UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 14-1500 (CKK, PAM, APM) REPLY MEMORANDUM

FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Statutes and Regulations

Miscellaneous

The Federal Election Commission ("FEC" or "Commission") showed in its opening brief that the narrow, event-driven disclosure requirements for federal "electioneering communications" ("ECs") are constitutional both on their face and as applied to communications, like plaintiff Independence Institute's proposed broadcast advertisement, that mention a federal candidate shortly before an election without expressly advocating for or against that candidate. As the Commission explained, this renewed constitutional challenge to the Bipartisan Campaign Reform Act's ("BCRA") EC disclosure requirements is foreclosed by two Supreme Court decisions upholding those precise disclosure requirements for the "entire range" of federal ECs and explicitly rejecting the central arguments plaintiff has asserted here. *McConnell v. FEC*, 540 U.S. 93, 190-202 (2003); *Citizens United v. FEC*, 558 U.S. 310, 366-71 (2010); *see* FEC Br. in Supp. of its Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J. at 13-20, ECF No. 42 ("FEC Br."). Indeed, and as the Commission also explained (FEC Br. at 18-21), plaintiff's contorted interpretations of the eight-justice opinions in *McConnell* and *Citizens United* are belied not only by the unambiguous holdings in those cases but also by decisions of a majority of the United States circuit courts of appeals, which have collectively interpreted *Citizens United* as permitting disclosure requirements in a broad range of contexts, including as applied to analogous state EC provisions. These Supreme Court and court of appeals decisions not only confirm the constitutionality of the challenged EC provisions, they also underscore the lack of any unconstitutional burden resulting from plaintiff's obligation to comply with that narrow, event-driven disclosure requirement. (*See* FEC Br. at 26, 37-38.)

Plaintiff's response to the FEC's motion confirms the weakness of its claims. Although plaintiff premised this action on its original contention that BCRA's EC disclosure requirement must be limited to communications that advocate for or against a federal candidate, it is now

attempting to reformulate that position. (*Compare* V. Compl. ¶ 122, ECF No. 1; Indep. Inst. Mot. for Summ. J. and Mem. in Supp. at 14, 37, ECF No. 36 ("Pl.'s Summ. J. Mem."), *with* (Indep. Inst. Consol. Opp'n to Def.'s Cross-Mot. for Summ. J. and Reply in Supp. of its Mot. for Summ. J. at 11 & n.14, ECF No. 46 ("Pls.'s Opp'n").) Apparently recognizing that its original express advocacy argument is irreconcilable with *Citizens United* and *McConnell*, plaintiff now proposes an "issue-speech-to-express-advocacy spectrum," which conveniently allows for the EC disclosure requirements to apply to Citizens United's movie ads, but not to plaintiff's advertisement advocating that listeners contact an incumbent candidate to urge support of a legislative issue. (Pl.'s Opp'n at 13.) As explained below, and as another court recently recognized, even setting aside that plaintiff proposes to add a standard that is less objective than what Congress prescribed, the new rule plaintiff now advocates is still foreclosed by *Citizens United*, in which the Supreme Court made clear that pre-election advertisements that mention a candidate "*are* deemed sufficiently campaign-related to implicate the government's interest in disclosure." *Indep. Inst. v. Williams*, 812 F.3d 787, 796 (10th Cir. 2016) ("*Indep. Inst. II*").

Plaintiff also provides further details about how it is organized and regulated under the tax code, and speculates that it could experience reputational and other harm as a result of some unidentified person's failure to distinguish between federal tax and campaign finance provisions. But none of plaintiff's tax-status arguments identifies any basis for finding a constitutional flaw in the independent regulation of "electioneering communications," part of the BCRA amendments to the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. § 30104(f).

Plaintiff's latest attempt to demonstrate an unconstitutional burden further undermines its claims. Plaintiff appears to vacillate between trying to escape its stipulation as to the absence of any reasonable probability of threats, harassment, or reprisals, and demonstrating that disclosure

"itself" is a violation of plaintiff's First Amendment rights, despite Supreme Court holdings to the contrary. Plaintiff also tries to paint the *option* of minimizing its disclosure obligations by financing its ECs from a separate bank account as unconstitutionally burdensome. Neither that voluntary alternative nor more comprehensive disclosure, should plaintiff eschew the separate account option, violates plaintiff's constitutional rights.

Finally, plaintiff's discussion of the supposed ease with which this Court could fashion the alternative disclosure standard plaintiff would prefer has nothing to do with the question whether the clear and objective requirement that Congress selected and the Supreme Court has twice upheld violates the First Amendment. It does not. For the reasons detailed below and in the FEC's opening brief, the Court should follow the Supreme Court's command, reject plaintiff's challenge, and award summary judgment to the Commission.

ARGUMENT

I. THE SUPREME COURT HAS ALREADY HELD THAT BCRA'S EC DISCLOSURE REQUIREMENT IS "EASILY UNDERSTOOD AND OBJECTIVELY DETERMINABLE," AND MAY CONSTITUTIONALLY BE APPLIED TO THE "ENTIRE RANGE" OF ECS

A. BCRA Imposes Event-Driven Disclosure Requirements on a Narrow and Objectively Defined Category of Communications

Contrary to plaintiff's overbroad characterization (Pl.'s Opp'n at 11), BCRA's EC disclosure provision does not apply to "all speech that mentions a candidate." Instead, and as the Commission previously described (FEC Br. at 5), the requirement is narrow and applies only to broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office, are publicly distributed within 60 days before a general, special, or runoff election or 30 days before a primary or preference election, or a political party nominating caucus or convention, and are targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A); 11 C.F.R.

