Case No. 14-5249

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

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	)
Appellant,	)
v.	)
FEDERAL ELECTION COMMISSION,	)
Appellee.	)

Appellant Independence Institute's Reply in Support of Its Motion for Summary Reversal

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INTRODUCTION

Unless the Independence Institute's claim has been necessarily foreclosed by a decision of the Supreme Court, this case must be heard by a three-judge district court. 52 U.S.C. § 30110 note. The Parties disagree on two substantive questions. First, when the Supreme Court reviewed commercial advertisements for a feature film designed to defeat Hillary Clinton's presidential candidacy, did the Court also address advertisements not before it that simply take a position on specific legislation? Second, what is the legal effect of a recent change in campaign finance law due to *Van Hollen v. FEC*, 2014 U.S. Dist. LEXIS 164833 (D.D.C. Nov. 25, 2014)? That case substantially broadened the scope of publicized donor disclosure beyond that reviewed by the Supreme Court in *Citizens United v. FEC*, 558 U.S. 310 (2010) and the district court below.

If the answer to the first question is "no," or the Institute is correct that *Van Hollen* changes the legal landscape so as to present legal questions that have not been heard in the Supreme Court, summary reversal is appropriate.

i. *Citizens United* does not foreclose the Institute's claim.

Under the statute challenged here, a non-political, non-profit organization may be required to publicly disclose all of its significant donors as a condition of asking citizens to contact their representatives concerning a pending piece of legislation. The FEC does not dispute that this is a correct description of the

statute. Nor does the Commission have a substantive response to the fact that *Buckley v. Valeo*—as heard both in the Supreme Court and, *en banc*, by this Court—puts the constitutionality of such statutory schemes in serious doubt. Appellant Combined Mot. for Summ. Rev. and Response to FEC Mot. for Summ. Affirmance at 14-22, 29 ("II Cross-Mot."); *Buckley v. Valeo*, 519 F.2d 821, 869-870, 878 (D.C. Cir. 1975) (*en banc*) (unconstitutional to require generalized donor disclosure when an organization "broadcast[] to the public any material referring to a 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))."

Nevertheless, the Commission insists that the Institute's claim is not merely misguided or wrong, but that it is "insubstantial" and "wholly foreclose[d]." FEC Reply and Opp. at 3, 5 ("FEC Reply"). Its only support for this position is a truncated portion of a single decision—*Citizens United*—excised from the case as a whole and from the body of jurisprudence that surrounds and illuminates it. FEC Reply at 3-4, 10, 18 (The Institute "seeks to relitigate the precise constitutional question that the Supreme Court answered…in *Citizens United v. FEC*"; "*Citizens United* makes that conclusion inescapable"; "*Citizens United*…is squarely on all fours with this case").

The Commission's misreading of *Citizens United* rests on three elementary errors.

The first, and most basic, is a misunderstanding of exacting scrutiny, which has two components: a "sufficiently important" governmental interest, and a "'substantial relation' between the disclosure requirement" and that interest. *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley v. Valeo*, 424 U.S.1, 64, 66 (1976)). The Commission has consistently stated that "the EC disclosure requirements survive exacting scrutiny based on 'the informational interest alone.'" FEC Reply at 11 (citing *Citizens United*, 558 U.S. at 369). But this point only goes to the first prong of exacting scrutiny. The question is what, precisely, the "informational interest" includes, and whether the disclosure requirements imposed by BCRA—especially after *Van Hollen*—bear a substantial relation to that properly-constrained interest.

The FEC's second, and related, error is its consistent failure to grapple with the Institute's argument: that *Buckley* found disclosure requirements appropriately tailored *only* when limited to organizations engaged in "unambiguously campaign related" speech. *Buckley*, 424 U.S. at 81. Only this type of disclosure serves the informational interest by "help[ing] voters…define more of the candidates' constituencies." *Id.*; II Cross-Mot. at 16-17.

The district court's opinion does not so much as reference the "unambiguously campaign related" standard. For its part, the FEC finally grapples with this argument in its opposition brief by claiming that, because the *Citizens United* Court declined to limit BCRA's disclosure requirements to "the functional equivalent of express advocacy," that the Court, in essence, overruled *Buckley*'s limitation of disclosure to speech that is "unambiguously campaign related." FEC Reply at 12. This is an odd reading, if only because the *Citizens United* Court failed to even mention the *Buckley* "unambiguously campaign related" standard.

