 30110 note). *See also* 28 U.S.C. § 2284 (three-judge court composition and procedure); LCvR 9.1 (governing three-judge court procedure in this District).

10. Therefore, plaintiffs will seek to have this matter heard by a three-judge panel of this Court.

VENUE

11. Venue is proper under 28 U.S.C. §§ 1391(b)(1) ("a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located") and (b)(2) (the "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred").

12. Venue is proper under 28 U.S.C. §§ 1391(e)(1)(A) (in a civil action against an agency, the judicial district where "a defendant in the action resides") and (e)(1)(B) (in a civil action against an agency, the judicial district where "a substantial part of the events or omissions giving rise to the claim occurred").

13. Venue is also proper under BCRA § 403(a)(1) (once codified at 2 U.S.C. § 437h note, now codified at 52 U.S.C. § 30110 note) ("the action shall be filed in the United States District Court for the District of Columbia").

PARTIES

14. Established in 1985, the Independence Institute is a nonprofit corporation organized under the Internal Revenue Code and under Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public); COLO. REV. STAT.

§§ 6-16-103(1) (defining "charitable organization"); 7-21-101 *et seq.* ("Colorado Revised Nonprofit Corporation Act").

15. Defendant Federal Election Commission ("FEC" or "Commission") is the agency charged with "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act ("FECA") (once codified at 2 U.S.C. § 431 *et seq.*, now codified at 52 U.S.C. § 30101 *et seq.*) and its amendments – including BCRA. 2 U.S.C. § 437c(b)(1) (now codified at 52 U.S.C. § 30106(b)(1)). The FEC is to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal campaign finance regime. *Id.*

FACTS

16. This case arises from BCRA § 201, defining and governing "electioneering communications." BCRA § 201, 116 Stat. at 88-89 (once codified at 2 U.S.C. § 434(f), now codified at 52 U.S.C. § 30104(f)).

17. The general election in Colorado is scheduled for November 4, 2014. COLO. REV. STAT.§ 1-1-104(17) ("General election' means the election held on the Tuesday succeeding the first Monday of November in each even-numbered year").

The Independence Institute and its tax status

18. Established May 31, 1985, the Independence Institute is a nonprofit corporation organized under the Internal Revenue Code ("IRC") and under Colorado

law. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public); COLO. REV. STAT. §§ 6-16-103(1) (defining "charitable organization"); 7-121-101 *et seq.* ("Colorado Revised Nonprofit Corporation Act").

19. The Independence Institute's mission is "to empower individuals and to educate citizens, legislators[,] and opinion makers about public policies that enhance personal and economic freedom." *See* INDEPENDENCE INSTITUTE "Mission Statement" *available at* http://www.i2i.org/about.php.

20. The Independence Institute's president is Jon Caldara.

21. Organizations exempt from taxation under §501(c)(3) may not engage in activity supporting or opposing a candidate. 26 U.S.C. §501(c)(3) (banning "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

22. In applying the lRC's prohibition of § 501(c)(3) political activity, the Internal Revenue Service ("IRS") has issued regulations and guidance on what does and does not constitute political activity. For example, voter registration drives and "get-out-the-vote" drives – if conducted in a nonpartisan manner – are not political activity. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422; *see also FEC v. Mass. Citizens for Life, Inc.*, 479

U.S. 238, 263-264 (1986) ("*MCFL*") (holding federal independent expenditure ban for corporations was unconstitutional as applied to a nonprofit's voter guide). Likewise, nonpartisan candidate fora are not political activity. Rev. Rul. 2007-41, 2007-25 I.R.B. at 1421; Rev. Rul. 66-256 2 C.B. 210 (1966).

23. However, BCRA § 201 specifically differentiates between the "political activity" covered by the § 501(c)(3) prohibition and "electioneering communications." 2 U.S.C. § 434(f)(7) (now codified at 52 U.S.C. § 30104(f)(7)) ("[n]othing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities . . . for purposes of the Internal Revenue Code"). Thus, "electioneering communications" are distinct from "political activity" under tax law.

24. The Independence Institute is not under the control or influence of any political candidate.

25. The Independence Institute is not under the control or influence of any political party.

26. "Public charity" § 501(c)(3) organizations may engage in only limited lobbying activity. 26 U.S.C. § 501(c)(3) ("An organization is not operated exclusively for one or more exempt purposes if . . . a substantial part of its activities is attempting to influence legislation by propaganda or otherwise"); 26 C.F.R 1.501(c)(3)-1(c)(3).

27. An organization may elect treatment under IRC § 501(h), which permits it to spend a defined portion of

its budget on lobbying. 26 U.S.C. §§ 501(h)(2)(B) and (D).

28. The Independence Institute elects treatment under § 501(h).

29. Federal law safeguards the privacy of donors to § 501(c)(3) organizations. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A) (prohibiting, in the case of organizations recognized under § 501(c)(3), "the disclosure of the name or address of any contributor to the organization").