§ 100.29(a)(2). In *McConnell v. FEC*, eight Supreme Court justices agreed that the "important state interests" generally sufficient to uphold disclosure laws — including providing the electorate with information, deterring corruption and avoiding its appearance, and gathering the data necessary to enforce other campaign finance provisions (*see* FEC Br. at 14) — "apply in full to BCRA." 540 U.S. at 196, *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). And in *Citizens United*, eight justices again held that BCRA's EC disclosure requirement is "substantially related" to the government's "sufficiently important" interest in ensuring "the public [can] . . . know[] who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369.

BCRA's EC disclosure requirements do *not* apply outside the statute's short pre-election windows. For this very reason, plaintiff has been free to broadcast its proposed ad without making an EC disclosure for the majority of time this case has been pending. (*See* FEC Br. at 11 (explaining that plaintiff's claims previously appeared to be moot because its proposed ad ceased to qualify as an EC following the November 2014 election).) Plaintiff's particular preference to broadcast an ad urging listeners to contact an incumbent Colorado Senator regarding his position on a legislative issue *only during the short period of time before the Senator is up for reelection* does not render BCRA's narrow disclosure provision overbroad or otherwise unconstitutional. As the Tenth Circuit recently recognized in rejecting a similar claim pressed by the same plaintiff in a nearly identical case, "[t]he logic of *Citizens United* is that advertisements that mention a candidate shortly before an election *are* deemed sufficiently campaign-related to implicate the government's interests in disclosure." *Indep. Inst. II*, 812 F.3d at 796.[1]

[1] Plaintiff's continued reliance (Pl.'s Opp'n at 13-14) on the D.C. Circuit's 27-year-old analysis of a dramatically different, broader, and since-repealed disclosure provision remains misplaced for all the reasons detailed in the Commission's opening brief. (*See* FEC Br. at 34-

B. Plaintiff's Bare Attempts to Dismiss the Supreme Court's Disclosure Holdings in *McConnell* and *Citizens United* Are Fatally Flawed

Plaintiff's opposition brief underscores its inability to reconcile its legal arguments with the Supreme Court's disclosure holdings in *McConnell* and *Citizens United*. Plaintiff devotes a mere two sentences to addressing *McConnell*'s disclosure holding and abruptly dismisses that holding as irrelevant simply because it "was a facial ruling." (Pl.'s Opp'n at 1.) While it is true that *McConnell*'s facial ruling does not, *a fortiori*, foreclose all as-applied challenges to the EC disclosure provision, the Supreme Court's disclosure analysis in *McConnell*, which it reaffirmed in *Citizens United*, 558 U.S. at 368, is of course controlling in this subsequent challenge to the exact same provision on the same, already rejected grounds. As the FEC previously explained (FEC Br. at 15-16, 17-18), the Supreme Court in *McConnell* held, as a matter of law, that "*Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (per curiam),] amply supports application of [BCRA's] disclosure requirements to the *entire range* of 'electioneering communications.'" *McConnell*, 540 U.S. at 196 (emphasis added). The *McConnell* Court refused to limit EC disclosure to communications that contain candidate advocacy, 540 U.S. at 189-90, and explained that while *Buckley* had imposed such a limitation on a *different* campaign finance provision to address vagueness concerns, BCRA's definition of "electioneering communication" is "both easily

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35.) Contrary to plaintiff's most recent mischaracterization (Pl.'s Opp'n at 14), BCRA's EC disclosure rule and the since-repealed provision at issue in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (per curiam), are *not* "similar" in their "regulatory scope." Whereas the provision at issue in the 1975 *Buckley* decision, former 2 U.S.C. § 437a, imposed ongoing political committee-type reporting requirements on any group that "commits any act directed to the public for the purpose of influencing the outcome of an election," *Buckley*, 519 F.2d at 869-70, BCRA's EC disclosure provision is event-driven and applies only to communications that meet the narrow and objective statutory criteria, including, *inter alia*, being broadcast within the short period of time immediately before an election. *See supra* pp. 3-4. And whereas the D.C. Circuit invalidated former section 437a on vagueness and overbreadth grounds, *Buckley*, 519 F.2d at 878 n.142, the Supreme Court has long since held that BCRA's EC definition is neither vague nor overbroad; its elements "are both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194.

understood and objectively determinable." *Id.* at 194. The Court further emphasized the absence of a "constitutionally mandated line" between candidate advocacy and issue advocacy, rejecting the notion that the First Amendment "erects a rigid barrier" between candidate and issue advocacy. *Id.* at 190, 193-94. The Supreme Court reaffirmed these conclusions in *Citizens United*. 558 U.S. at 368-69.

Plaintiff does not even attempt to identify any basis for this Court to find that the Supreme Court's controlling legal conclusions in *McConnell* and *Citizens United* are inapplicable here. Instead, it effectively asks this Court to ignore the Supreme Court's directly applicable holdings and recognize a First-Amendment-based exception for "issue advocacy" disclosure that the Supreme Court has explicitly refused to impose in the precise context of the EC disclosure requirements challenged here.[2]

Plaintiff further attempts to dismiss *Citizens United* as inapplicable (Pl.'s Opp'n at 1-2) by mischaracterizing the D.C. Circuit's narrow *jurisdictional* determination in this case. Plaintiff asserts that "the Court of Appeals has already held that *Citizens United* does *not* foreclose this challenge . . . for two reasons" (*id.*), but the panel issued no such holding.[3] The Court of Appeals concluded only that plaintiff is "'entitle[d]' . . . to make its case 'before a three-judge district court'" based on the panel majority's inability to "say that Independence Institute's attempt to advance its as-applied First Amendment challenge is 'essentially fictitious, wholly

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[2] As detailed below, there is no dispute that a party may attempt to substantiate a harassment-based, as-applied exemption from the EC disclosure requirement, but plaintiffs have stipulated that they are not doing so here. *See infra* pp. 20-22; FEC Br. at 36.

