UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE, Appellant, v. FEDERAL ELECTION COMMISSION, Appellee.	No. 14-5249 MOTION FOR SUMMARY AFFIRMANCE

APPELLEE FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY AFFIRMANCE

Appellee Federal Election Commission ("FEC" or "Commission") respectfully moves for summary affirmance of the decision below, which granted judgment to the Commission and found the claims so insubstantial in light of previous Supreme Court decisions that a statutory three-judge court provision was inappropriate. Mem. Op. and Order, Civ. No. 14-1500 (CKK) (D.D.C. Oct. 6, 2014) (Docket Nos. 23 and 24) (attached as Exhibits 1 and 2). Independence Institute asserts that the definition in the Bipartisan Campaign Reform Act ("BCRA") of an "electioneering communication" ("EC") is unconstitutionally overbroad as applied to a particular advertisement that Independence Institute wished to distribute before the November 2014 elections. It also challenges the statutory disclosure requirements for ECs as applied to its proposed advertisement.

Pursuant to a special judicial review provision in BCRA, Independence Institute asked the district court to convene a three-judge court to decide its claims and filed a motion for a preliminary injunction. Shortly after Independence Institute filed its preliminary-injunction motion, the parties agreed to a suggestion by the district court to consolidate briefing for that motion with briefing on the merits. Mem. Op. at 1; Joint Stipulation of the Parties and Order of the Court as to the Scope of Pl.'s Allegations and Claims, Civ. No. 14-1500 (CKK) (D.D.C. Sept. 10, 2014) (Docket No. 14) ("Joint Stipulation and Order"). The district court reviewed the case to determine whether it presented a "substantial claim," found that Independence Institute's "challenge is clearly foreclosed by Supreme Court precedent," Mem. Op. at 6 (citations and internal quotation marks omitted), denied Independence Institute's application for three-judge court, and awarded judgment to the Commission.

The Supreme Court has twice upheld BCRA's disclosure requirements for ECs and has explicitly rejected the argument, upon which Independence Institute's claims are premised, that the EC disclosure requirements must be limited to communications that constitute express candidate advocacy or the functional equivalent of such advocacy. Given those directly applicable rulings, which include the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), Independence Institute's claims plainly fail. Because no benefit would be

gained from further briefing and argument on these issues, this Court should summarily affirm the district court's decision.

LEGAL AND FACTUAL BACKGROUND

I. THE FEC AND THE FEDERAL ELECTION CAMPAIGN ACT

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("the Act" or "FECA"), 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457), including the amendments added by BCRA.[1] FECA requires certain periodic and event-driven disclosures of information about the sources and financing of election-related communications. *See generally id.* § 30104 (2 U.S.C. § 434). These requirements "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371.

II. BCRA'S DISCLOSURE REQUIREMENTS FOR ELECTIONEERING COMMUNICATIONS

BCRA defines a narrow category of "electioneering communications," which are broadcast, cable, or satellite communications that refer to a clearly

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. To avoid confusion, this submission will indicate in parentheses the former Title 2 citations.

identified candidate for federal office, are publicly distributed within 60 days before a general election or 30 days before a primary election, and are targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A) (2 U.S.C. § 434(f)(3)(A)); 11 C.F.R. § 100.29(a)(2). The statute requires that any entity that spends over $10,000 to produce or distribute an EC must file a statement with the Commission disclosing certain information about the sources and financing of the communication. 52 U.S.C. § 30104(f)(1), (2)(A) (2 U.S.C. § 434(f)(1), (2)(A)). The statement must identify, in relevant part, the person making the EC disbursement and the amount and date of the disbursement. The statement must also disclose certain information about the sources of the funds used to pay for the EC disbursement. 52 U.S.C. § 30104(f)(2)(E)-(F) (2 U.S.C. § 434(f)(2)(E)-(F)). As relevant here, if the EC is financed by a corporation, the corporation must report "the name and address of each person who made a donation aggregating $1,000 or more to the corporation . . . for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). If the disbursement is made out of a "segregated bank account established to pay for electioneering communications," however, the corporation making the EC need only identify those individuals who contributed $1,000 or more to the account itself. 11 C.F.R. § 104.20(c)(7)(ii).

The Supreme Court has twice upheld BCRA's definition of "electioneering communication" and the statutory disclosure requirements that apply to such

communications. In both instances, the Court made clear that such disclosure requirements need not be limited to communications that contain express candidate advocacy or the functional equivalent of such advocacy.

First, in a portion of *McConnell v. FEC* joined by eight Justices, the Court upheld BCRA's EC definition and disclosure requirements on their face and concluded that *Buckley v. Valeo*, 424 U.S. 1 (1976), "amply supports application of [the Act's] disclosure requirements to the entire range of electioneering communications." 540 U.S. 93, 196 (2003); *see* Mem. Op. at 17 (quoting *McConnell*, 540 U.S. at 196). As the court below explained, "*McConnell* forthrightly 'rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy.'" Mem. Op. at 17 n.15 (quoting *McConnell*, 540 U.S. at 194).

Second and more recently, in *Citizens United*, eight Justices again reaffirmed the part of *McConnell* that upheld BCRA's EC disclosure requirements on their face, and further upheld those disclosure requirements as applied to certain "commercial advertisements" that "only attempt[ed] to persuade viewers to see [a] film" and that contained no candidate advocacy. 558 U.S. at 366-71; *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (explaining that Citizens United's proposed ads "did not advocate Senator Clinton's election or defeat"). The Court rejected Citizens United's contention that the First Amendment prevents

such requirements from being applied to communications that lack express candidate advocacy or the functional equivalent of such advocacy. 558 U.S. at 368-69. And the Court held that "the public has an interest in knowing who is speaking about a candidate shortly before an election" and that "informational interest alone" was a sufficient basis for upholding the EC disclosure requirements as applied to Citizens United's proposed advertisements. *Id.* at 369.

III. APPELLANT INDEPENDENCE INSTITUTE

Appellant Independence Institute is a Colorado nonprofit corporation that "'conducts research and educates the public on various aspects of public policy — including taxation, education policy, health care, and justice policy.'" Mem. Op. at 2 (quoting Compl. ¶ 2). Independence Institute alleged that it planned to produce and distribute a radio advertisement that would clearly mention Colorado Senator Mark Udall, who was a candidate in the November 2014 general election, within 60 days of that election. *See id.* at 2-3 & n.2 (describing the proposed advertisement and quoting its script). The proposed advertisement would have met the statutory definition of an EC if it had been distributed as Independence Institute intended and accordingly it would have triggered the disclosure requirements for such communications. Mem. Op. at 3.

IV. THE DISTRICT COURT PROCEEDINGS

Independence Institute challenges the constitutionality of the EC definition and disclosure requirements as applied to the radio advertisement that it intended to run. It asserts that the EC disclosure requirements cannot constitutionally be applied to its proposed advertisement because the communication lacks express advocacy or the functional equivalent thereof, and also lacks a "pejorative" description of a federal candidate. Mem. Op. at 3.