The advertisement

30. As part of its mission, the Independence Institute wishes to run an advertisement discussing federal sentencing guidelines.

31. The advertisement will clearly mention the sitting United States Senators from Colorado, Mark Udall and Michael Bennet, the former of whom is also a candidate for re-election in November 2014.

32. The advertisement will be approximately 60 seconds in length, and be distributed over local broadcast radio in Colorado on major AM radio stations – 850 KOA and 630 KHOW.

33. The advertisement will reach more than 50,000 natural persons in the Denver metropolitan area.

34. The Independence Institute intends to spend more than $10,000 on the advertisement.

35. The advertisement will read as follows:

Independence Institute
Radio :60
"Let the punishment fit the crime"

Let the punishment fit the crime.

But for many federal crimes, that's no longer true.

Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.

And for what purpose?

Studies show that these laws don't cut crime.

In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.

Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619.

It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.

Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act.

Tell them it's time to let the punishment fit the crime.

> Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

36. The Independence Institute wishes to raise funds for this specific advertisement from individual donors, independent of its general fundraising efforts for other programs.

37. The Independence Institute wishes to raise funds for the specific advertisement, including seeking donations in amounts greater than $1,000 from individual donors.

38. The Independence Institute guards the privacy of its donors and therefore does not wish to disclose their names and addresses on an electioneering communications report. If forced to do so, it will not run the advertisement.

THE LAW AT ISSUE

The statutory and regulatory definition of "electioneering communications"

39. Departing from the traditional "issues speech versus candidate speech" dichotomy, BCRA created a new form of speech to be regulated. "Electioneering communications" are

> [A]ny broadcast, cable, or satellite communication which – (I) refers to a clearly identified candidate for Federal office; (II) is made within – (aa) 60 days before a general, special,

> or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i) (now codified at 52 U.S.C. § 30104(f)(3)(A)(i)).

40. "Targeted to the relevant electorate" is a term of art, with a specific definition under BCRA, meaning:

> a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons – (i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or (ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 434(f)(3)(C) (now codified at 52 U.S.C. § 30104(f)(3)(C)).

41. Since the general election is on November 4, 2014, sixty days prior to the general election is Friday, September 5, 2014. FEDERAL ELECTION COMMISSION, *Colorado 2014 Federal Election Compliance Information*, http://www.fec.gov/info/ElectionDate/2014/CO.shtml (last accessed July 29, 2014).

42. BCRA provides exemptions to the definition of "electioneering communications," including a press exemption (2 U.S.C. § 434(f)(3)(B)(i) (now codified at 52 U.S.C. § 30104(f)(3)(B)(i))) and an exemption for candidate fora (2 U.S.C. § 434(f)(3)(B)(iii) (now codified at 52 U.S.C. § 30104(f)(3)(B)(iii))).

43. BCRA also exempts "a communication which constitutes an expenditure or an independent expenditure under this Act" from the electioneering communications definition. 2 U.S.C. § 434(f)(3)(B)(ii) (now codified at 52 U.S.C. § 30104(f)(3)(B)(ii)). That is, expenditures – communications that expressly advocate for or against a specified candidate – are not "electioneering communications." *See Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (regulation of expenditures "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office"). Thus, electioneering communications do not contain express advocacy.

44. Organizations exempt from taxation under § 501(c)(3) may not engage in activity supporting or opposing a candidate. 26 U.S.C. § 501(c)(3). BCRA § 201 specifically differentiates, however, between the § 501(c)(3) "political activity" prohibition and activities that constitute "electioneering communications." 2 U.S.C. § 434(f)(7) (now codified at 52 U.S.C. § 30104(f)(7)) ("Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities . . . for purposes of the Internal Revenue Code. . . ."). Thus,

"electioneering communications" are distinct from the "political activity" regulated under the tax laws.

45. The FEC promulgated rules to give effect to BCRA. *See, e.g.*, Federal Election Commission, Electioneering Communications Notice 2002-20, 67 Fed. Reg. 65190 (Oct. 23, 2002) (initial regulation).

46. The FEC defined communications as referring to a "clearly identified candidate" when: "the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference. . . ." 11 C.F.R. § 100.29(b)(2).

47. Likewise, the FEC clarified the "targeted to the relevant electorate" standard, as defined by a radio station's audience. 11 C.F.R. §§ 100.29(b)(7)(i)(C) (station within the relevant jurisdiction of the election) and (D) (station only partially within the relevant jurisdiction with the election).

48. The FEC and the Federal Communications Commission have produced a database to determine if a station's coverage qualifies under BCRA's definition of targeting the relevant electorate. 11 C.F.R. § 100.29(b)(6)(i).