[3] In fact, the D.C. Circuit panel's *only* discussion of whether plaintiff's claims are "foreclosed" by *Citizens United* appears in Judge Wilkins's dissenting opinion, in which he concluded that plaintiff's "reading of *Buckley is squarely foreclosed by subsequent Supreme Court precedent*" and explained that he would have dismissed the case for lack of jurisdiction because plaintiff has merely "repackage[d] an *already foreclosed legal theory*." *Indep. Inst. v. FEC*, 816 F.3d 133, 118-19 (D.C. Cir. 2016) (Wilkins, J., dissenting) (emphases added).

insubstantial, obviously frivolous, and obviously without merit.'" *Indep. Inst.*, 816 F.3d at 117 (quoting *Shapiro v. McManus,* 136 S. Ct. 450, 456 (2015)). Far from deciding whether plaintiff's substantive legal arguments are contrary to Supreme Court precedent, the Court of Appeals clarified that its jurisdictional determination that plaintiff's claims clear the "low" bar of not being "'essentially fictitious'" or "'obviously frivolous'" is "*not* [a] suggest[ion] that Independence Institute's argument is a winner." *Indep. Inst.*, 816 F.3d at 117 (emphasis added).

Likewise erroneous is plaintiff's misleading suggestion (Pl.'s Opp'n at 2) that the Court of Appeals determined that "the Institute and Citizens United differ in organizational mission and activity, as reflected in their differing tax status." The panel majority instead merely observed that "Independence Institute's 501(c)(3) argument may *or may not prevail on the merits*." *Indep. Inst.*, 816 F.3d at 117 (emphasis added). And, as plaintiff itself concedes in a footnote (Pl.'s Opp'n at 2 & n.2), the Court of Appeals did *not* conclude that "the ad at issue in this case cannot fairly be compared to the ads at issue in *Citizens United*." The majority expressly declined to address that argument. *Indep. Inst.*, 816 F.3d at 117.

Finally, plaintiff's attempt to dismiss *Citizens United* by misconstruing the Supreme Court's disclosure holding as a determination that Citizens United's movie ads "should not be regulated *because* they were commercial speech — speech entitled to comparatively-slight constitutional protection" (Pl.'s Opp'n at 16 (emphasis added)) is inconsistent with the actual language in the Court's opinion. As the single-judge district court previously recognized, when the Supreme Court in *Citizens United* concluded that "[e]ven if [Citizens United's] ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election," 558 U.S. at 369, the Court was "[r]esponding to an argument that 'an informational interest' did not apply to the *Hillary* advertisements," *Indep.*

Inst. v. FEC, 70 F. Supp. 3d 502, 510 (D.D.C. 2014), *rev'd on other grounds*, 816 F.3d 113 (D.C. Cir. 2016). Having found a sufficient informational interest in the disclosure of "who is speaking about a candidate" in Citizens United's movie ads, *in spite of* the "commercial" nature of those ads, the Supreme Court explained that "[b]ecause the informational interest alone is sufficient to justify application of [BCRA's EC disclosure provision] to these ads, it is not necessary to consider the Government's other asserted interests." *Citizens United*, 558 U.S. at 369; *see Indep. Inst.*, 70 F. Supp. 3d at 510 ("In other words, even though [Citizens United's] 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.'"). As the single-judge district court observed, "[i]n no sense does this language imply that the Supreme Court determined that this speech deserved only the lesser First Amendment protections of commercial speech." *Id.* Plaintiff's unsupported argument that *Citizens United*'s disclosure holding is limited to "commercial speech" is inconsistent with that opinion and must be rejected.

C. Plaintiff's Reformulated "Unambiguously Campaign Related" Argument Would Reduce BCRA's Clarity and is Foreclosed by *Citizens United*

In its initial court filings, plaintiff premised this action on its contention that "only communications that 'expressly advocate the election or defeat of a clearly identified candidate'" may constitutionally be "subject to disclosure." *See* V. Compl. ¶ 122; Pl.'s Summ. J. Mem. at 14, 37; *see also Indep. Inst.*, 70 F. Supp. 3d at 504 (citing argument in plaintiff's preliminary injunction brief 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"). Plaintiff alternatively suggested that a communication must at least contain "pejorative" (or complimentary) references to a candidate to be constitutionally subject to disclosure. *See Indep. Inst.*, 70 F. Supp. 3d at 511-12 (rejecting plaintiff's "pejorative"

argument because "there is nothing in *Citizens United* limiting the disclosures holding to electioneering communications that are pejorative (or, alternatively, complimentary) on their face").

In its latest court filing, plaintiff appears to recognize that its original positions are irreconcilable with *Citizens United*. (*E.g.* Pl.'s Opp'n at 11 n.14 (arguing that the "functional equivalent of express advocacy test" — which the Supreme Court in *Citizens United* refused to adopt as a standard for determining whether campaign finance disclosure requirements are constitutional — "may well be . . . the best test" for evaluating disclosure requirements, "[b]ut it is not the *only* test under which the Institute prevails").) Plaintiff thus tries to further redefine its position as allowing for the challenged requirements to apply to a communication that lacks candidate advocacy but is nevertheless "campaign related," while barring the requirements from applying to "genuine issue speech." (Pl.'s Opp'n at 11-14.) According to plaintiff, this new position would accommodate *Citizens United*'s holding that the EC disclosure requirements may constitutionally apply to a ten-second movie ad stating "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie,'" while precluding application of the EC disclosure requirements to plaintiff's proposed radio ad asking listeners to contact Colorado's Senators, one of whom is up for reelection, and "[t]ell them to support" pending legislation concerning criminal justice reform. (Pl.'s Summ. J. Mem. at 31-32; Pl.'s Opp'n at 15-16.)