Independence Institute invoked a special judicial review provision that provides for a three-judge court to decide substantial constitutional challenges to BCRA, and for such decisions to be directly appealable to the Supreme Court. 52 U.S.C. § 30110 note (formerly 2 U.S.C. § 437h note), Pub. L. No. 107-155, 116 Stat. 81, 113-14; *Feinberg v. Fed. Deposit Ins. Corp*., 522 F.2d 1335, 1338-39 (D.C. Cir. 1975) (explaining that a "single district judge need not request that a three-judge court be convened [under applicable statutes] if a case raises no substantial claim"). It also filed a motion for a preliminary injunction and, in the interest of expediting final resolution of this case, the parties agreed to consolidate briefing on that motion with briefing on the merits. Mem. Op. at 3-4. The parties further stipulated, and the Court ordered, that "'this case presents an as-applied challenge to 52 U.S.C. § 30104(f)(1)-(2) based upon the content of the Independence Institute's intended communication, and not the possibility that its

donors will be subject to threats, harassment, or reprisals.'" *Id.* at 4 (quoting Joint Stipulation and Order at 1).

The Commission opposed Independence Institute's application for a three-judge court and claims on the merits. The district court agreed with the Commission that Independence Institute's "claims are foreclosed by clear United States Supreme Court precedent, principally by *Citizens United*." Mem. Op. at 2 (citing *Citizens United*, 558 U.S. at 366-71). The court concluded that "[t]his dispute can be distilled to the application of the Supreme Court's clear instructions in *Citizens United*," and that Independence Institute "seeks the same relief that has already been foreclosed by *Citizens United*." *Id.* at 6-7. The court thus denied Independence Institute's application for a three-judge court and preliminary-injunction motion, entered judgment for the Commission, and dismissed the action. *Id.* at 6-7.

STANDARDS OF REVIEW

This Court reviews the district court's summary judgment ruling *de novo*. *Judicial Watch, Inc. v. United States Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013); *see Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir. 1990) (explaining that where question presented is "whether the caselaw reviewing and interpreting Federal Election Campaign Act amendments disposes of this constitutional challenge," the Court's "review is *de novo*").

Summary affirmance is appropriate where "[t]he merits of the parties' positions are so clear as to warrant summary action," *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar. 11, 2013) (per curiam), and "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc., v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (per curiam) (granting summary affirmance).

ARGUMENT

Independence Institute contends that BCRA's EC disclosure requirements are unconstitutional as applied to its proposed radio advertisement because the advertisement lacks express candidate advocacy or the functional equivalent of such advocacy. Mem. Op. at 3. As the district court correctly held, this case is "foreclosed by clear United States Supreme Court precedent," including *Citizens United*, in which the Supreme Court "in no uncertain terms . . . rejected the attempt

to limit BCRA's disclosure requirements to express advocacy and its functional equivalent." *Id.* at 2, 6 (citing *Citizens United*, 558 U.S. at 369).[2]

The Supreme Court in *McConnell* facially upheld BCRA's EC statutory definition and disclosure requirements. 540 U.S. at 194, 201-02, 207-08. The EC definition was not limited to "communications expressly advocating the election or defeat of particular candidates," and the Court rejected the notion that its decision in *Buckley* had established a "constitutionally mandated line" between express candidate advocacy and issue advocacy. *Id.* 189-90. The Court in *Buckley* had construed the statutory term "expenditure" narrowly to avoid invalidating FECA's regulation of "expenditures" on vagueness grounds and thus limited the term to encompass only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44 (footnote omitted). In *McConnell*, the Court explained that unlike FECA's definition of "expenditure," BCRA's EC definition did not raise any vagueness

[2] With the passage of the November 2014 elections, Independence Institute's challenge to the constitutionality of BCRA's EC provisions as applied to the particular advertisement described in its complaint appears to be moot: the proposed advertisement no longer appears to meet the statutory definition of an EC. *See* 52 U.S.C. § 30104(f)(3)(A) (2 U.S.C. § 434(f)(3)(A)) (defining ECs as communications that, *inter alia*, refer to a current federal candidate and that are publicly distributed within 60 days before a general election or 30 days before a primary election in which that candidate is seeking office). Nevertheless, Independence Institute's challenge appears to fall within the "exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wis. Right to Life*, 551 U.S. 449, 461-464 (2007); *see, e.g.*, Compl. ¶¶ 2, 127 (attached as Exhibit 3).

concerns; on the contrary, its elements "are both easily understood and objectively determinable." 540 U.S. at 194. The Court thus rejected the *McConnell* plaintiffs' argument that "Congress cannot constitutionally require disclosure of . . . 'electioneering communications' without making an exception for those 'communications' that do not meet *Buckley's* definition of express advocacy," because *Buckley's* "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *Id.* at 190; *see* Mem. Op. at 17-19 (explaining that in light of *McConnell*, Independence Institute "cannot rely on *Buckley* to argue that the Constitution requires limiting disclosures [for ECs] to express advocacy and its functional equivalent").

The Court in *McConnell* held that BCRA's disclosure requirements for ECs are constitutional because they serve the important governmental interests of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," and "d[o] not prevent anyone from speaking." 540 U.S. at 196, 201 (internal quotation marks omitted); *see* Mem. Op. at 17 ("'[T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full . . . to the *entire range* of 'electioneering communications'.'") (quoting *McConnell*, 540 U.S. at 196).

In 2010, the Supreme Court in *Citizens United* revisited, *inter alia*, the Act's disclosure requirements for electioneering communications. Citizens United, a nonprofit corporation, sought to distribute a film about then-Senator Hillary Clinton, who at the time was a candidate in the Democratic Party's 2008 Presidential primary elections. 558 U.S. at 319-20. Citizens United also sought to distribute several advertisements promoting the film. *Id.* at 320.

In a portion of the opinion that eight Justices joined, the Court reaffirmed the part of *McConnell* that upheld BCRA's electioneering communication disclosure requirements on their face, and further upheld those disclosure requirements as applied to both Citizens United's movie and its proposed "commercial advertisements" that "only attempt[ed] to persuade viewers to see the film" and that contained no advocacy. 558 U.S. at 366-71; *see Citizens United*, 530 F. Supp. 2d at 280 (explaining that Citizens United's proposed ads "did not advocate Senator Clinton's election or defeat; instead, they proposed a commercial transaction — buy the DVD of *The Movie*"). Even though the "ads only pertain[ed] to a commercial transaction," the Supreme Court held that "the public has an interest in knowing who is speaking about a candidate shortly before an election" and the government's "informational interest alone" was a sufficient basis for upholding the constitutionality of the EC disclosure provision as applied to the promotional ads. *Citizens United*, 558 U.S. at 369. Like Independence

Institute, Citizens United had argued that the EC disclosure requirements "must be confined to speech that is the functional equivalent of express advocacy." *Id.* at 368. The Supreme Court explicitly "reject[ed] this contention." *Id.* at 369.

The court below correctly recognized that the Supreme Court's "unambiguous language" in *Citizens United* forecloses this challenge. Mem. Op. at 7. It also thoroughly considered and correctly rejected each of appellant's attempts to avoid the Supreme Court's explicit holding in *Citizens United*.

