ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5249

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

INDEPENDENCE INSTITUTE,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN, INC. IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 429-2008

Donald J. Simon
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, D.C. 20005
(202) 682-0240

Charles Fried
1545 Massachusetts Avenue
Cambridge, MA 02138

Counsel for Amici Curiae

J. Gerald Hebert*
Tara Malloy
Lawrence M. Noble
Megan McAllen
THE CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, D.C. 20005
(202) 736-2200

Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Amici Curiae

*Counsel of Record

CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of the Campaign Legal Center.

Democracy 21 is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. Democracy 21 neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of Democracy 21.

Public Citizen, Inc. is a non-profit corporation dedicated to openness in government and the protection of individuals against overreaching by government and corporate entities alike. Public Citizen neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of Public Citizen.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* submit their Certificate as to Parties, Rulings, and Related Cases:

(A) Parties and Amici. Independence Institute was the plaintiff in the district court and is the appellant in this Court. The Commission was the defendant in the district court and is the appellee in this Court. *Amici curiae* in the proceedings before the district court were the Campaign Legal Center, Democracy 21, and Public Citizen, Inc. In this Court, *amici* briefs have been filed by (1) Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, Free Speech Coalition, Free Speech Defense and Education Fund and U.S. Justice Foundation, and (2) the Campaign Legal Center, Democracy 21, and Public Citizen, Inc.

(B) *Rulings Under Review*. Independence Institute appeals the October 6, 2014 order of the United States District Court for the District of Columbia (Kollar-Kotelly, J.) denying its application for a three-judge court, entering judgment for the Commission, and dismissing the case.

(C) *Related Cases*. *Amici curiae* are aware of no related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities upon which the amici curiae principally rely are marked with an asterisk.

Cases:

Federal Statutes:

Federal Regulations and Administrative Materials:

Miscellaneous Resources:

GLOSSARY

BCRA	-	Bipartisan Campaign Reform Act of 2002
FEC	-	Federal Election Commission
FECA	-	Federal Election Campaign Act

STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center, Democracy 21 and Public Citizen, Inc. are nonprofit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have participated in many of the Supreme Court cases cited by the Independence Institute (the "Institute") as forming the basis of its First Amendment challenge, including *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010). *Amici* thus have a demonstrated interest in the challenged law.[2]

SUMMARY OF ARGUMENT

The Institute challenges the constitutionality of the federal "electioneering communication" disclosure provisions, 52 U.S.C. § 30104(f), as applied to an ad referencing U.S. Senators Mark Udall and Michael Bennet that it wished to run on broadcast television shortly before the 2014 general election. Senator Udall was a candidate for re-election in 2014. Consequently, the ad was an electioneering communication and the provisions challenged here would have required the Institute to make certain disclosures about the financing of the ad.

---

[1] No party or party's counsel authored this brief in whole or in part, and no person, other than the *amici curiae* contributed money intended to fund the preparation or submission of this brief.

[2] All parties have consented to *amici*'s participation in this case.

The crux of the Institute's argument below was that its ad does not constitute express advocacy or its functional equivalent, and disclosure laws must be limited to these two forms of communications. But the Supreme Court specifically considered, and rejected, this precise argument in both *McConnell* and *Citizens United*. Accordingly, the district court below correctly declined to convene a three-judge court, explaining that the Institute's suit was "foreclosed by clear United States Supreme Court precedent, principally by *Citizens United*." Joint Appendix ("J.A.") 38.

On appeal, the Institute presses the same invalid constitutional argument, but attempts to refresh it with new terminology, declaring now that the test for a disclosure law is whether it extends beyond "unambiguously campaign related" communications. Pl.-Appellant's Opening Br. (Apr. 8, 2015), 11. Thus, instead of requesting an exception for its ad because it is not "the functional equivalent of express advocacy," J.A. 39, the Institute now demands an exception because its ad is allegedly not "unambiguously campaign related." This is a distinction without a difference. As the Institute concedes, these "tests" are virtually synonymous. Appellant Br. 38 (defining "unambiguously campaign related" speech as a "category of speech which, while falling short of express advocacy, functions in the same way"). Relabeling its argument does not make the Institute's case any stronger, nor does it make *Citizens United* any less controlling here.