Plaintiff's latest position would introduce additional inquiries that are not as "easily understood and objectively determinable" as the definition that Congress enacted and the Supreme Court endorsed. *McConnell*, 540 U.S. at 194. For example, plaintiff still fails to offer any persuasive basis for reconciling its dual positions that a movie advertisement that neither described Hillary Clinton nor identified her as a federal candidate is "unambiguously campaign

related," while its proposed advertisement that links a federal candidate with a legislative issue in the period shortly before an election is "entirely divorced from any candidacy." (*Compare* Pl.'s Opp'n at 12, *with* FEC Br. at 28-29 (explaining that plaintiff's proposed "pejorative" standard reduces the objectivity of the EC analysis).) Indeed, plaintiff's most recent suggestion that the advertisements at issue in *Citizens United* may not have been entirely political, contradicts its prior insistence that such advertisements were "'equivalent'" to express advocacy. (*Compare* Pl.'s Opp'n at 12 (referencing "the speech at issue in *Citizens United*: *to the extent it was political at all*" (emphasis added)), *with* V. Compl. ¶ 87; Pl.'s Summ. J. Mem. at 31 (labeling Citizens United's ads as "'pejorative' equivalents of express advocacy").)

Moreover, debatable inferences like plaintiff has drawn regarding the movie ads at issue in *Citizens United* (*see* FEC Br. at 28-29) could similarly lead a person to conclude that plaintiff's proposed advertisement is "campaign related." For example, the Tenth Circuit concluded in *Independence Institute II* that "[a]n advertisement purporting *merely* to discuss an issue, while incidentally mentioning a candidate, can nonetheless be construed as 'relating to' the candidate's campaign." 812 F.3d at 796. That court of appeals further found that the similar advertisement underlying plaintiff's analogous challenge in *Independence Institute II* "does not say much about Governor Hickenlooper, but it does insinuate, at minimum, that he has failed to take action on an issue that the Institute considers important. That could bear on his character or merits as a candidate." *Id.* That court would appear likely to take the same position on the ad at issue in this case, viewing it as insinuating that Colorado's senators, one of whom was up for re-election, have "failed to take action on" the issue of prison reform, which is "an issue that the Institute considers important." *Id.* The simple EC test Congress enacted requires no comparable analysis.

Independence Institute II not only highlights the lack of objectivity behind plaintiff's latest legal position, it confirms that plaintiff's reformulated argument remains foreclosed by *Citizens United*, because "[t]he logic of *Citizens United* is that advertisements that mention a candidate shortly before an election *are* deemed sufficiently campaign-related to implicate the government's interests in disclosure." *Id.* at 796. The Tenth Circuit emphasized the Supreme Court's "near[] unanim[ity] in applying BCRA's disclosure requirements both to Citizens United's express advocacy *and* to ads that did not take a position on a candidacy." *Id.*

Plaintiff purports to distinguish this case from *Independence Institute II* because the ad at issue here "encourages Coloradoans to contact *both* of the state's U.S. senators, not merely the one running for re-election," whereas the ad at issue in *Independence Institute II* urged viewers to contact only the incumbent governor who was up for re-election. (Pl.'s Opp'n at 7.) But recognizing that single distinction as dispositive would enable any organization to shield an EC from BCRA's disclosure requirements simply by mentioning an additional person, who is not a candidate, in an otherwise regulable electioneering communication. The public's important interest in knowing who is "speaking about a candidate shortly before an election" is not diminished simply because a pre-election communication that mentions a candidate also mentions someone else. *Citizens United*, 558 U.S. at 369.

Plaintiff also purports to distinguish the advertisement at issue in *Independence Institute II* as "suggest[ing] [the identified candidate's] position on the issue being discussed." (Pl.'s Opp'n at 7.) But to the extent that is true, the advertisement at issue here is no different. As the Commission previously explained (FEC Br. at 19), both proposed communications advocated a position on a policy issue (healthcare or prison reform) and urged viewers (or listeners) to contact an incumbent government official (Colorado's Governor or United States Senator), who

was up for reelection at the time the ad would be aired, and tell him to support legislation in favor of the policy position Independence Institute was advocating in the advertisement. This case is exactly like *Independence Institute II*. And here too, "*Citizens United* is dispositive as to the constitutionality of [BCRA's] disclosure laws as applied to the Institute's ad." *Independence Institute II*, 812 F.3d at 799.

D. A Majority of the Courts of Appeals Have Confirmed that *Citizens United* Precludes the "Issue Advocacy" Disclosure Exception Plaintiff Seeks Here

In the FEC's opening brief, the Commission cited recent decisions from nine of the United States circuit courts of appeals, including *Independence Institute II* discussed *supra* pp. 10-12, collectively relying on *Citizens United* in holding that various federal and state campaign finance disclosure provisions need not be limited to candidate advocacy to survive First Amendment scrutiny. (FEC Br. at 18-21 (collecting cases from the First, Second, Third, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).) Plaintiff claims these cases "are all inapposite" because they involve different parties and different disclosure provisions. (Pl.'s Opp'n at 10.) While that is barely true for *Independence Institute II*, *see supra* pp.10-12, the differences plaintiff identifies in the remaining decisions are all beside the point. Plaintiff does not, and cannot, dispute that each of these decisions recognized what plaintiff has refused to acknowledge: that *Citizens United* forecloses its attempt to exempt from disclosure an "issue advocacy" communication that mentions a federal candidate, in the period shortly before the election in which he is running, and that plaintiff seeks to broadcast in the jurisdiction where voters who may hear the ad will be deciding whether to cast their vote for the identified candidate. *See, e.g.*, *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015) (recognizing the Supreme Court's "consistent[]" holdings that "there is not a 'rigid barrier between express advocacy and so-called issue advocacy'" (quoting *McConnell*, 540 U.S. at

193)), *cert. denied*, 136 S. Ct. 2376 (2016); *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."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) ("[T]he distinction between issue discussion and express advocacy has no place in First Amendment review of . . . disclosure-oriented laws."); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) (concluding, in light of *Citizens United*, that "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable").