First, the district court properly concluded that the Supreme Court's holding that the EC disclosure requirements need not be limited to communications that are the functional equivalent of express advocacy was binding precedent. Mem. Op. at 8-11. Independence Institute had "relie[d] heavily on one opinion from the Seventh Circuit Court of Appeals, *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), which states that *Citizens United*'s discussion of disclosures was dicta." Mem. Op. at 8. The district court clarified that "[n]othwithstanding its comment regarding dicta, the Seventh Circuit panel *agrees* that, as a result of the Supreme Court's discussion of disclosures in *Citizens United*, the express-advocacy limitation does not apply to the disclosure system established by BCRA." *Id.* at 8-9 (emphasis added). The court below further explained that "[g]iven that the Supreme Court did not determine that the *Hillary* advertisements were the equivalent of express advocacy, its refusal to import the

express advocacy limitation to the disclosure context was not dicta but a holding — a holding that ultimately encompasses the facts in this case." *Id.* at 10. All Courts of Appeals addressing the issue have held that "*Citizens United*'s language forecloses the suggestion that disclosure requirements must be limited to express advocacy and its functional equivalent." *Id.* at 10-11 (citing *Nat'l. Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010)).[3] The district court further noted that Independence Institute apparently "abandoned this argument in its Reply." *Id.* at 8 n.8.

Second, the district court correctly recognized that Independence Institute's tax status is immaterial. Mem. Op. at 11-12. Independence Institute had attempted

[3] *See also Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir. 2013) (explaining that in *Citizens United*, the Supreme Court "found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address even ads that 'only pertain to a commercial transaction'" (citation omitted)), *cert. denied*, 134 S. Ct. 2288 (2014); *Real Truth About Abortion v. FEC*, 681 F. 3d 544, 551-52 (4th Cir. 2012) (citing *Citizens United*'s holding that "mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy and 'only pertain to a commercial transaction'" (quoting *Citizens United*, 558 U.S. at 369)), *cert. denied*, 133 S. Ct. 841 (2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny.").

to distinguish *Citizens United* based on the fact that Independence Institute is organized under section 501(c)(3) of the Internal Revenue Code, whereas Citizens United is a section 501(c)(4) organization. *Id.* As the district court explained, "nothing in *Citizens United*'s discussion of disclosures of contributions cabins the Supreme Court's holding to certain types of organizations," Independence Institute's argument that there should be a distinction "has no basis" because neither type of organization is obligated by federal tax law to disclose their donors, and Independence Institute failed to cite any "authority that such a distinction would be required by the First Amendment." Mem. Op. at 11-12; *see* 26 U.S.C. § 6104(d)(3)(A).

Third, the district court properly found that the EC disclosure requirements may constitutionally apply to Independence Institute's proposed advertisement regardless of whether it is express candidate advocacy or issue advocacy. Mem. Op. at 12-14. As the district court explained, the Supreme Court in *Citizens United* "refused to draw a line between express advocacy and issue advocacy in the BCRA disclosure context" and "stated that whether an electioneering communication is express advocacy or issue advocacy does not determine whether BCRA's disclosure requirement can be lawfully applied." *Id.* at 12-13. Even if an advertisement lacks express candidate advocacy, the Supreme Court recognized

that "the public interest still supports disclosure of 'who is speaking about a candidate.'" *Id.* at 13.

Fourth, the district court correctly noted that the "perjorative" tone of the advertisements at issue in *Citizens United* was immaterial to the Supreme Court's holding in that case and thus properly rejected Independence Institute's argument that *Citizens United*'s "clear conclusion with respect to BCRA's disclosure requirements ought to be limited to advertisements, like the ones before the Supreme Court in that case, which spoke 'pejoratively' about a candidate." Mem. Op. at 14. As the district court explained, "the text of the opinion does not even hint that" the Supreme Court's holding regarding EC disclosures was limited to facially perjorative (or complimentary) advertisements. *Id.* at 15-16.

Finally, the district court accurately determined that the alternative, pre-*Citizens United* decisions on which Independence Institute attempted to rely "do not suggest a different outcome from *Citizens United*." Mem. Op. at 16; *see id.* at 16-21 & n.17 (explaining that neither the Supreme Court decision in *Buckley*, nor this Court's decision in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (en banc), nor the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), support Independence Institute's constitutional arguments); *see supra* pp. 10-11.

In sum, the Supreme Court's decision in *Citizens United* clearly forecloses Independence Institute's claims here. This lawsuit thus "is not so much an as-applied challenge as it is an argument for overruling a [Supreme Court] precedent." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge court), *aff'd*, 561 U.S. 1040 (2010).

The district court properly denied Independence Institute's application for a three-judge court and granted judgment to the Commission. Three judge-courts need not be convened "if a case raises no substantial claim or justiciable controversy" and "[c]onstitutional claims may be regarded as insubstantial if they are 'obviously without merit,' or if their 'unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" *Feinberg*, 522 F.2d at 1338-39 (citations omitted); *see Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011) (per curiam) (applying *Feinberg* to BCRA § 403(a)). This is precisely the sort of case this Court had in mind in *Feinberg*.

There is no reason for this Court to provide full briefing and oral argument on Independence Institute's attempt to relitigate the issues squarely resolved by eight Justices in *Citizens United*.

CONCLUSION

The district correctly identified Independence Institute's claims as insubstantial and this Court should summarily affirm that decision.

Respectfully submitted,

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November 25, 2014

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE, Appellant, v. FEDERAL ELECTION COMMISSION, Appellee.	No. 14-5249 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2014, I electronically filed the FEC's Motion for Summary Affirmance with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, and I will cause four paper copies to be hand-delivered to the Court pursuant to Circuit Rule 27(b). Service was made on the following through CM/ECF:

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE,	)	
Appellant,	)	
v.	)	No. 14-5249
FEDERAL ELECTION COMMISSION,	)	EXHIBIT 1
Appellee.	)	

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 14-1500 (CKK)

ORDER
(October 6, 2014)

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 6th day of October, 2014, hereby

ORDERED that Plaintiff's [3] Application for a Three Judge Court is DENIED; and it is further

ORDERED that Plaintiff's [5] Motion for Preliminary Injunction is DENIED as MOOT; and it is further

ORDERED that JUDGMENT is entered for the Defendant; and it is further

ORDERED that this action is dismissed in its entirety.

SO ORDERED.

This is a final, appealable Order.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE,	)	
Appellant,	)	
v.	)	No. 14-5249
FEDERAL ELECTION COMMISSION,	)	EXHIBIT 2
Appellee.	)	

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 14-1500 (CKK)

MEMORANDUM OPINION
(October 6, 2014)

Plaintiff Independence Institute, a Colorado non-profit organization, brought this action against Defendant Federal Election Commission ("FEC"), seeking declaratory and injunctive relief declaring that the disclosure provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") are unconstitutional as applied to a specific radio advertisement that Plaintiff plans to run before the November 4, 2014, federal elections. Presently before the Court are Plaintiff's [3] Application for a Three Judge Court and Plaintiff's [5] Motion for Preliminary Injunction. In the interest of expediting the resolution of this action, the parties agreed that the Court would rule on the merits of the Complaint as opposed to the preliminary injunction. Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court DENIES

[1] Compl., ECF No. [1] ("Compl."); Pl.'s Application for a Three Judge Court and Mem. in Support, ECF No. [3] ("Pl.'s App."); Pl.'s Mot. for Prelim. Inj. and Mem. in Support, ECF No. [5] ("Pl.'s Mot."); Joint Stipulation of the Parties and Order of the Court as to the Scope of Pl.'s Allegations and Claims, ECF No. [13] ("Joint Stip."); Def. Federal Election Comm'n's Opp'n to Pl.'s Application for a Three-Judge Court, ECF No. [16] ("Def.'s 3-Judge Opp'n"); Plaintiff's Reply Mem. on Application for a Three Judge Court, ECF No. [17] ("Pl.'s 3-Judge Reply"); Def. Federal Election Comm'n's Mem. of Law in Opp'n to Pl.'s Mot. for Prelim. Inj., ECF No. [19] ("Def.'s Opp'n"); Brief *Amici Curiae* of Campaign Legal Center, Democracy 21

Plaintiff's motions. Plaintiff's claims are foreclosed by clear United States Supreme Court precedent, principally by *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). *See id*. at 366-71. Having considered the merits of this dispute, the Court enters JUDGMENT for Defendant. Accordingly, this action is DISMISSED in its entirety.