49. According to the FEC's website, advertisements run on KOA and KHOW are targeted to the Colorado electorate. FCC MEDIA BUREAU, THE ELECTIONEERING COMMUNICATION DATABASE (last accessed July 31, 2014), http://apps.fcc.gov/ecd/ (search run by choosing

"Federal Senate Race," "Colorado," "AM stations" and running "KOA" and "KHOW").

Disclosure requirements for "electioneering communications"

50. Electioneering communications disclosure under BCRA is triggered once an organization spends $10,000 on electioneering communications during any calendar year. 2 U.S.C. § 434(f)(1) (now codified at 52 U.S.C. § 30104(f)(1)). Once disclosure is triggered, every disbursement over $200 must be reported. 2 U.S.C. § 434(f)(2)(C) (now codified at 52 U.S.C. § 30104(f)(2)(C)).

51. Disclosure is due within approximately 24 hours of the disbursement. 2 U.S.C. § 434(f)(1) (now codified at 52 U.S.C. § 30104(f)(1)); 2 U.S.C. § 434(f)(4) (now codified at 52 U.S.C. § 30104(f)(4)) (defining "disclosure date" as "the first date during any calendar year by which a person has made [qualifying] disbursements for . . . electioneering communications . . . ; and any other date during such calendar year by which a person has made [qualifying] disbursements for . . . electioneering communications . . . since the most recent disclosure date for such calendar year"); *but see* 11 C.F.R. § 104.20(b) ("[e]very person who has made an electioneering communication, as defined in 11 C.F.R. 100.29 . . . shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date").

52. Electioneering communications disclosure includes the "identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement." 2 U.S.C. § 434(f)(2)(A) (now codified at 52 U.S.C. § 30104(f)(2)(A)). The principal place of business of the organization is also disclosed. 2 U.S.C. § 434(f)(2)(B) (now codified at 52 U.S.C. § 30104(f)(2)(B)).

53. If the funds to pay for the electioneering communication came out of a special, segregated account, then only the [sic] "the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date" must be disclosed. 2 U.S.C. § 434(f)(2)(E) (now codified at 52 U.S.C. § 30104(f)(2)(E)).

54. If the funds used to pay for the electioneering communication came from an account not described in 2 U.S.C. § 434(f)(2)(E) (now codified at 52 U.S.C. § 30104(f)(2)(E)), then "the names and addresses of *all contributors* who contributed an aggregate amount of $1,000 or more to the person" must be disclosed. 2 U.S.C. § 434(f)(2)(F) (now codified at 52 U.S.C. § 30104(f)(2)(F)) (emphasis added). Thus, without first forming a separate account, an organization faces the very real possibility of being required to disclose *all* of its donors, should it disseminate an electioneering communication.

55. The FEC believes that 2 U.S.C. §§ 434(f)(2)(E) and 434(f)(2)(F) (now codified at 52 U.S.C. §§ 30104(f)(2)(E) and 30104(f)(2)(F)), taken together, mean that only donations of $1,000 or more – earmarked for electioneering communications – are required to be disclosed. 11 C.F.R. § 104.20(c)(9). This construction was recently tacitly upheld in *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110 (D.C. Cir. 2012) (per curiam). But the D.C. Circuit vacated and remanded the case for further consideration of a proposed rulemaking clarifying the FEC's justification for its rule. *Id.* at 112. Absent a new rulemaking, the district court in *Van Hollen* has been ordered to perform a *Chevron* step two analysis. *Id.*

56. Failure to disclose and report the donors who earmark their donations for the proposed advertisement will result in investigations, prosecutions, possible criminal liability and substantial civil penalties. 2 U.S.C. § 437g (now codified at 52 U.S.C. § 30109) (detailing investigatory and enforcement process by the FEC along with referral to the attorney general for criminal prosecution).

SUPREME COURT DECISIONS REGARDING ISSUE ADVOCACY

Buckley v. Valeo

57. The Supreme Court's touchtone [sic] for all campaign finance law is *Buckley v. Valeo*, 424 U.S. 1 (1976), an omnibus facial challenge to the Federal Election

Campaign Act ("FECA") (once codified at 2 U.S.C. § 431 *et seq.*, now codified at 52 U.S.C. § 30101 *et seq*.).

58. One aspect of FECA limited the amount spent on independent communications made "relative to a clearly identifiable candidate." *Id.* at 7.

59. The language "relative to a clearly identifiable candidate" was found unconstitutionally vague because the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42.

60. To avoid this vagueness, the Supreme Court said FECA "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.*

61. Specifically, the Court limited regulable speech to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.' " *Id.* at 44 n. 52.

62. In this way, the Court explicitly acted to prevent the federal campaign finance regime from reaching speech discussing issues of public policy. For decades, this "express advocacy" test (or "*Buckley*'s 'magic words' " – including synonymous words or phrases) remained the hallmark for examining communications.

63. In addition to distinguishing between issue speech and campaign speech, the Supreme Court has also recognized that disclosure implicates the First Amendment freedom of association. *Buckley*, 424 U.S. at 75.