The Commission also cited several courts of appeals opinions, including *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), to demonstrate that disclosure of the funders of ECs serves the important government interest in gathering data to detect violations of financing restrictions, including the prohibition on financing of ECs by foreign nationals. (FEC Br. at 14-15.) Plaintiff made no argument in response.

E. Plaintiff is Unable to Distinguish the Analogous Cases Upholding Disclosure Requirements in the Context of Ballot Initiatives

As the FEC previously explained (FEC Br. at 22-23), various court decisions upholding disclosure requirements regarding ballot-initiative activity further demonstrate the constitutional permissibility of applying disclosure requirements to what plaintiffs call "pure issue advocacy." Like "issue advocacy," ballot-initiative activity is inherently issue-focused and does not have the same corruptive potential as spending to influence candidate elections. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (footnote and citations omitted)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.15 (1995)

(quoting *Bellotti*). Plaintiff's superficial attempt to distinguish ballot advocacy cases from this case because "ballot advocacy is unambiguously campaign related" (Pl.'s Opp'n at 16-17) is transparently deficient. The "campaign" to which ballot advocacy is related concerns an *issue*, not a candidate, and thus does not present the same concerns about potential corruption of an elected official. Indeed, while the government's informational interest in disclosure in the ballot-advocacy context is indisputably important, *see, e.g.*, *Doe v. Reed*, 561 U.S. 186, 197-99 (2010); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1249 (11th Cir. 2013); FEC Br. at 22-23, that context does not implicate the particular interest applicable here in informing the public about who is "speaking *about a candidate* shortly before an election." *Citizens United*, 558 U.S. at 369 (emphasis added).

F. *Citizens United* Explicitly Supports the Commission's Discussion of Analogous Cases Upholding Lobbying Disclosure Requirements

The dispositive disclosure holdings in *McConnell* and *Citizens United* are consistent with the nearly unanimous court decisions upholding disclosure requirements regarding lobbying expenditures on the basis of the government's interest in informing the public as to who is attempting to sway the resolution of public issues and how they are attempting to do so, as previously explained (FEC Br. at 24). Plaintiff criticizes the Commission's discussion of *United States v. Harriss*, 347 U.S. 612 (1954) (Pl.'s Opp'n at 17-18), because that case was decided in 1954 and campaign finance laws have developed and evolved significantly since that time. While that is of course true, plaintiff ignores that the Supreme Court itself, in *Citizens United*, invoked the *Harriss* decision as support for its holding that BCRA's EC disclosure provision survives constitutional scrutiny. *See Citizens United*, 558 U.S. at 369 (citing past decisions in which the Court "has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech," and invoking *Harriss*, 347 U.S. at 625, in which "the

Court . . . upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself"). Plaintiff's failure to address the Supreme Court's *recent* reliance on *Harriss* in the specific context of upholding the disclosure provision plaintiff seeks to relitigate here undermines its attempt to minimize the significance of *Harriss* based on when that case was decided.

G. Plaintiff's Tax Status is Irrelevant to the Question Whether BCRA's EC Disclosure Requirement May Constitutionally Apply to Plaintiff's Proposed Electioneering Communication

1. *Citizens United* is Inconsistent with Plaintiff's Tax-Status Argument

The nature of plaintiff's registration as a non-profit organization under the federal tax code is irrelevant to the question whether BCRA's EC disclosure requirement may constitutionally be applied to an advertisement that falls within BCRA's objective and unambiguous definition of "electioneering communication." (*See* FEC Br. at 29-32.) The majority opinion in *Citizens United* simply described that organization as "a nonprofit corporation," *Citizens United* 558 U.S. at 319, a broad category that includes plaintiff Independence Institute as well. The Commission thus explained (FEC Br. at 29) that the Supreme Court in *Citizens United* neither explicitly nor implicitly suggested that its disclosure holding in that case was intended to be confined to any particular group of advertisers or subset of nonprofit corporations. If anything, the Court's recognition in *Citizens United* of the importance of providing the public with access to information about who is "speaking about a candidate shortly before an election" is inconsistent with the categorical exception for certain nonprofit organizations that plaintiff advocates here. *Citizens United*, 558 U.S. at 369; *see* FEC Br. at 29-30. Plaintiff fails to identify anything in *Citizens United* or any other opinion supporting its proposed tax-status-based limitation on BCRA's EC disclosure requirement.

2. Plaintiff's Tax-Status Argument Lacks Any Legal Basis

The Internal Revenue Code does not require public disclosure of donors to section 501(c)(3) non-profit groups like plaintiff or section 501(c)(4) groups like Citizens United. (FEC Br. at 31-32.) Plaintiff's proposal to adopt separate campaign finance disclosure requirements for the two types of entities is premised entirely on the proposition that there are different tax-law disclosure requirements for each, but there is no such discrepancy. (*Id.*) Plaintiff fails to squarely dispute the Commission's showing on this and related points, including that an organization's tax status generally is not dispositive regarding the organization's compliance with other federal laws. (FEC Br. at 31 (citing cases).)

Plaintiff contends without any basis that "[t]ax law and Supreme Court precedent protect donors to § 501(c)(3) organizations to a greater extent than donors to § 501(c)(4) groups." (Pl.'s Opp'n at 6-7.) Neither type of nonprofit organization, however, is obligated by federal tax law to make public *disclosures* regarding donors through the Internal Revenue Service, 26 U.S.C. § 6104(d)(3)(A), as we have shown (*see* FEC Br. at 31-32). Plaintiff misleadingly cites the disclosure requirements for organizations with the major purpose of participating in elections, section 527 organizations (Pl.'s Opp'n at 6 & n.9), but nowhere substantiates the purported lack of protection from disclosure of 501(c)(4) donors relative to 501(c)(3) donors. Plaintiff also makes the unsupported claim that the tax code "abhors" disclosure generally (Pl.'s Opp'n at 6), but, as the Ninth Circuit has explained, federal tax-law provisions do *not* "create a pervasive scheme of privacy protections." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1319 (9th Cir. 2015) ("*CCP*"), *cert. denied*, 136 S. Ct. 480 (2015).