I. BACKGROUND

A. Factual and Procedural Background

Independence Institute is a nonprofit corporation that "conducts research and educates the public on various aspects of public policy—including taxation, education policy, health care, and justice policy." Compl. ¶ 2. Independence Institute plans to produce a radio advertisement that will ask the current United States senators from Colorado, Mark Udall and Michael Bennet, to support the Justice Safety Valve Act.[2] *Id*. ¶¶ 3, 31, 32. Senator Udall is up for reelection on

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and Public Citizen, Inc. in Support of Def. and in Opp'n to Pl.'s Mot. for Prelim. Inj., ECF No. [21] ("*Amici* Br."); and Pl.'s Reply, ECF No. [22] ("Pl.'s Reply").

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f). Moreover, holding a hearing would not be consistent with the Court's commitment to expediting these proceedings in light of the timing of the upcoming elections.

[2] The verbatim text of the proposed radio 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.
>
> 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.

November 4, 2014. *Id.* ¶¶ 31, 41. Plaintiff agrees that its planned advertisement meets BCRA's definition of an "electioneering communication" and that, therefore, the statute requires it to disclose contributors. *Id.* ¶ 4; Pl.'s Mot. at 4. However, Plaintiff claims that the disclosure requirement is overbroad as applied to the radio advertisement that it plans to run. Compl. ¶¶ 114, 129. In particular, Plaintiff argues that the disclosure requirements of BCRA section 201 are overbroad as applied because the advertisement is genuine issue advocacy rather than express advocacy or the functional equivalent thereof. *See* Pl.'s Mot. at 17, 22-23. Plaintiff also emphasizes that the Independence Institute is organized pursuant to section 501(c)(3) of the Internal Revenue Code and that the content of the advertisement is not pejorative towards Senator Udall. *Id*. at 18, 23. As discussed below, Plaintiff's arguments are unavailing.

Plaintiff brought this action seeking declaratory and injunctive relief with respect to the advertisement it plans to run. Plaintiff seeks to have the merits adjudicated by a three-judge court. Plaintiff also filed a motion for preliminary injunction because the 60-day window before the November election, during which BCRA's requirements apply, had already begun. In the interest of expediting the resolution of the case, the parties agreed to consolidate briefing on the preliminary injunction with briefing on the merits, relying initially on Plaintiff's merits arguments with respect to the preliminary injunction. Joint Stip. at 1-2. The parties further

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> 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.

Compl. ¶ 35.

agreed, "in light of Plaintiff Independence Institute's agreement not to supplement its Motion for Preliminary Injunction (Docket No. 5) with supplemental substantive briefing or evidence, for the Court to consider Plaintiff's Motion for Preliminary Injunction as a Motion for Summary Judgment and to follow the briefing schedule" previously set by the Court with respect to the preliminary injunction. *Id*. The parties also stipulated that "this case presents an as-applied challenge to 52 U.S.C. § 30104(f)(1)-(2) based upon the content of the Independence Institute's intended communication, and not the possibility that its donors will be subject to threats, harassment, or reprisals." *Id*. at 1.

B. Legal Background

1. Statutory Framework

The Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, amended the Federal Election Campaign Act of 1971 ("FECA"), as well as other statutory provisions. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 114 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 310. In addition to other requirements, BCRA mandates certain disclosures pertaining to "electioneering communications." *See Citizens United*, 558 U.S. at 366. "An electioneering communication is defined as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election."[3] *Id.* at 321 (quoting 2 U.S.C. § 434(f)(3)(A), now codified at 52 U.S.C. § 30104(f)(3)(A)).

Pursuant to BCRA section 201, "any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the

[3] The definition is further specified by regulation. *See Citizens United*, 558 U.S. at 321. Plaintiff does not dispute that the advertisement at issue satisfies the statutory and regulatory criteria. *See* Pl.'s Mot. at 3-4.

FEC."[4] *Id.* at 366. "That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors." *Id.* The reporting of contributions is limited to "contributors who contributed an aggregate amount of $1,000 or more."[5] 52 U.S.C. § 30104(f)(2)(E), (F). In *McConnell*, the Supreme Court upheld section 201's disclosure provisions against a facial challenge. *See* 540 U.S. at 197. But the Supreme Court did not "foreclose possible future challenges to particular applications of that requirement." *Id*. at 199. In *Citizens United*, in an as-applied challenge, the Supreme Court upheld the section 201 disclosure requirement "as applied to the ads for the movie [*Hillary*] and to the movie itself." 558 U.S. at 367.

In addition, BCRA section 203 originally prohibited corporations and unions from spending general treasury funds to finance electioneering communications, as defined in the Act.[6] *McConnell*, 540 U.S. at 204. After having upheld this provision against a facial challenge in *McConnell*, *see id*. at 209, the Supreme Court invalidated the expenditure prohibition as related to corporations and unions in *Citizens United*, *see* 558 U.S. at 318-19. Even though section 203 is not at issue in this litigation, it provides the context for the case law that resolves this dispute.

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[4] For the purposes of BCRA section 201, "persons" includes corporations and labor unions, including nonprofit corporations like Plaintiff. *See McConnell*, 540 U.S. at 194-95.

[5] For funds paid out of a segregated bank account, only contributors to that account must be disclosed. 52 U.S.C. § 30104(f)(2)(E). For other funds, disclosures are required only for "contributors who contributed . . . to the person making the disbursement." *Id*. § 30104(f)(2)(F). Although the parties dispute the ramifications of this distinction, the Court need not address it further because it is immaterial to the resolution of this action.

[6] "Section 203 of BCRA amends FECA § 316(b)(2) to extend this rule [prohibiting the spending of general treasury funds], which previously applied only to express advocacy, to all 'electioneering communications.' " *McConnell*, 540 U.S. at 204.