64. To prevent the federal disclosure requirement from reaching groups that merely mentioned candidates in the context of issue speech, the *Buckley* Court construed the relevant provisions to apply *only* to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.

65. Expenditures by groups under the control of a candidate or with "the major purpose" of supporting or opposing a candidate "are, by definition, campaign related." *Id.* This language, now known as "the major purpose test," effectively narrowed the reach of FECA's disclosure provisions to protect the associational freedoms of individuals and groups speaking about issues.

66. As applied to individuals and groups that did *not* have "the major purpose" of political activity, the *Buckley* Court narrowed the definition of "expenditures" in the same way – "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. To describe the term "expressly advocate," the Court simply incorporated the "magic words" examples listed in footnote 52. *Id.* at 80 n. 108 (incorporating *id.* at 44 n. 52).

67. Under *Buckley*, disclosure of donors is appropriate only when an organization is under the control of a

candidate or has the major purpose of supporting or opposing clearly identified candidates. To protect issue speech, *Buckley* demanded express advocacy before speech-suppressing regulations could take effect.

McConnell v. FEC

68. In 2002, Congress again substantively overhauled the federal campaign finance regime, creating a new category of communications called "electioneering communications." BCRA § 201, 116 Stat. at 88 (once codified at 2 U.S.C. § 434(f)(3)(A)(i), now codified at 52 U.S.C. § 30104(f)(3)(A)(i)); *McConnell v. FEC*, 540 U.S. 93, 189 (2003) *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010)).

69. An omnibus facial challenge was brought against BCRA. *See McConnell* 540 U.S. at 194 (discussing facial overbreadth challenge to electioneering communications provisions).

70. The new "electioneering communications" term was a response to the rise of "sham issue advocacy . . . candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (internal quotations omitted).

71. With this in mind and in the context of a facial challenge, the Supreme Court examined the ban on electioneering communications by corporations and unions. *McConnell*, 540 U.S. at 206 (examining BCRA § 203 (once codified at 2 U.S.C. § 441b(b)(2), now codified at 52 U.S.C. § 30118(b)(2)).

72. The Court noted a study in the *McConnell* record that found "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an electioneering purpose. *Id.*

73. Therefore, while pure issue speech could not be regulated as an electioneering communication, the government could regulate speech *if* ads "broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*." *Id.* (emphasis added). Consequently, the Court upheld the statute against a facial challenge. *Id.*

74. But the *McConnell* Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*," and thus left open the possibility for future, as-applied challenges. *Id.* at 206, n. 88 (emphasis added).

FEC v. Wisconsin Right to Life

75. Four years later, the Court addressed just such an as-applied challenge involving the ban on corporation-funded electioneering communications. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"). *WRTL II* examined the distinction between issue advocacy and candidate advocacy under "the functional equivalent of express advocacy" test. *Id.* at 455-56.

76. Returning to *Buckley*, *WRTL II* noted the difficulty of distinguishing "between discussion of issues on the one hand and advocacy of election or defeat of

candidates on the other," and therefore rejected "analyzing the question in terms 'of intent and of effect'" as it "would afford 'no security for free discussion.'" *Id.* at 467 (quoting *Buckley*, 424 U.S. at 43).

77. Consequently, "a court should find that an ad is the 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." *Id.* at 469-470 (emphasis added); *see also Citizens United v. FEC*, 558 U.S. 310, 324-25 (quoting and applying this test).

78. Invoking this standard, the *WRTL II* Court found that BCRA § 203's ban did not apply to the nonprofit's three proposed advertisements:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads 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. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 470 (Roberts, C.J., controlling opinion); *see also id.* at 482 (announcing decision of the Court upholding the district court's ruling that the advertisements were not subject to the ban in BCRA § 203).

79. The controlling opinion specifically rejected the assertion that "any ad covered by § 203 that includes an appeal to citizens to contact their elected representative is the 'functional equivalent' of an ad saying defeat or elect that candidate." *Id.* (internal quotations and citation omitted).

80. Noting that the "Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent," the controlling opinion agreed with the district court below that there was no compelling interest in regulating the advertisements. *Id.* at 476 (approving of *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 208-210 (D.D.C. 2006)); *Id.* at 481.

Citizens United v. FEC

81. The Court struck down the corporate independent expenditure ban (both BCRA § 203 and other parts of 2 U.S.C. § 441b, now 52 U.S.C. § 30118) in *Citizens United v. FEC*, 558 U.S. at 372. In so doing, the Court specifically upheld BCRA's disclosure and disclaimer requirements. *Id.* But "this part of the opinion is quite brief." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014).

82. Citizens United argued that "the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy . . . ," but the Court "reject[ed] this contention." *Citizens United*, 558 U.S. at 368-69. The Court held that disclosure is "a

less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369 (citing *MCFL*, 479 U.S. at 262 and *Buckley*, 424 U.S. at 75-76).