Similar to its inaccurate claim of varied donor disclosure requirements for different types of nonprofits, plaintiff continues to claim that past donor disclosure by Citizens United

differentiates it from Independence Institute. (Pl.'s Opp'n at 2-3.) But, as plaintiff itself has emphasized (*see, e.g.*, Pl.'s Opp'n at 2; Pl.'s Summ. J. Mem. at 22), Citizens United is a section 501(c)(4) nonprofit organization and is thus not required to disclose its donors publicly through tax filings. *See* 26 U.S.C. § 6104(d)(3). Contrary to plaintiff's suggestion (Pl.'s Opp'n at 2-3 n.3), the Supreme Court in *Citizens United* did not indicate that the plaintiff was disclosing its own donors; instead, the "donor disclosure" in the record before the Supreme Court concerned "approximately 1000 contributors" to Citizens United's political committee, the Citizens United Political Victory Fund. Br. for Appellee at 49 n.17, *Citizens United v. FEC*, No. 08-205 (Feb. 2009) (citing FEC disclosure reports filed by Citizens United Political Victory Fund), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_fec_brief.pdf.

Plaintiff also attempts to bolster its unsupported tax-status argument in its opposition brief by elaborating on the conditions an organization must satisfy to maintain a section 501(c)(3) exemption, and detailing the penalties an organization could face *under tax law* if it engages in prohibited "'political campaign intervention,'" which "may" include "'any message favoring or opposing a candidate.'" (Pl.'s Opp'n at 4 (quoting tax regulations); *see id.* at 2-7.) Plaintiff speculates (*id.* at 4) that it could accordingly suffer "reputational and enforcement risk" if someone misinterprets its compliance with BCRA's separate EC disclosure requirement as an "implication . . . that the Institute has done something *illegal*" under the tax code. Such speculation, premised on anticipated unfamiliarity with distinctions between separate campaign-finance and tax provisions, is not a basis for finding BCRA's EC disclosure requirement unconstitutional.[4]

[4] It is unremarkable that the scope of activities regulated by federal tax and campaign finance laws are not identical. *See, e.g.*, Erika K. Lunder, L. Paige Whitaker, Congressional Research Service, *501(c)(3)s and Campaign Activity: Analysis Under Tax and Campaign*

This court has already expressed concern over a rule that would "effective[ly] delegate[e]" to the IRS the FEC's authority over campaign finance regulation in light of the fact that "the IRS in the past has not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are so considered under FECA." *Shays v. FEC*, 337 F. Supp. 2d 28, 127-28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). And plaintiff's speculation appears to be unfounded for the additional reason that section 501(c)(3) organizations, in fact, have engaged in extensive spending on ECs. (*See* FEC Br. at 31 (referencing hundreds of thousands of dollars in spending on electioneering communications by a 501(c)(3) organization).) Plaintiffs do not respond directly to either of these points.

The Third Circuit Court of Appeals relied on the fundamental distinctions between campaign finance and tax law in rejecting another organization's claim that its section 501(c)(3) status renders unconstitutional application of Delaware's EC disclosure rule to that organization. *Del. Strong Families*, 793 F.3d at 308. In *Delaware Strong Families*, the Court of Appeals held that there is "no compelling reason to defer to the § 501(c)(3) scheme in determining which communications require disclosure under" Delaware's statutory provisions regulating ECs. *Id.* Like plaintiff here, Delaware Strong Families emphasized its inability to engage in any political campaign by virtue of its status as a section 501(c)(3) nonprofit organization. *Id.* The Third Circuit found the organization's tax status irrelevant: "[W]e conclude that it is the conduct of an

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Finance Laws, 7-8 (Sept 10, 2013), *available at* http://electionlawblog.org/wp-content/uploads/CRS-Report-on-IRS-Line-Between-Issue-Advocacy-and-Campaign-Activity-2013.pdf) (explaining different scope of IRC and FECA. As the CRS report recognizes, "an issue advocacy communication, depending on its timing and content, might be an electioneering communication under FECA, but might not be treated as campaign intervention under the IRC." *Id.* Plaintiff contends without citation that the FECA definition of "electioneering communication" "would likely be relevant to" determinations regarding campaign intervention by the IRS (Pl.'s Opp'n at 4 n.5), but the IRS has indicated the opposite (s*ee* FEC Br. at 31).

organization, rather than an organization's status with the Internal Revenue Service, that determines whether it makes communications subject to the Act." *Id.* at 308-309.

Plaintiff does not even try to reconcile its tax-status argument with the holding in *Delaware Strong Families*. It emphasizes differences between its proposed advertisement and the voter guide at issue in *Delaware Strong Families*, and also notes that the Third Circuit "applied exacting scrutiny to the specific facts of that as-applied case." (Pl.'s Opp'n at 8.) But such distinctions have nothing to do with the question whether the First Amendment requires that section 501(c)(3) organizations be categorically exempt from campaign finance disclosure requirements, as plaintiff advocates. The Third Circuit's holding that tax-status is irrelevant to determining the constitutionality of a campaign finance provision was independent from the court's analysis of whether the voter guide at issue in that case survived exacting scrutiny. In any event, as indicated *supra* pp. 12-13, plaintiff's attempt to distinguish *Delaware Strong Families* ignores the Third Circuit's directly relevant explanations regarding the constitutional scope of campaign finance disclosure requirements in light of *McConnell* and *Citizens United*. 793 F.3d at 308 (explaining that *McConnell* makes clear "there is not a 'rigid barrier between express advocacy and so-called issue advocacy," and that *Citizens United* "surely repudiated" any suggestion "that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent").

In sum, none of plaintiff's explanations about the requirements for maintaining a particular non-profit exemption *under the tax code* lends any support to its legal argument that the First Amendment requires the nature of a non-profit organization's tax exemption to be determinative of whether that organization can be required to comply with BCRA's disclosure requirement even for communications satisfying the statutory definition of an EC.