2. Three-Judge Court

Pursuant to BCRA section 403(a)(3), "any action [] brought for declaratory or injunctive relief to challenge the constitutionality of any provision of [the] Act . . . shall be heard by a 3-judge court," in accordance with 28 U.S.C. § 2284. 52 U.S.C. 30110 note. The statute leaves the district judge with "the vexing initial determination of whether an action is required to be heard and determined by a three-judge court." *Feinberg v. Federal Deposit Ins. Corp*., 522 F.2d 1335, 1338 (D.C. Cir. 1975) (construing 28 U.S.C. § 2284). "A single district judge need not request that a three-judge court be convened if a case raises no substantial claim or justiciable controversy. . . . Constitutional claims may be regarded as insubstantial if they are 'obviously without merit,' or if their 'unsoundness so clearly results from the previous decisions of (the Supreme Court) as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " *Id.* at 1338-39 (citations omitted). *See Schonberg v. Fed. Election Comm'n*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011) (applying the D.C. Circuit's interpretation of section 2284 in *Feinberg* to BCRA § 403(a)). The Court concludes that Plaintiff's challenge is "clearly foreclosed by Supreme Court precedent." *Rufer v. Fed. Election Comm'n*, --- F. Supp. 2d ---, Nos. 14-cv-837, 14-cv-853, 2014 WL 4076053, at * 1 (D.D.C. Aug. 19, 2014). Accordingly, based on the reasoning and conclusions stated in this opinion, the Court denies the application for a three-judge court and resolves the merits of this dispute today.

II. DISCUSSION

This dispute can be distilled to the application of the Supreme Court's clear instructions in *Citizens United*: in no uncertain terms, the Supreme Court rejected the attempt to limit BCRA's disclosure requirements to express advocacy and its functional equivalent. *See* 558 U.S. at 369. Plaintiff in this case seeks the same relief that has already been foreclosed by *Citizens United*. Plaintiff's efforts to distinguish this challenge from that in *Citizens United* are futile.

Moreover, it is clear that the additional precedent that Plaintiff attempts to enlist provides no more assistance to it than does *Citizens United*. Accordingly, Plaintiff's arguments lack merit.

A. *Citizens United*

In *Citizens United*, in a section that eight justices joined, the Supreme Court concluded that there was no constitutional defect in applying the disclosure requirements of BCRA section 201 to specific electioneering communications that were neither express advocacy nor the functional equivalent thereof.[7] *Citizens United*, 558 U.S. at 367-69. The Supreme Court used clear language without any explicit or implicit constraints:

> As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in [*Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007),] limited 2 U.S.C. § 441b's restrictions on *independent expenditures* to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's *disclosure requirements*. We reject this contention.

Id. at 368-69 (citation omitted) (emphasis added). Despite this unambiguous language, Plaintiff attempts to argue that *Citizens United* does not determine the outcome of this case. Plaintiff first argues that this language was dicta and therefore not binding on this Court. Plaintiff next argues that, even if this language is binding, it does not govern the outcome of this challenge because *Citizens United* was an as-applied challenge addressing materially different facts. Specifically, Plaintiff offers what amounts to three distinctions: (i) that it is a 501(c)(3) organization while Citizens United is a 501(c)(4) organization; (ii) that its advertisement is not the functional equivalent of express advocacy while the ads in *Citizens United*, in Plaintiff's estimation, were

[7] " '[A] court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.' " *Citizens United*, 558 U.S. at 324-325 (*quoting Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 559, 469-70 (2007)) (alterations in original).

the equivalent of express advocacy; and (iii) that its advertisement has no positive or negative references to a candidate while the advertisement in *Citizens United* referred to a candidate pejoratively. None of these distinctions have the effect Plaintiff desires, and *Citizens United* still governs this matter. The Court addresses these arguments in turn.

1. *Citizens United* as Binding Precedent

With respect to the argument that *Citizens United*'s discussion of disclosures is not binding, Plaintiff relies heavily on one opinion from the Seventh Circuit Court of Appeals, *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), which states that *Citizen United*'s discussion of disclosures was dicta.[8] *See* Pl. Mot. at 15; Pl. 3-Judge Reply at 2-3 (citing *Barland*, 751 F.3d at 836). In *Barland*, the Seventh Circuit panel notes, referring to the Supreme Court, that "the Court declined to apply the express-advocacy limitation to the federal disclosure and disclaimer requirements for electioneering communications" and concludes that "[t]his was dicta." 751 F.3d at 836.

But in the same opinion, the Seventh Circuit panel ultimately concludes that the discussion of disclosures in *Citizens United* is binding with respect to BCRA section 201. Immediately after the statement that the relevant portion of *Citizens United* was dicta, the court in *Barland* states that "the Supreme Court's dicta must be respected, and on the strength of this part of *Citizens United*, we said in [*Center for Individual Freedom v.*] *Madigan* that the 'distinction between express advocacy and issue discussion does not apply in the disclosure context.' " *Id*. (quoting *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012)). Notwithstanding its comment regarding dicta, the Seventh Circuit panel agrees that, as a

[8] Plaintiff appears to have abandoned this argument in its Reply, focusing instead on showing that *Citizens United* is "distinct" from the facts of this case. Pl.'s Reply at 9; *see id*. at 9-17. Nonetheless, this opinion addresses both arguments for the sake of completeness.

result of the Supreme Court's discussion of disclosures in *Citizens United*, the express-advocacy limitation does not apply to the disclosure system established by BCRA.[9] *See id*.

Moreover, *Barland*'s categorization of the discussion of disclosures in *Citizens United* as dicta is based upon a misunderstanding. That categorization relies on the Seventh Circuit panel's finding that the "[Supreme] Court had already concluded that *Hillary* and the *ads* promoting it were the equivalent of express advocacy." *Id*. (emphasis added). But this statement is not supported by the Supreme Court's own language as it relates to the *Hillary* advertisements. Although the *Citizens United* Court had determined that *Hillary: The Movie* was "equivalent to express advocacy," *Citizens United*, 558 U.S. at 325, the Court had made no such determination with respect to the *Hillary* advertisements. Plaintiff does not even attempt to indicate where in *Citizens United* the Supreme Court held that the advertisements were the functional equivalent of

[9] After opining that *Citizen United*'s discussion of disclosures was dicta, the Seventh Circuit panel contrasted the disclosure regime in BCRA section 201 with the state disclosure scheme that it was considering in *Barland*:

> This aspect of *Citizens United* must be understood in proper context. The Court's language relaxing the express-advocacy limitation applies only to the specifics of the disclosure requirement at issue there. The Court was addressing the onetime, event-driven disclosure rule for federal electioneering communications, a far more modest disclosure requirement than the comprehensive, continuous reporting regime imposed on federal PACs, or even the less burdensome disclosure rule for independent expenditures. When the Court said that 'disclosure is a less restrictive alternative to more comprehensive regulations of speech,' *Citizens United*, 558 U.S. at 369, it was talking about the disclosure requirement for electioneering communications. In that specific context, the Court declined to apply the express-advocacy limiting principle. But nothing in *Citizens United* suggests that the Court was tossing out the express-advocacy limitation for all disclosure systems, no matter how burdensome.

Barland, 751 F.3d at 836 (citations omitted). Accordingly, the Seventh Circuit agrees that the "express-advocacy limitation" does not apply to the disclosure provisions challenged in this action.

express advocacy.[10] *See* Pl.'s Reply at 10. Given that the Supreme Court did not determine that the *Hillary* advertisements were the equivalent of express advocacy, its refusal to import the express advocacy limitation to the disclosure context was not dicta but a holding—a holding that ultimately encompasses the facts in this case.