83. In *Citizens United*, the organization produced a film called *Hillary: The Movie* ("*Hillary*") and several advertisements to promote the film. *Id.* at 320.

84. Central to the Court's disposition of the challenge to corporate independent expenditures was whether *Hillary* and its supporting advertisements were express advocacy or its functional equivalent, as articulated in *WRTL II*. *Citizens United*, 558 U.S. at 324-25.

85. The Court explicitly held that *Hillary* was the functional equivalent of express advocacy under the *WRTL II* test. *Id.* at 325.

86. Turning to the advertisements, the Court held that "[t]he ads fall within BCRA's definition of an 'electioneering communication'" because "[t]hey referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy." *Id.* at 368.

87. The Seventh Circuit has stated that the *Citizens United* Court's reasoning on electioneering communication disclosure "was dicta. The Court had already concluded that *Hillary* and the ads promoting it were the equivalent of express advocacy." *Barland*, 751 F.3d at 836 (citations omitted). Given that the Court had already found *Hillary* to be express advocacy, and the advertisements to be "pejorative," the holding does not address advertisements that are pure issue advocacy.

88. As *Buckley* observed, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 at 42.

89. Speech, under the law, lies on a spectrum. On one end sits express advocacy – speech using *Buckley*'s magic words of "support" or "reject" or their synonyms in connection with a specific candidacy. *See id.* at 44 n. 52. Next to express advocacy sit communications that do not use *Buckley*'s magic words but are nonetheless the "functional equivalent of express advocacy," under the test articulated in *WRTL II* and found to apply to the communications at issue in *Citizens United. WRTL II*, 551 U.S. at 469-70; *Citizens United*, 558 U.S. at 325; *id.* at 368.

90. But on the other end of the spectrum is pure issue advocacy – discussion of public policy that also asks elected leaders to take action. The Independence Institute's advertisement is pure issue advocacy. It simply educates the public and asks Colorado's senator [sic] to support the Justice Safety Valve Act.

91. In rejecting the organization's claim that disclosure would harm its donors, the Court noted that the organization had already disclosed its donors in the past. *Citizens United*, 558 U.S. at 370. But Citizens United is a IRC § 501(c)(4) organization. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008). Thus, the court did not examine the dangers of disclosure in the more sensitive IRC § 501(c)(3) context.

92. The problem of disclosure attendant to "electioneering communications" has not been directly addressed by the Supreme Court in the situation of pure issue advocacy by an IRC § 501(c)(3) nonprofit organization (which, by statute, cannot engage in *any* political activity). 26 U.S.C. § 501(c)(3).

The D.C. Circuit in *Buckley v. Valeo*

93. In the *en banc* D.C. Circuit decision in *Buckley v. Valeo*, the Court of Appeals was asked to interpret 2 U.S.C. § 437a. *Buckley v. Valeo*, 519 F.2d 821, 869-870 (D.C. Cir. 1975) *aff'd in part and rev'd in part* 424 U.S. 1 (1976).

94. Later repealed, the provision provided for disclosure of organizations

> who publish[ ] or broadcast[ ] to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, *or other official acts (in the case of a candidate who holds or has held Federal office)*, or otherwise designed to influence individuals to cast their votes.

Id. (emphasis added) (quoting 2 U.S.C. § 437a (repealed by Federal Election Campaign Act Amendments of 1976 Pub. L. 94-283 § 105 90 Stat. 475, 481 (1976))). The problem was that this provision covered the activity of nonprofit organizations, such as the New

York Civil Liberties Union, that engaged in issue advocacy. *Id.* at 871.

95. The Supreme Court never reviewed this provision of FECA because the government did not appeal the holding of the D.C. Circuit. *Buckley*, 424 U.S. at 11 n. 7.

96. The D.C. Circuit's *Buckley* opinion recognized that "compelled disclosure . . . can work a substantial infringement on the associational rights of those whose organizations take public stands on public issues." *Id.* at 872 (citing *NAACP v. Alabama*, 357 U.S. at 462; *Bates*, 361 U.S. at 522-524).

97. Even though "discussion of important public questions can possibly exert some influence on the outcome of an election" the "nexus may be far more tenuous" then in the context of advocacy for or against candidates. *Id.* at 872-73.

98. Therefore the law is not allowed to equate "groups seeking only to advance discussion of public issues or to influence public opinion" with "groups whose relation to political processes is direct and intimate." *Id.* at 873.

99. These principles are unmodified by the subsequent Supreme Court decision and therefore remain good law in this Circuit.

CAUSES OF ACTION

Count 1:
Declaratory judgment regarding BCRA's definition of "electioneering communications" as applied to the Independence Institute's proposed advertisements

100. Plaintiff realleges and incorporates by reference paragraphs 1 through 99.

101. The Supreme Court described the dichotomy between issue speech and political speech in *Buckley*. Noting that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," the Court created the express advocacy standard to *protect* issue speech from the regulations applicable to political speech. *Buckley*, 424 U.S. at 42.