II. PLAINTIFF STILL FAILS TO IDENTIFY ANY UNCONSTITUTIONAL BURDEN ARISING FROM THE EC DISCLOSURE REQUIREMENTS

A. Plaintiff Has Stipulated and the Court Has Ordered that This Case Does Not Involve a "Reasonable Probability" of Threats, Harassment, or Reprisals

As the Commission explained in its opening brief (FEC Br. at 37), *Buckley*, *McConnell*, and *Citizens United* all recognized that as-applied challenges to disclosure requirements might be appropriate in a single situation: when an organization's disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" of its members. *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74). The Commission also explained that the parties have stipulated and the Court has ordered that this case does *not* involve any allegations or evidence that there is a "reasonable probability" that complying with BCRA's EC disclosure requirements will subject plaintiff's donors to any threats, harassment, or reprisals. ((FEC Br. at 37; Joint Stip. Of Parties and Order, ECF No. 14 ("Joint Stip.").) To the extent plaintiff now seeks, in its final merits brief, to reverse course and suggest that such a probability may be present in this case, that approach is foreclosed by plaintiff's own stipulation and the Court's order. *Compare* Pl.'s Opp'n at 19 (stating that plaintiff "does not assert *a specifically higher risk of threats, harassment, or reprisals*," and claiming that disclosure presents a "general and universal danger of threats, harassment, and reprisals"), *with* Joint Stip. at 1 (stipulating that plaintiff "has neither alleged nor introduced any evidence — *nor will it allege or introduce any evidence* — that there is a reasonable probability that its donors would face threats, harassment, or reprisals if their names were disclosed as a result of plaintiff's compliance with [BCRA's EC] provision" (emphasis added)); Joint Status Report at 1, 2, ECF No. 34 (citing the parties' September 10, 2014 Joint Stipulation and Proposed Order "limiting the

scope of the Plaintiff's claims," noting that "[t]he proposed Order was adopted by the Court," and stating that "[t]he parties do not anticipate contested questions of material fact").[5]

Plaintiff's principal argument — that EC "[d]isclosure itself" is an unconstitutional burden (Pl.'s Opp'n at 19) — is similarly foreclosed by the Supreme Court's campaign finance disclosure holdings, as one federal court of appeals recently recognized. In *CCP*, the Ninth Circuit Court of Appeal applied the Supreme Court's *Buckley* decision to hold that CCP, an organization that neither claimed nor produced evidence to suggest that its donors would experience threats, harassment, or other chilling conduct as a result of its compliance with a state disclosure requirement, had "not demonstrated any 'actual burden,' . . . on its or its supporters' First Amendment rights." 784 F.3d at 1316 (citation omitted); *see* FEC Br. at 38.

Plaintiff attempts to distinguish *CCP* on the basis that it "is not a campaign finance case." (Pl.'s Opp'n at 20.) But plaintiff ignores that the Ninth Circuit in *CCP* was responding to the same argument plaintiff presses here, *i.e.*, that a "disclosure requirement alone constitutes significant First Amendment injury," 784 F.3d at 1312, and that in so responding, the court of appeals found the Supreme Court's campaign finance jurisprudence regarding the constitutionality of disclosure requirements to be "instructive," *id.* at 1315. The court of appeals explained that *Buckley* had "left open the possibility" of challenging a campaign-finance disclosure requirement based on demonstrating "a reasonable probability that the compelled

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[5] Any attempt by plaintiff to escape its stipulation and the Court's order at this late stage in the proceedings is plainly precluded by the doctrine of judicial estoppel. *See, e.g.*, *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) ("Courts may invoke judicial estoppel '[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position.'" (internal quotation marks omitted)); *Zuckman v. Monster Beverage Corp.*, 958 F. Supp. 2d 293, 300 (D.D.C. 2013) (holding that a plaintiff's affidavits and stipulations are binding under the doctrine of judicial estoppel).

disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals," *id.*, but that "no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." *Id.* at 1316.[6] That holding, premised on the Ninth Circuit's interpretation and application of the Supreme Court's campaign finance disclosure jurisprudence, is at least as instructive in this case, which concerns the constitutionality of a repeatedly upheld campaign finance disclosure requirement.

B. The Voluntary Option to Finance ECs from a Separate Bank Account is Not an Unconstitutional Burden

Plaintiff's attempt (Pl.'s Opp'n at 21-22) to portray as an unconstitutional "burden" the *voluntary option* of limiting the scope of its disclosure requirements by financing its ECs from a separate bank account is plainly misguided. Neither BCRA nor FEC regulations *require* the use of a separate bank account and neither Congress nor the Commission has claimed an "interest in" the segregation of plaintiff's funds. The statute and Commission regulations simply provide corporations and other groups that finance ECs with the discretionary alternative to pay for their ECs from a segregated bank account as a means of limiting the scope of disclosures they are required to make under BCRA. *See* 52 U.S.C. § 30104(f)(2)(E); 11 C.F.R. § 104.20(c)(7); FEC Br. 5-6, 7-8, 37-38. If plaintiff finds the separate bank account option to be "burdensome," it need not elect that alternative means of financing its ECs.

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[6] Plaintiff's attempt (Pl.'s Opp'n at 19-21 & n.25) to support its contrary argument by citing the *dissenting* opinion of Justice Thomas in *Doe v. Reed*, 561 U.S. 186 (2010), is surprising, because, in that case, like *McConnell* and *Citizens United*, eight justices agreed that the challenged disclosure requirements were constitutional. Indeed, *Doe v. Reed* confirms that as-applied challenges to disclosure requirements may be appropriate *only* when an organization's disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" of its members. *Id.* at 200-01; *see id.* at 200 ("[T]hose resisting disclosure can prevail under the First Amendment *if* they can show a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals." (emphasis added)). As the late Justice Scalia observed in his concurrence, "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Id.* at 228.