Indeed, numerous other Circuit courts beyond the Seventh Circuit have determined that *Citizens United*'s language forecloses the suggestion that disclosure requirements must be limited to express advocacy and its functional equivalent. *See, e.g., Nat'l 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.); *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) ("*Citizens United* removed any lingering uncertainty concerning the reach of constitutional limitations in this context. In *Citizens United*, the Supreme Court expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy,' because disclosure is a less restrictive strategy for deterring corruption and informing the electorate." (quoting *Citizens United*, 558 U.S. at 369) (citation and footnotes omitted)); *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 requirements cannot constitutionally reach issue advocacy is unsupportable.") (emphasis added). By contrast, Plaintiff can point to no Court of Appeals decision that has

[10] Even in the face of the assertions by Defendant and by *amici* that the Supreme Court opinion does not support such a conclusion, Plaintiff simply relies on the fact that the Seventh Circuit panel had erroneously conflated the movie and the advertisements in its analysis. *See* Pl.'s Reply at 10 (quoting *Barland*, 751 F.3d at 823). This Court cannot rely on a decision in the Seventh Circuit when the Supreme Court's own language contradicts the conclusion.

reached a contrary conclusion, including the Seventh Circuit.[11] Therefore, the Supreme Court's conclusion in *Citizens United* with respect to disclosures under BCRA section 201 is binding precedent.

2. Tax Status Is Immaterial

Independence Institute next argues that its status as a section 501(c)(3) organization under the Internal Revenue Code, whereas Citizens United is a section 501(c)(4) organization, requires a different result from *Citizens United*. But this is a distinction without a difference. Most importantly, nothing in *Citizens United*'s discussion of disclosures of contributions cabins the Supreme Court's holding to certain types of organizations. *See Citizens United* 558 U.S. at 367-70. Insofar as Plaintiff argues that the election disclosure requirements ought to be different for section 501(c)(3) organizations and section 501(c)(4) organizations because the tax code differentiates among them with respect to disclosures, this argument has no basis. Neither type of nonprofit organization is obligated by federal tax law to disclose donor information. *See* 26 U.S.C. § 6104(d)(3)(A); *Amici* Br. at 22-23.

Plaintiff also points to the Supreme Court's statement that "Citizens United has been disclosing its donors for years" while the Independence Institute has not. Pl.'s Mot. at 18. However, the purpose of the Supreme Court's statement was only to note that Citizens United had "identified no instance of harassment or retaliation" in its years of disclosing donors, thus defeating the argument that it could not be mandated to disclose because of "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names

[11] Plaintiff attempts to show that the cases from other circuits on which Defendant relies are distinguishable from the facts in this as-applied challenge. *See* Pl.'s Reply at 13-15. But, putting aside the merits of Plaintiff's attempt to distinguish these cases, Plaintiff does not address the fact that these opinions treat the Supreme Court's clear conclusion with respect to disclosures as binding.

were disclosed." *Citizens United*, 558 U.S. at 370 (citing *McConnell*, 540 U.S. at 198). However, such a probability is not an issue in this action because the parties have stipulated to that effect. Joint Stip. at 1. Accordingly, the Supreme Court's statement that Citizens United had been disclosing donors for years does not suggest a different outcome for the Independence Institute.

Ultimately, Plaintiff's effort to draw a line between different types of nonprofit organizations is not supported by any citation to authority that such a distinction would be required by the First Amendment. There is no reason to conclude that *Citizens United*'s clear refusal to import the express advocacy-issue advocacy distinction into the disclosure context should be limited to advocacy by certain types of nonprofit organizations.[12]

3. Categorization of Advertisements as Express Advocacy or Issue Advocacy Is Immaterial

Plaintiff next argues that "*Citizens United* is distinct because it contemplated advertisements which could be fairly characterized as the functional equivalent of express advocacy." Pl.'s Reply at 9. Even aside from the merits of this characterization of the advertisement in *Citizens United*, this argument cannot prevail. When considering Citizens United's advertisements, the Supreme Court refused to draw a line between express advocacy and issue advocacy in the BCRA disclosure context. *Citizens United*, 558 U.S. at 368-69. In plain language, the Supreme Court stated that whether an electioneering communication is

[12] Plaintiff is correct that the Federal Election Commission had promulgated a regulation in 2003 that exempted 501(c)(3) organizations from the disclosure requirements in section 201. *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, 38, 125 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005). Plaintiff is also correct that this regulation failed review pursuant to the Administrative Procedure Act because the agency "failed to conduct a 'reasoned analysis' " as required. *Id*. at 127. But the Court's conclusion in *Shays* does not support the assumption that *Citizens United*'s holding was implicitly limited to certain types of organizations. *See id*. at 128 (finding fault with the FEC's failure to consider potential problems that might emerge by effectively delegating the enforcement of election law to the IRS). *See also Amici* Br. at 11-13.

express advocacy or issue advocacy does not determine whether BCRA's disclosure requirement can be lawfully applied. Accordingly, even if it were clear that the advertisements in *Citizens United* were express advocacy and the one in this case were issue advocacy, the Supreme Court's holding in *Citizens United* would nonetheless resolve this dispute.[13]

In an attempt to counter Defendant's argument that the advertisements at issue in *Citizens United* were not, in fact, express advocacy, Plaintiff adopts another approach. Plaintiff looks to *Citizens United*'s reference to the *Hillary* advertisements as advocating a commercial transaction, in other words watching *Hillary: The Movie*. Pl.'s Reply at 11-12. Plaintiff argues that, if anything, this reference suggests that the *Hillary* advertisements deserved the reduced First Amendment protections afforded commercial speech. *See id*. This reference cannot be excised from its context. Responding to an argument that "an informational interest" did not apply to the *Hillary* advertisements, the Supreme Court concluded: "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests." *Citizens United*, 558 U.S. at 369. In other words, even though the advertisement encourages someone to watch the movie rather than vote for a candidate, the public interest still supports disclosure of "who is speaking about a candidate." In no sense does this language imply that the Supreme Court determined that this speech deserved only the lesser

[13] Moreover, the Court doubts that the advertisements in *Citizens United* could satisfy the strict standard for being considered the functional equivalent of express advocacy. *See Citizens United*, 558 U.S. at 324-25 ("[A] court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007)) (alterations in original)).

First Amendment protections of commercial speech, "that is, expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). In any event, with respect to Plaintiff's attempt to distinguish its advertisement from that of Citizens United, the reference to a commercial transaction does not alter the Supreme Court's clear conclusion: whether speech is express advocacy or issue advocacy does not affect the lawful applicability of BCRA's disclosure requirements.