Congress enacted the electioneering communication disclosure law as part of the Bipartisan Campaign Reform Act of 2002 ("BCRA") to improve existing disclosure provisions in the Federal Election Campaign Act ("FECA"), which had been construed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) "to reach only. . . communications that *expressly advocate[d]* the election or defeat of a clearly identified candidate." *Id.* at 80 (emphasis added). Under FECA, political advertisers could easily evade disclosure simply by omitting these "magic words" of express advocacy. The electioneering communication disclosure provisions were meant "to replace the narrowing construction of [FECA's] disclosure provisions adopted … in *Buckley*." *McConnell*, 540 U.S. at 189. And to avoid the vagueness concerns that led to *Buckley*'s narrowing construction, Congress defined "electioneering communication" by reference to clear, objective criteria: an "electioneering communication" is a "broadcast, cable, or satellite communication" that "refers to a clearly identified federal candidate," is "targeted to the relevant electorate," and airs within sixty days of general election or thirty days of a primary election or nominating convention. 52 U.S.C. § 30104(f)(3).

BCRA's disclosure provisions were challenged on their face in *McConnell* on exactly the same grounds as the Institute asserts here: the law regulated "'communications' that do not meet *Buckley*'s definition of express advocacy"—or rephrased in the Institute's new terminology, that are not "unambiguously

campaign related." 540 U.S. at 190. The Supreme Court, however, upheld the disclosure provisions as to "the entire range of electioneering communications," regardless of whether such communications constituted express advocacy or its functional equivalent. *Id*. at 196.

In *Citizens United*, the BCRA disclosure provisions were again challenged, this time as applied to advertisements promoting a documentary about then-candidate Hillary Clinton. All the parties agreed that the ads were not express advocacy or its equivalent. Br. for Appellant at 51, *Citizens United* (No. 08-205); Br. for Appellee at 36. But the Supreme Court held in an 8-1 decision that the public nevertheless had "an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. In so holding, the Court specifically "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id*. at 369.

According to the Institute, however, the twice-affirmed BCRA disclosure law is unconstitutional because it requires disclosure in connection to "genuine issue advocacy," i.e., speech that is not "unambiguously campaign related." *Id.* at, e.g., 17, 20, 26, 30-33, 36. But the Supreme Court directly rejected exactly this type of attempt to limit the BCRA disclosure requirements. The Institute's entire case is an attempt to persuade this Court that the eight members of the Supreme Court who upheld the disclosure provisions in both in *McConnell* and *Citizens*

United did not mean what they said. This Court should reject the Institute's attempt and affirm the district court judgment below.

ARGUMENT

I. The Institute's Attempt to Restrict Disclosure Laws to Express Advocacy Is Foreclosed by Supreme Court Precedent.

The Supreme Court has twice considered—and twice upheld—the federal electioneering communication disclosure provisions: facially in *McConnell*, 540 U.S. at 196, and as applied in *Citizens United*, 558 U.S. at 367. In both cases, the Supreme Court rejected attempts to limit the federal disclosure law to express advocacy or its functional equivalent.

A. *McConnell* Upheld the Electioneering Communications Disclosure Provisions on Their Face as to "the Entire Range of Electioneering Communications."

The "major premise" of the facial challenge in *McConnell* was that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy." 540 U.S. at 190. The plaintiffs there argued that disclosure requirements could not constitutionally extend to electioneering communications "without making an exception for those 'communications' that do not meet *Buckley*'s definition of express advocacy." *Id.* The Supreme Court flatly rejected this argument, finding that neither its prior precedents nor the First Amendment

"requires Congress to treat so-called issue advocacy differently from express advocacy" for purposes of disclosure requirements. *Id.* at 194.