102. But BCRA § 201 regulates communications near an election that contain mere mention of a "clearly identified candidate." 2 U.S.C. §§ 434(f)(3)(A)(i) (now codified at 52 U.S.C. § 30104(f)(3)(A)(i)); 11 C.F.R. § 100.29(b)(2).

103. *McConnell* upheld this regulation on its face, fearing "sham issue advocacy." *McConnell*, 540 U.S. at 132 (internal quotations omitted). But this conclusion, reached in a facial context, was premised explicitly on a record demonstrating that the vast majority of the covered ads were the functional equivalent of express advocacy. *Id.* at 206.

104. Indeed, *McConnell* Court specifically "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*." *Id.* at 206 n. 88 (emphasis added).

105. In this case, the Independence Institute presents a genuine issue advertisement that merely mentions Senator Udall, a candidate for reelection to represent Colorado in the Senate, together with his Senate colleague who is not a candidate for reelection.

106. Although the advertisement mentions Senator Udall, a candidate in the upcoming general election, the advertisement is not presently an electioneering communication because it is not yet within the 60-day electioneering communication period before the general election.

107. Considering the time needed to raise funds for and produce the advertisement, the advertisement will run after September 5, 2014, and consequently during the electioneering communications period.

108. The proposed advertisement does not qualify under BCRA's press exemption, since they are paid advertisements, not "communication[s] appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station." 2 U.S.C. § 434(f)(3)(B)(i) (now codified at 52 U.S.C. § 30104(f)(3)(B)(i)).

109. Since the proposed advertisement merely mentions Senator Udall (and contain no words of express advocacy or its functional equivalent), it does not

qualify as an independent expenditure exempted under 2 U.S.C. § 434(f)(3)(B)(ii) (now codified at 52 U.S.C. § 30104(f)(3)(B)(ii)). Likewise, it is not an expenditure. *Id.* In either case, it is not likely to be "reported under the Act or Commission regulations" and therefore is not eligible under that exemption. 11 C.F.R. § 100.29(c)(3).

110. Nor does the advertisement constitute a debate forum or a call to hold such a forum. Thus, it is not exempt under 2 U.S.C. § 434(f)(3)(B)(iii) (now codified at 52 U.S.C. § 30104(f)(3)(B)(iii)).

111. Finally, 2 U.S.C. § 434(f)(3)(b)(iv) (now codified at 52 U.S.C. § 30104(f)(3)(b)(iv)) ("other communications") likely does not apply since the proposed advertisement unambiguously refers to a candidate for office and satisfies the other electioneering communication requirements. *See, e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 282-283, 368 (D.D.C. 2003) *aff'd in part and rev'd in part*, 540 U.S. 93 (noting that the 2 U.S.C. § 434(f)(3)(b)(iv) (now 52 U.S.C. § 30104(f)(3)(b)(iv)) exemption was not to apply to issue advocacy). Therefore, no BCRA exemption applies.

112. Because none of the statutory electioneering communication exemptions apply, the Independence Institute is left to choose between burdensome regulation and the violation of its donors' privacy, or remaining silent. The Independence Institute's speech is, consequently, chilled.

113. Since the proposed advertisement is not "an appeal to vote for or against a specific candidate," but rather a genuine discussion of a pressing issue of public

concern, BCRA § 201 is overbroad as applied to the Independence Institute's advertisement.

114. Therefore, the Independence Institute seeks a declaration that 2 U.S.C. § 434(f)(3)(A)(i) (now codified at 52 U.S.C. § 30104(f)(3)(A)(i)) is overbroad as applied to the Independence Institute's proposed advertisement.

Count 2:
Declaratory judgment on the associational burdens of BCRA's electioneering communications disclosure provision as applied to the Independence Institute

115. Plaintiff realleges and incorporates by reference paragraphs 1 through 114.

116. The Independence Institute's planned advertisement is genuine issue speech.

117. The Independence Institute wishes to raise funds for this specific advertisement, including soliciting donations greater than $1,000 from individual donors.

118. Due to the sensitive nature of § 501(c)(3) donor lists, the Independence Institute wishes to keep such donations private, and therefore does not wish to disclose its donors on an electioneering communications report, as required by 2 U.S.C. §§ 434(f)(1)-(2) (now 52 U.S.C. §§ 30104(f)(1)-(2)).

119. Failure to disclose and report the donors who support the proposed advertisement will subject the Independence Institute to investigations, prosecutions, possible criminal liability, and substantial civil penalties. 2 U.S.C. § 437g (now codified at 52 U.S.C. § 30109) (detailing investigatory and enforcement process by the FEC along with referral to the attorney general for criminal prosecution).