4. "Pejorative" Tone of the *Hillary* Advertisements Is Immaterial

Plaintiff next argues that *Citizens United*'s clear conclusion with respect to BCRA's disclosure requirements ought to be limited to advertisements like the ones before the Supreme Court in that case, which spoke "pejoratively" about a candidate, rather than "genuine issue speech," as Plaintiff characterizes its proposed ad. *See* Pl.'s Reply at 14, 15-16. The Court does not disagree that the *Hillary* advertisements could be considered critical of then-candidate Hillary Clinton, while the advertisement in this action, *on its face*, says nothing positive or negative about a candidate for Federal office. But this is a distinction without a difference. Notwithstanding *Citizen United*'s two references to the advertisements as pejorative, the language in *Citizens United* does not suggest that the pejorative nature of the advertisements in any way was important to the conclusion with respect to disclosures. The disclosures holding is neither explicitly nor implicitly limited to certain types of advertisements. *See Citizens United*, 558 U.S. at 368-69 ("Citizens United seeks to import a similar distinction into the BCRA's

disclosure requirements. We reject this contention."). Examining the two references in context confirms that the disclosure discussion is not limited by those references.[14]

In introducing the factual background of the case, the Supreme Court, within the first pages of the opinion, describes the advertisements: "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 Website address." *Id.* at 320. This reference is separated from the discussion of the disclosure requirements by approximately 47 pages of the United States Reports, and nothing in either portion of the opinion suggests that the former reference is imported into the latter discussion. Moreover, the parenthetical phrasing of that reference suggests an aside rather than a core element of the Supreme Court's legal analysis.

When the Supreme Court turns to its analysis of the disclosure and disclaimer requirements, it describes the advertisements factually once again: "The ads fall within BCRA's definition of an 'electioneering communication': They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy." *Id*. at 368. In fact, the quoted language pertains to the discussion of BCRA section 311's disclaimer requirements, not section 201's disclosure requirements. Even though the discussions of section 311 and section 201 are located in the very same section of the opinion, the text of the opinion does not even hint that the Supreme Court meant to limit the disclosures holding by the adjective "pejorative."

Moreover, Plaintiff's claim that "Justice Kennedy use[d] the word 'pejorative' in every instance in which the Court discusses the ads for *Hillary: The Movie*," Pl.'s Reply at 15, does not

[14] Notwithstanding Plaintiff's assertion to the contrary, *see* Pl.'s Mot. at 16, these two references also do not suggest that the *Citizens United* Court considered the *Hillary* ads to be the functional equivalent of express advocacy.

withstand scrutiny. Variations on the word "advertisement" show up in Justice Anthony Kennedy's opinion well over twenty times. Only the two times discussed in this section does he use the word pejorative. In sum, while the *Hillary* advertisements may very well have been pejorative in a way that Plaintiff's advertisement is not, there is nothing in *Citizens United* limiting the disclosures holding to electioneering communications that are pejorative (or, alternatively, complimentary) on their face.

B. Alternative precedent

Arguing that *Citizens United* does not determine the outcome of this case, Plaintiff relies on alternative Supreme Court precedent to assert that the application of BCRA section 201's disclosure requirements to its advertisement is unconstitutional. In particular, Plaintiff cites to *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449 (2007), both decided prior to *Citizens United*, to argue that section 201's disclosure requirements may be applied constitutionally only to communications that contain express advocacy, or its functional equivalent. In fact, those cases do not indicate that result. Because *Citizens United* does foreclose Plaintiff's claim, the other cases Plaintiff cites are at best background. Even so, examining them reinforces the conclusion that they do not suggest a different outcome from *Citizens United*.

1. *Buckley v. Valeo*

Plaintiff primarily relies on *Buckley v. Valeo*, 424 U.S. 1 (1976), which resolved a facial challenge to the Federal Election Campaign Act ("FECA"), to argue that, in the absence of *Citizens United*, *Buckley*'s distinction between express advocacy and issue advocacy resurfaces in the context of the disclosure requirements of BCRA section 201. *See* Pl.'s Mot. at 10. However, that dichotomy emerged only as part of the *Buckley* Court's analysis of a particular

statute, FECA (BCRA's predecessor), that is distinguishable from BCRA. Furthermore, the state interests in favor of disclosure that were highlighted in *Buckley*, in fact, support the disclosure requirements challenged in this case.

In upholding BCRA's disclosure requirements against a facial challenge,[15] *McConnell* explains why Plaintiff's reliance on *Buckley* is unavailing. *See* 540 U.S. at 196. *First*, contrary to Plaintiff's contention, *Buckley* actually supports BCRA's disclosure requirements. The *McConnell* Court emphasized that

> the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the *entire range* of 'electioneering communications.' "

Id. (emphasis added). This language prevents Plaintiff from wielding *Buckley* as a sword against BCRA's disclosure requirements. *McConnell*'s status as a facial challenge is not to the contrary: the Supreme Court's understanding of the relevant case law, on which it relied in upholding the statute against that facial challenge, is unambiguous and directly contradicts Plaintiff's argument.

Second, *McConnell* explains that *Buckley* did not introduce a division between express advocacy and issue advocacy as a constitutional matter, as Plaintiff suggests:

> [A] plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we

[15] *McConnell* forthrightly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." *Id*. at 194. The Court need not determine the effective scope of this language—given that *McConnell* rejected a facial challenge but did "not foreclose possible future challenges to particular applications of that requirement"—because *Citizens United* came to the same conclusion in an as-applied challenge that encompasses the action before the Court now. *McConnell*, 540 U.S. at 199.

> nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

Id. at 191-92. *Buckley*'s division between express advocacy and issue advocacy emerged from the Supreme Court's reading of a particular statute—one notably different from BCRA—in order to avoid constitutional defects with the statute. *McConnell* further explains how the *Buckley* Court derived the express advocacy test and applied it to the FECA disclosures requirements, demonstrating that the Supreme Court did not fashion the test as a general constitutional rule:

> In *Buckley*, we began by examining then–18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV), which restricted expenditures " 'relative to a clearly identified candidate,' " and we found that the phrase " 'relative to' " was impermissibly vague. We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." We provided examples of words of express advocacy, such as " 'vote for,' 'elect,' 'support,' . . . 'defeat,' [and] 'reject,' ", and those examples eventually gave rise to what is now known as the "magic words" requirement.
>
> We then considered FECA's disclosure provisions, . . . , which defined " 'expenditur[e]' " to include the use of money or other assets " 'for the purpose of . . . influencing' " a federal election. Finding that the "ambiguity of this phrase" posed "constitutional problems," we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."

McConnell, 540 U.S. at 190-91 (quoting *Buckley*, 424 U.S. at 40-44, 77-78, 80) (citations omitted) (alterations in original). The line *Buckley* drew emerged from the particular statute the Supreme Court was considering—a statute that suffered from serious vagueness problems, unlike BCRA—not from a general constitutional command.

Plaintiff cites the caveat in *McConnell*'s conclusion that the express advocacy line was the product of statutory construction, *see id*. at 192 ("[W]e nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line"), to

argue that this is such a case that would require the statutory construction "to toe the same express advocacy line." Pl.'s Reply at 7-8. While Plaintiff does not claim that BCRA presents the vagueness problems addressed with respect to FECA, *see id*. at 6, Plaintiff asserts that BCRA's disclosure requirements are overbroad, arguing that this opens the door to importing *Buckley*'s statutory construction to the section 201 disclosure requirements, *id.* at 7. However, implicit in the caveat to which Plaintiff cites is that BCRA is not such a vague or overbroad statute. *See McConnell*, 551 U.S. at 191-92. Indeed, *McConnell* resolved the overbreadth question with regard to BCRA section 201 over ten years ago. *See* 540 U.S. at 190-94; *cf. WRTL II*, 551 U.S. at 476 n.8 ("[I]n deciding this as-applied challenge, we have no occasion to revisit *McConnell*'s conclusion that the statute is not facially overbroad.") The caveat on which Plaintiff relies falls away, leaving *Buckley*'s statutory construction inapplicable to BCRA.[16] Accordingly, Plaintiff cannot rely on *Buckley* to argue that the Constitution requires limiting disclosures under BCRA section 201 to express advocacy and its functional equivalent.