The Commission's view makes little sense on its face: express advocacy (and its equivalents) are but a small subset of speech that is related to campaigns. To take only two examples, nonpartisan discussions of voting trends, or advertisements intended to generally raise voter turnout, are related to campaigns, but do not advocate for particular candidates. In essence, the FEC's position is that because the Court has found that all apples (express advocacy and its equivalents) are fruit (unambiguously campaign related), therefore all produce (political speech that mentions a candidate) is fruit. FEC Reply at 12 (the Institute's contention that "'*all* of the communications at issue in *Citizens United* were unambiguously campaign related' – is just a reformulation" of the claim that the ads in *Citizens United* were "the functional equivalent of express advocacy.") (emphasis in original). But *Buckley* was very clear on this point. To press the analogy:

disclosure can only be required of *fruit* sellers, and *not* all produce is fruit. 424 U.S. at 80 ("To insure that the reach of [disclosure] is not impermissibly broad…[it must be] directed precisely to spending that is unambiguously related to the campaign of a particular federal candidate"). The *Citizens United* Court did not rule, contrary to *Buckley*, that any speech that merely names a candidate is subject to compulsory disclosure.

The Commission's third error is to conflate the advertisements at issue in *Citizens United* with those at issue here. That topic has already been adequately explored in the Institute's opening brief on appeal. [1] II Cross-Mot. at 6-7, 7 n. 4 (comparing text of ads for *Hillary* with the Institute's proposed communication); 29 (same). The *Citizens United* Court found "'the informational interest alone is sufficient to justify application of [the EC disclosure requirements] to *these ads*.'" 558 U.S. at 369 (emphasis supplied*). Citizens United* merely decided the case that was before the Court at that time—a case that is easily distinguished from this one.

[1] The *Hillary* advertisements clearly discuss Senator Clinton's candidacy generally and her fitness for office in particular. The Commission's insistence that the Institute has "fail[ed] to identify any other references to Hillary Clinton that it contends are comments on her candidacy or fitness for office" outside of the context of the "Pants" ad—which suggests the only "kind word" that could be said about a candidate for the Presidency is that she has good fashion sense—is, simply, bluster. FEC Reply at 13. All of Citizens United's ads center on a candidate for President, for the purpose of encouraging viewers to watch a movie that functioned as express advocacy against that candidate. *See, e.g., Citizens United v. FEC*, 530 F. Supp. 2d 274,276, n. 4 (D.D.C. 2008) (advertisement stating "Hillary is the closest thing we have in America to a European socialist").

ii. The *Van Hollen* decision has materially altered the relevant law.

Even if *Citizens United* did foreclose the Institute's case, the present BCRA disclosure regime bears little resemblance to the one reviewed by that Court or by Judge Kollar-Kotelly below. As the Institute anticipated when it brought its suit, the BCRA disclosure regime has been undone by the recent decision in *Van Hollen v. FEC*, which struck down 11 C.F.R. 104.20(c)(9). V. Compl. ¶55 (Dist. Ct. Dkt. No. 1). The FEC specifically promulgated this regulation to prevent "corporations…[from being] required to report the sources of funds that made up their general treasury funds." 72 Fed. Reg. 72899, 72910 (Dec. 26, 2007).

Without the FEC's narrowing construction, *all* of the Institute's donors giving over $1,000 in aggregate since "the first day of the preceding calendar year"—not simply those who earmark funds for an electioneering communication—must be publicly disclosed. 52 U.S.C. § 30104(f)(2)(F). Nothing in the Supreme Court's terse discussion of disclosure under BCRA indicates that the Court would have approved of such a far-reaching scheme. *Wisconsin Right to Life v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014) ("The [*Citizens United*] Court's language relaxing the express-advocacy limitation applies only to the *specifics* of the disclosure requirement at issue there") (emphasis supplied). If nothing else, this change in the law necessitates new, as-applied review by a three-judge court. The Supreme Court cannot foreclose that which it has not reviewed.

Nevertheless, the Commission makes the astonishing argument that 11 C.F.R. § 104.20(c)(9) is "irrelevant" because it was merely "an FEC implementing *regulation* that is not at issue in this challenge to *statutory* provisions of the Federal Election Campaign Act…that the Supreme Court has twice upheld." FEC Reply at 1 (emphasis FEC's).

This is not only contrary to law—an agency's properly-promulgated rules have the same effect as statutes—it is contrary to the FEC's repeated assertions in this very case.[2] Below, the Commission averred that 11 C.F.R. § 104.20(c)(9) "remains valid, in force, and binding on the Commission." FEC Opp. to Pl. App. for a Three-Judge Court (Dist. Ct. Dkt. No. 16) at 9 n. 5. It stated that "[t]he disclosure requirements for [the Institute], however, are even narrower than the statute, because…FEC regulations limit the scope of disclosure." FEC Mem. of Law in Opp. to Pl.'s Mot. for Prelim. Injunction (Dist. Ct. Dkt. No. 19) at 33. And the Commission attempted to limit the constitutional harm at issue here, and have the Institute's case dismissed, by stating that "[t]o the extent plaintiff's alleged injury is fear of having to disclose *every* donor who gives more than $1,000 to the organization even if such donors do not earmark their donation or have no knowledge of the particular electioneering communication, *that fear is baseless*."