120. The Supreme Court has consistently recognized the danger of requiring disclosure of donors to non-profit organizations. *See, e.g.*, *Buckley*, 424 U.S. at 64 (citing *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958)).

121. Under *Buckley*, disclosure is only appropriate for groups "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.

122. Likewise, if a group does not have "the major purpose" of political activity, then only communications that "expressly advocate the election or defeat of a clearly identified candidate" are subject to disclosure. *Id.* at 80.

123. Nevertheless, BCRA § 201 demands the name and address for every person who gives more than $1,000 to an organization that wishes to run an issue advertisement that happens to mention a candidate for office within the electioneering communications

window. 2 U.S.C. § 434(f)(2) (now codified at 52 U.S.C. § 30104(f)(2)).

124. Indeed, unless the organization uses a segregated account, *every* donor who gives more than $1,000 to the organization – even if they do not earmark their donation, and even if they have no knowledge of the particular electioneering communication – may need to be reported. *Compare* 2 U.S.C. § 434(f)(2)(E) *with* 2 U.S.C. § 434(f)(2)(F) (now 52 U.S.C. § 30104(f)(2)(E) *with* 52 U.S.C. § 30104(f)(2)(F)). While the Commission does not read the statute in this manner, that rule is currently the subject of pending litigation. 11 C.F.R. § 104.20(c)(9); *Van Hollen*, 694 F.3d at 110.

125. Therefore, the "earmarked only" reading of disclosure rests on unsteady footing, posing an even greater risk that the Independence Institute may be forced to disclose *all* of its donors, merely because it engaged in a single instance of issue speech.

126. While *Citizens United* upheld similar disclosure, it was in the context of an lRC § 501(c)(4) organization making a film and advertisements that were the "functional equivalent of express advocacy." This case presents distinctly different facts.

127. The Independence Institute and similarly situated groups organized under IRC § 501(c)(3) must remain silent on *issues* 60 days before a general election, if they wish to protect their donors private information, consistent with federal statutory and judicial safeguards.

128. The Independence Institute wishes to raise funds to run the proposed advertisement, but cannot for fear that the donors who give more than $1,000 will be disclosed. BCRA's electioneering communications disclosure makes the Independence Institute choose between disclosing its donors and remaining silent on issues central to its mission.

129. Therefore, the Independence Institute seeks a declaration that, as applied to the Independence Institute's proposed advertisement, 52 U.S.C. § 30104(f)(1)-(2)'s disclosure provisions are overbroad.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. A declaration that definition of "electioneering communication" in 2 U.S.C. § 434(f)(3)(A)(i) (now codified at 52 U.S.C. § 30104(f)(3)(A)(i)) is overbroad as applied to the Independence Institute's proposed advertisement.

B. A declaration that the electioneering communication disclosure regime in 2 U.S.C. §§ 434(f)(1)-(2) (now codified at 52 U.S.C. §§ 30104(f)(1)-(2)) is overbroad as applied to the Independence Institute and its proposed advertisement.

C. Such injunctive relief as this Court may direct.

D. Any other relief this Court may grant in its discretion. Respectfully submitted this 2nd day of September, 2014.

s/ Allen Dickerson
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Counsel for Plaintiff
**Admission* pro hac vice *pending*

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

I, Jon Caldara, president of the Independence Institute, being first duly sworn, state under oath that I have read the foregoing VERIFIED COMPLAINT, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

/s/ Jon Caldara

Subscribed and sworn before me this 29 day of August, 2014.

/s/ Mary Ila Macfarlane
Notary Public

My Commission
Expires: 7-11-2016

MARY ILA MACFARLANE
NOTARY PUBLIC,
STATE OF COLORADO
My Comm. Expires
July 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2014, the foregoing document was served on the following, via first class mail:

Lisa J. Stevenson,
Deputy General Counsel – Law
Federal Election Commission
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s/ Allen Dickerson
Allen Dickerson

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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26 U.S.C. § 501(c)(3)

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

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26 U.S.C. § 4955

(a) Initial taxes

(1) On the organization

There is hereby imposed on each political expenditure by a section 501(c)(3) organization a tax equal to 10 percent of the amount thereof. The tax imposed by this paragraph shall be paid by the organization.

(2) On the management

There is hereby imposed on the agreement of any organization manager to the making of any expenditure, knowing that it is a political expenditure, a tax equal to 2½ percent of the amount thereof, unless such agreement is not willful and is due to reasonable cause. The tax imposed by this paragraph shall be paid by any organization manager who agreed to the making of the expenditure.

(b) Additional taxes

(1) On the organization

In any case in which an initial tax is imposed by subsection (a)(1) on a political expenditure and such expenditure is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount of the expenditure. The tax imposed by this paragraph shall be paid by the organization.