In addition, Plaintiff cites *Buckley* to show that disclosure requirements are subjected to exacting scrutiny. *See* Pl.'s Reply at 2. This proposition is unremarkable, and, indeed, this is the standard that *Citizens United* applied. *See Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66) ("The Court has subjected these requirements to 'exacting scrutiny,' which

[16] Insofar as Plaintiff is trying to assert that the disclosure requirements are "overbroad" as applied to its advertisement, Compl. ¶ 129, as opposed to merely unconstitutional in these particular circumstances, Plaintiff is conflating as-applied challenges and facial challenges. Overbreadth, as *McConnell* uses it, is fundamentally a facial claim. *See New York v. Ferber*, 458 U.S. 747, 769 (1982) ("The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted."); *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) ("[W]e have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' "); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.2.2. (4th ed. 2011).

requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."); *see also id*. at 369. Accordingly, applying this unremarkable proposition yields the same outcome as in *Citizens United*: BCRA section 201's disclosure requirements satisfy the requirements of exacting scrutiny.

In sum, *Buckley* does not support the result that Plaintiff seeks. First, the state interests discussed by *Buckley* supporting disclosures in the context of FECA also support disclosures in the context of BCRA. Second, *Buckley*'s introduction of the express advocacy test was limited to the predecessor statute before the Supreme Court at the time. And, third, while *Buckley* does stand for the requirement that exacting scrutiny must be applied to disclosure requirements, *Citizens United* applied exactly that standard—with a result that contradicts what Plaintiff is seeking in this case.[17]

2. *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL II*)

Four years after *McConnell*, the Supreme Court considered an as-applied challenge to BCRA section 203, which barred corporations from expenditures on electioneering communications, in *WRTL II*. 551 U.S. at 455-56. The Supreme Court concluded that "the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy," and concluded that the expenditure bar in BCRA section 203 was unconstitutional as applied to the advertisements at issue in that action. *Id*. at 457. While

[17] Plaintiff also relies on the D.C. Circuit *en banc* court's analysis in *Buckley*, specifically its holding regarding a provision that was not appealed to the Supreme Court. *See* Pl.'s Mot. at 18-20 (citing *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). In particular, Plaintiff cites to the D.C. Circuit's discussion of a provision of FECA requiring certain individuals to file reports as if they were political committees. *See id*. at 18-19 (citing *Buckley*, 519 F.2d at 869-70). That provision bears no resemblance to the disclosure requirements in BCRA section 201 and sheds no light on the Court's consideration of them. Moreover, insofar as the *en banc* opinion is at odds with subsequent Supreme Court precedent, including *Citizens United*, the *en banc* opinion is superseded by that later precedent.

Plaintiff cites *WRTL II* "as strong authority for the continued vitality of *Buckley*'s separation of issue speech from express advocacy," Pl.'s Mot. at 14, *WRTL II* does not suggest that distinction is relevant with respect to disclosures—regardless of the asserted vitality of that distinction with respect to expenditures.

Plaintiff's attempt to apply the reasoning of *WRTL II* to *disclosure requirements* fails. *WRTL II* was an as-applied challenge to the regulation of expenditures pursuant to BCRA section 203 while only the disclosure requirements in section 201 are challenged in this action. Plaintiff acknowledges as much. *See id*.; Pl.'s Reply at 5. Indeed, the Plaintiff's argument with respect to *WRTL II* is precisely the argument rejected in *Citizens United*. *See Citizens United*, 558 U.S. at 368-69 ("The principal opinion in *WRTL* [*II*] limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention."). As explained above, *Citizens United* is binding, and it forecloses the application of the restrictions applied in *WRTL II* to this case. In sum, *WRTL II* provides no authority to support importing the express advocacy (or functional equivalent) test to the disclosure requirements of BCRA section 201.

IV. CONCLUSION

Plaintiff's claim is squarely foreclosed by *Citizens United*, in which the Supreme Court refused to import the distinction between express advocacy and its functional equivalent and issue advocacy to the disclosure requirements of BCRA section 201. In all relevant ways, the advertisement that Independence Institutes proposes to run is similar to the *Hillary* advertisements considered by the Supreme Court in *Citizens United*. That Independence Institute is subject to section 501(c)(3) of the tax code, while Citizens United is subject to

section 501(c)(4), does not provide a basis for a different result. Neither does the fact that the *Hillary* advertisements were arguably pejorative while Plaintiff's advertisement is, on its face, neither complimentary nor pejorative with respect to any candidate. Just as Citizens United's as-applied challenge to the disclosure requirements of section 201 failed, so too does Plaintiff's as-applied challenge to those same disclosure requirements. Moreover, the other precedent that Plaintiff seeks to enlist in its cause is either inapposite or, upon examination, actually supportive of the application of the disclosure requirements of BCRA in these circumstances.

For the foregoing reasons, Plaintiff's [3] Application for a Three Judge Court is DENIED. Pursuant to the parties' agreement to consolidate briefing on the merits with the preliminary injunction briefing, the Court enters JUDGMENT in favor of Defendant.[18] Therefore, Plaintiff's [5] Motion for Preliminary Injunction is MOOT. This action is DISMISSED in its entirety. An appropriate Order accompanies this Memorandum Opinion.

Dated: October 6, 2014

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

[18] Even without either a formal cross-motion for summary judgment by Defendant, the Court can award judgment to Defendant. *See Henok v. Chase Home Fin., LLC*, 922 F. Supp. 2d 110, 117 (D.D.C. 2013) *aff'd in part sub nom. Henok v. JPMorgan Chase Bank, N.A.*, 13-7036, 2013 WL 4711675 (D.C. Cir. Aug. 2, 2013); 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2720 (3d ed. 1998) ("The grant of judgment for the nonmoving party clearly is proper if both sides agree that there are no material fact issues and join in the request that the case be decided, for the moving or the nonmoving side, on the basis of a motion for judgment made by only one of them.); Fed. R. Civ. P. 56(f) ("After giving notice and a reasonable time to respond, the court may (1) grant summary judgment for a nonmovant"). The parties agreed that the Court would adjudicate this case on the merits without the submission of additional evidence, and there are no disputes as to material facts. Joint Stip. at 1-2. In addition, even without a formal motion, Defendant has requested that the Court award judgment to it. *See* Def.'s Opp'n at 2.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE,	)	
Appellant,	)	
v.	)	No. 14-5249
FEDERAL ELECTION COMMISSION,	)	EXHIBIT 3
Appellee.	)	

EXHIBIT 3

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,** **v.** **FEDERAL ELECTION COMMISSION**, 999 E Street, N.W. Washington, D.C. 20436 **Defendant.**	Civil Action No. _____ **Three-Judge Court Requested**

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 IRC'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 "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 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 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 nonprofit 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 IRC § 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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**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.

Jon Caldara

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

Marylla MacFarlane
Notary Public

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

My Commission Expires: 7-11-2016

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:

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