The *McConnell* Court noted that in *Buckley*, the Court was construing a FECA disclosure requirement that applied to ads "'for the purpose of . . . influencing' a federal election." *Id.* at 191. The *Buckley* Court found this language vague and consequently construed the statute to reach only express advocacy. *Id.* *McConnell* explained, however, that *Buckley*'s holding was "specific to the statutory language" of FECA. *Id.* at 192-93. Consequently the Court refused to elevate *Buckley*'s express advocacy limitation—"an endpoint of statutory interpretation"—into "a first principle of constitutional law." *Id.* at 190. The vagueness concerns "that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy [were] simply inapposite" with respect to BCRA's "easily understood and objectively determinable" definition of "electioneering communication." *Id.* at 194. The Court thus upheld BCRA's disclosure provisions, finding that "the important state interests that prompted *Buckley* to uphold FECA's disclosure requirements"—providing the electorate with information, deterring corruption, and enabling enforcement of the law—"apply in full to BCRA." *Id.* at 196.

The Institute attempts to downplay this holding by asserting that *McConnell* did not consider when "speech that qualifies as an electioneering communication is

not unambiguously campaign related." Appellant Br. 36. But the *McConnell* Court did acknowledge that the electioneering communication definition potentially encompassed both express advocacy and "genuine issue ads," noting that the "precise percentage" of electioneering communications that "had no electioneering purpose" was "a matter of dispute." 540 U.S. at 206. Nevertheless, it upheld BCRA's disclosure requirements as "to the *entire range* of 'electioneering communications.'" *Id.* at 196 (emphasis added). In so holding, the majority confirmed that the governmental interests that had led the *Buckley* Court to uphold FECA's disclosure provisions also supported disclosure of electioneering communications, even though some percentage of "genuine issue ads" were covered by BCRA.

B. *Citizens United* Sustained Disclosure Provisions as Applied to Ads That Were *Not* the Functional Equivalent of Express Advocacy.

Citizens United considered a challenge to the electioneering communication disclosure provisions as applied to Citizens United's film, *Hillary: The Movie* and three promotional ads for the movie. In making this challenge, the plaintiff relied principally on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), although *WRTL* addressed BCRA's restrictions on corporate spending on electioneering communications, not its disclosure requirements for electioneering communications. *Id.* at 457. In *WRTL*, the Court had concluded that BCRA's prohibition on corporate funding of electioneering communications

could constitutionally apply only to speech that was "express advocacy or its functional equivalent," and not to "'issue advocacy[]' that mentions a candidate for federal office." *Id.* at 456, 481. The plaintiff Citizens United, citing *WRTL*'s holding that BCRA's *expenditure* restrictions could only reach "express advocacy and its functional equivalent," sought "to import a similar distinction into BCRA's *disclosure* requirements." *Citizens United*, 558 U.S. at 368-69 (emphasis added). The Supreme Court "reject[ed] this contention," *id.* at 369, explaining that the constitutional limitations it had established with respect to expenditure limits did not apply to disclosure requirements:

> [D]isclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found [BCRA's ban on corporate funding of electioneering communications] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, *we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy*.

Id. (emphasis added) (internal citations omitted). The Court could not have made its conclusion any clearer: disclosure requirements may extend beyond express advocacy and its functional equivalent.

The Institute—in a futile attempt to escape *Citizens United*'s clear holding—implies that this entire section of the decision was dicta. Appellant Br. 40-41

(citing *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014)). It contends that the Court had already concluded that the movie and its promotional ads were the equivalent of express advocacy, or in the Institute's current parlance, "unambiguously campaign related." Appellant Br. 40-43.

But this is a mischaracterization. As the district court noted, although the Court determined that Citizens United's *movie* was the functional equivalent of express advocacy, it made no similar finding with respect to *the advertisements* for the movie—and it was the *ads* that were the focus of the disclosure analysis. 558 U.S. at 325, 367-71; J.A. 9-10. The Institute's suggestion that the disclosure section of *Citizens United* is non-precedential—or somehow distinguishable from this case—is incorrect. The Court's holding on the scope of disclosure laws was necessary to its judgment and is controlling here.