[2] Contrary to its treatment of 11 C.F.R. § 104.20(c)(9) in this case, "the FEC did not appeal the decision" to strike that regulation down under *Chevron* step one. *Van Hollen*, 2014 U.S. Dist. LEXIS 164833 at 2. Consequently, the successful defense of that regulation on appeal was left to third-party intervenors. *Id*. at 3.

Id. (second emphasis supplied, citation and quotation marks omitted). In fact, the Commission maintained that "the applicable regulation, 11 C.F.R. § 104.20(c)(9), expressly preclude[d] such an interpretation." *Id*.

Now, by contrast, the Commission states that the Institute's reference to the nullification of that same regulation, a limiting rule relied upon below by the FEC, is merely "a last-ditch effort to reinvigorate [this] appeal." FEC Reply at 15.

The FEC attempts to argue that the Supreme Court never "relied upon…the regulation struck by the *Van Hollen* court." FEC Reply at 16. This is misleading. The regulation was a part of the record: the opinion from which the *Citizens United* appeal arose explicitly cited 11 C.F.R. § 104.20(c)(9) in describing how BCRA's electioneering communications disclosure regime functioned. *Citizens United*, 530 F. Supp. 2d at 280. Moreover, the *Citizens United* Court simply reviewed the law before it, and in explaining that law, the Commission noted the limitations of 11 C.F.R. 104.20(c) several times. Brief for Appellee at 5, 30, *Citizens United v. FEC*, No. 08-205 ("The statement must identify… all those who contributed '$1,000 or more to the corporation…for the purpose of furthering electioneering communications.' 11 C.F.R. 104.20(c)"; "During discovery, appellant disclosed *only* those donations of $1000 or more that were made or pledged for the purpose of furthering the production or public distribution of appellant's films regarding

then-Senators Clinton and Obama. *See*…11 C.F.R. 104.20(c)(9)" (emphasis in original)).

The Commission argues that 11 C.F.R. § 104.20(c)(9) was struck down on administrative law grounds, which, while certainly true, hardly mitigates the new burden imposed on the Institute, particularly in light of the FEC's obvious intention to enforce the new, broader reading of the law against the Institute. FEC Reply at 16-17. No court, let alone the Supreme Court, has reviewed the BCRA disclosure regime, as modified by *Van Hollen*, under a First Amendment analysis. This alone necessitates the composition of a three-judge court to hear the Institute's case.

Finally, the Institute has noted the somewhat uncomfortable fact that, under current law, it would have to provide greater disclosure for its planned ad than for an advertisement (which it may not legally run) stating "vote for Candidate Smith." II Cross-Mot. at 24. The FEC responds that because "[t]he EC provisions were part of an effort by Congress to address gaps in the preexisting disclosure regime… [i]t is thus unsurprising that the EC provisions are in some respects more comprehensive than the disclosure requirements for [express advocacy]." FEC Reply at 18-19. Perhaps so. But the Commission can point to no court ruling stating that it is constitutional to regulate the mere mention of a candidate more

strongly than an explicit endorsement. Again, this significant change alone necessitates the empaneling of a three-judge court to hear the Institute's case.

The FEC is wrong to contend that a regulation it considered key to defeating the Institute's case in its earlier briefing, a regulation that limited the constitutional harm of the EC regime, and which was explained to both the district court here and the Supreme Court in *Citizens United*, is in fact irrelevant.[3]

CONCLUSION

Because *Citizens United* does not foreclose the Institute's claim, especially in light of *Van Hollen v. FEC*, summary reversal is appropriate.

Respectfully submitted,

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[3] The Commission raises a number of other points that are quickly dispatched. It complains of the Independence Institute's "baseless allegations of procedural deficiencies," and that the Institute has "repeat[ed] the same arguments it made to the district court." FEC Reply at 10, 1, 3, The Institute does not complain that the district court reached the merits, but rather that a *single judge* of the district court did so, as opposed to the statutorily mandated three-judge court. Similarly, it is the nature of appellate review to present arguments already reviewed by the district court. To do otherwise would risk waiver of those argument. *Lemusu v. U.S. Dep't of Justice*, 344 Fed. Appx. 621, 622 (D.C. Cir. 2009). These various objections, which take up pages of the FEC's brief, are groundless and distract from the relevant issues in this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, I electronically filed the Independence Institute's Combined Reply in Support of Its Motion for Summary Reversal and in Opposition to Appellee's Cross-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 caused four paper copies to be delivered to the Court pursuant to Circuit Rule 27(b).

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