The false comparison plaintiff attempts to draw between that discretionary option for financing ECs and the total ban on corporate- and union-financed expenditures that the Supreme Court struck down in *Citizens United* thus must be rejected. The provision invalidated in *Citizens United* prohibited corporations and unions from financing *any* independent expenditures or electioneering communications except through a connected political committee or "PAC." *See Citizens United*, 558 U.S. at 337 (explaining that former 2 U.S.C. § 441(b) was "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak"). The Court found that "the PAC exemption from § 441(b)'s expenditure ban . . . does not allow corporations to speak," and that PACs are "burdensome alternatives" to the prohibited direct corporate speech, including through solicitation and source restrictions. *Id.* This case does not involve any *prohibition* of plaintiff's speech, nor any limits on how and from whom donations may be solicited. Plaintiff is free to finance and distribute its proposed electioneering communication and the voluntary option to do so from a separate bank account is not remotely analogous to a rule banning plaintiff from financing ECs unless it does so from such an account.

III. THE LEGALITY AND FEASIBILITY OF PLAINTIFF'S PREFERRED ALTERNATIVE DISCLOSURE RULE DOES NOT DEMONSTRATE THAT THE EXISTING RULE IS UNCONSTITUTIONAL

Plaintiff devotes several pages of its opposition brief (Pl.'s Opp'n at 22-25) to an apparent effort to reassure the Court that its preferred reinterpretation of BCRA's EC disclosure rule would be both constitutional and feasible. This misguided argument is flawed for at least three independent reasons.

First, the argument is entirely irrelevant to the constitutional question presented in this case. Even if plaintiff could successfully demonstrate that an alternative definition of "electioneering communication" would be legally permissible and easy to implement, such a

demonstration would not advance its claim that the *existing* definition, which Congress chose and the Supreme Court has repeatedly upheld, does not satisfy intermediate scrutiny under the First Amendment. *Cf. Brown v. Bd. of Ed.*, 347 U.S. 483, 495 (1954) (explaining that "consideration of appropriate relief [is] necessarily subordinated to the primary [constitutional] question"). As detailed in the FEC's opening brief and above, the Supreme Court's holdings in *McConnell* and *Citizens United* and various lower court decisions relying on the holdings in those cases confirm that the existing EC rule *does* survive First Amendment scrutiny.[7]

Second, plaintiff's acceptance of BCRA's back-up definition as "unquestionably constitutional" because it "has been blessed by the Supreme Court" (Pl.'s Opp'n at 7-8, 22) undermines its attempt in this case to relitigate a constitutional question that eight justices of the Supreme Court have directly and unambiguously answered twice. Plaintiff's positions are irreconcilable. If plaintiff concedes that a footnote in *McConnell* about an analogous, separate provision of BCRA forecloses any question as to the constitutionality of BCRA's back-up definition of "electioneering communication," then it must also concede that its challenge to the existing EC requirements is foreclosed by the Supreme Court's multi-page constitutional holdings in *McConnell* and *Citizens United*, in which the Court upheld the constitutionality of

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[7] Plaintiff's irrelevant argument appears to be tied to its disingenuous attempt to distinguish *Independence Institute II* based on the absence of a readily available, pre-approved back-up definition for the Colorado law challenged in that case. Specifically, plaintiff has argued here (Pl.'s Opp'n at 7) that *Independence Institute II* is unlike this case in part because the Colorado EC provision, in contrast to BCRA, "did not and does not contain an unquestionably constitutional back-up definition." (*Id.* at 7-8.) In its opposition brief here, plaintiff asserts that Colorado's lack of a back-up definition for its EC provision created a "potential difficulty in determining a remedy" for plaintiff's similar constitutional challenge to Colorado's analogous EC rule. That position is contrary to the argument plaintiff pressed in *Independence Institute II*, in which it asserted that "[t]he judiciary routinely countenances as-applied exceptions to otherwise vague or overbroad rules" and in the specific "campaign finance context, the courts have generally had little difficulty in fashioning bright line rules" to address constitutional concerns. Appellant's Opening Br. at 51, *Indep. Inst. II*, No. 14-1463 (10th Cir. Jan. 7, 2015), ECF No. 01019366546.

the EC disclosure requirement as applied to "the entire range" communications that fall within the *existing* definition, *McConnell*, 540 U.S. at 196, and subsequently reaffirmed the constitutional application of such requirements, *Citizens United*, 558 U.S. at 369. Under plaintiff's own logic, this challenge must be rejected because the EC provision that plaintiff seeks to relitigate here "already enjoys the Supreme Court's approval." (Pl.'s Opp'n at 22 (citing *McConnell*).)

Third and finally, plaintiff's arguments in favor an alternative definition for *all* electioneering communications belie its insistence that this action merely involves claims that the EC disclosure requirement "cannot be constitutionally applied to [plaintiff's] intended speech." (*Compare* Pl.'s Opp'n at 22-23 (arguments in favor of back-up EC definition), *with id.* at 1 & n.1 (insistence that this challenge is "as-applied").) In its opposition brief, plaintiff explicitly urges the Court to invalidate the *existing* definition of "electioneering communication" and issue a "ruling narrowing the field of political regulation." (Pl.'s Opp'n at 23.) Such a ruling would not be limited to the particular advertisement at issue in this case and for this independent reason, plaintiff's attempt to challenge BCRA's EC definition is foreclosed by *McConnell*, 540 U.S. at 196. (*See* FEC Br. at 18 n.4.)

CONCLUSION

For the foregoing reasons, and those in the FEC's Memorandum in Support of its Motion for Summary Judgment, the Court should grant the Commission's motion for summary judgment, deny plaintiffs' motion for summary judgment, and award judgment to the Commission.

Respectfully submitted,

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