(2) On the management

In any case in which an additional tax is imposed by paragraph (1), if an organization manager refused

to agree to part or all of the correction, there is hereby imposed a tax equal to 50 percent of the amount of the political expenditure. The tax imposed by this paragraph shall be paid by any organization manager who refused to agree to part or all of the correction.

(c) Special rules

For purposes of subsections (a) and (b) –

(1) Joint and several liability

If more than 1 person is liable under subsection (a)(2) or (b)(2) with respect to the making of a political expenditure, all such persons shall be jointly and severally liable under such subsection with respect to such expenditure.

(2) Limit for management

With respect to any 1 political expenditure, the maximum amount of the tax imposed by subsection (a)(2) shall not exceed $5,000, and the maximum amount of the tax imposed by subsection (b)(2) shall not exceed $10,000.

(d) Political expenditure

For purposes of this section –

(1) In general

The term "political expenditure" means any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements),

any political campaign on behalf of (or in opposition to) any candidate for public office.

(2) Certain other expenditures included

In the case of an organization which is formed primarily for purposes of promoting the candidacy (or prospective candidacy) of an individual for public office (or which is effectively controlled by a candidate or prospective candidate and which is availed of primarily for such purposes), the term "political expenditure" includes any of the following amounts paid or incurred by the organization:

(A) Amounts paid or incurred to such individual for speeches or other services.

(B) Travel expenses of such individual.

(C) Expenses of conducting polls, surveys, or other studies, or preparing papers or other materials, for use by such individual.

(D) Expenses of advertising, publicity, and fundraising for such individual.

(E) Any other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit, of such individual.

(e) Coordination with sections 4945 and 4958

If tax is imposed under this section with respect to any political expenditure, such expenditure shall not be treated as a taxable expenditure for purposes of

section 4945 or an excess benefit for purposes of section 4958.

(f) Other definitions

For purposes of this section –

(1) Section 501(c)(3) organization

The term "section 501(c)(3) organization" means any organization which (without regard to any political expenditure) would be described in section 501(c)(3) and exempt from taxation under section 501(a).

(2) Organization manager

The term "organization manager" means –

(A) any officer, director, or trustee of the organization (or individual having powers or responsibilities similar to those of officers, directors, or trustees of the organization), and

(B) with respect to any expenditure, any employee of the organization having authority or responsibility with respect to such expenditure.

(3) Correction

The terms "correction" and "correct" mean, with respect to any political expenditure, recovering part or all of the expenditure to the extent recovery is possible, establishment of safeguards to prevent future political expenditures, and where full recovery is not possible,

such additional corrective action as is prescribed by the Secretary by regulations.

(4) Taxable period

The term "taxable period" means, with respect to any political expenditure, the period beginning with the date on which the political expenditure occurs and ending on the earlier of –

(A) the date of mailing a notice of deficiency under section 6212 with respect to the tax imposed by subsection (a)(1), or

(B) the date on which tax imposed by subsection (a)(1) is assessed.

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26 U.S.C. § 6104

(b) Inspection of annual returns

The information required to be furnished by sections 6033, 6034, and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information. . . .

[. . .]

(c) Publication to State officials

[. . .]

(3) Disclosure with respect to certain other exempt organizations

Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information of any organization described in section 501(c) (other than organizations described in paragraph (1) or (3) thereof) for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations. Such information may only be inspected by or disclosed to a person other than the appropriate State officer if such person is an officer or employee of the State and is designated by the appropriate State officer to receive the returns or return information under this paragraph on behalf of the appropriate State officer.

[. . .]

(d) Public inspection of certain annual returns, reports, applications for exemption, and notices of status

[. . .]

(3) Exceptions from disclosure requirement

(A) Nondisclosure of contributors, etc.

In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization. In the case of an organization described in section 501(d), paragraph (1) shall not require the disclosure of the copies referred to in section 6031(b) with respect to such organization.

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52 U.S.C. § 30104(f)

Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a

purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection –

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless

such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 30101(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the

communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means –

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with title 26

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of title 26.

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52 U.S.C. § 30110 note

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act [see Tables for classification] or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

(b) Intervention by Members of Congress. – In any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised (including but not limited to an action described in subsection (a)), any member of the House of Representatives (including a Delegate or Resident Commissioner to the Congress) or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment. To avoid duplication of efforts and reduce the burdens placed on the parties to the action, the court in any such action may make such orders as it considers necessary, including orders to require intervenors taking similar positions to file joint papers or to be represented by a single attorney at oral argument.

(c) Challenge by Members of Congress. – Any Member of Congress may bring an action, subject to the special rules described in subsection (a), for declaratory or injunctive relief to challenge the constitutionality of

any provision of this Act or any amendment made by this Act.

(d) Applicability. –

(1) Initial claims. – With respect to any action initially filed on or before December 31, 2006, the provisions of subsection (a) shall apply with respect to each action described in such section.

(2) Subsequent actions. – With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action."