Further, the parties in *Citizens United* themselves agreed that the advertisements were not express advocacy, and the trial court likewise found that the ads "did not advocate Senator Clinton's election or defeat." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (per curiam). Express advocacy requires the use of certain "magic words." *McConnell*, 540 U.S. at 191. The "functional equivalent of express advocacy" requires that a communication be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70. The Institute's new

category of "unambiguously campaign related" speech appears to be coextensive with the "functional equivalent of express advocacy." Appellant Br. 38. But even if these tests are distinct, none of them was conceivably satisfied by Citizens United's promotional ad that stated, in its entirety: "If you thought you knew everything about Hillary Clinton ... wait 'til you see the movie." *Citizens United*, 530 F. Supp. 2d at 276 n.2. Indeed, if that ad met the Institute's self-devised test for "unambiguously campaign related" speech, then *a fortiori* the Institute's proposed ad would as well.

The Institute also makes too much of *Citizens United*'s passing reference to the advertisements as containing "pejorative" references to then-Senator Clinton. Appellant Br. 40-41. The Court offered that characterization as part of its description of the promotional ads, not as an element of its constitutional analysis. 558 U.S. at 368. There is nothing in *Citizens United* to suggest that a communication must contain a "pejorative statement" to be permissibly subject to disclosure. *McConnell* upheld "application of [BCRA's] disclosure requirements to the *entire range*" of electioneering communications, without regard to their "pejorative" nature. 540 U.S. at 196 (emphasis added). Had the Court in *Citizens United* wished to overrule that *McConnell* holding and limit disclosure to ads containing "pejorative" references, it would have done so explicitly. Moreover, the Court's reasoning—that the public has an interest in knowing who is speaking

about a candidate right before an election—applies equally to all communications that refer to a candidate, whether they are "pejorative" or not.

Furthermore, if the BCRA disclosure requirement were instead predicated upon a determination of whether a communication was or was not "unambiguously campaign related," as the Institute demands, it would implicate the same vagueness concerns raised in *Buckley*, and would ignore the Supreme Court's explicit approval of the "easily understood and objectively determinable" criteria of the electioneering communication definition. *McConnell*, 540 U.S. at 194. Not even the Institute can articulate a test for when a communication is "unambiguously campaign related"—at least not without falling back on *WRTL*'s test for the "functional equivalent of express advocacy." *See, e.g.*, Appellant Br. 38 (defining "unambiguously campaign related" speech as a "category of speech which, while falling short of express advocacy, functions in the same way"). The Institute's argument has been rejected by the Supreme Court's clear holdings in *Citizens United* and *McConnell*, and should be rejected here as well.

C. No Legal Authority Supports the Institute's Position.

In an attempt to escape the weight of controlling Supreme Court authority, the Institute invokes a host of other decisions. Even if these decisions could override Supreme Court precedent—which they obviously cannot—they are not on point.

1. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975)

The Institute urges this Court to discount *McConnell* and *Citizens United* and to rely instead on *Buckley*—but not the Supreme Court's opinion, but rather an unappealed portion of the D.C. Circuit's 1975 opinion. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). Appellant Br. 53-56. There, this Court found that a disclosure provision, FECA § 308, was unconstitutionally vague. 519 F.2d at 878. The Institute argues that the BCRA disclosure requirements here are likewise unconstitutional because the FECA provision "sought the same scope of government power that the Commission claims here." Appellant Br. 55. The Institute is incorrect; the *Buckley* appellate decision is not relevant to this case.

As an initial matter, the appellate *Buckley* decision obviously predated the Supreme Court's rulings in *McConnell* and *Citizens United*, and the latter two rulings would supersede anything in the former that might conflict with them. The *Buckley* appellate decision also considered a very different disclosure law, and unsurprisingly, given its vintage, did not consider the question central to this case: whether express advocacy and its functional equivalent (terms the Supreme Court had not yet even invented) mark the outer boundary of permissible disclosure requirements. Thus, instead of conflicting with *McConnell* or *Citizens United*, the 1975 *Buckley* decision simply does not address the same issues.

The law at issue in *Buckley* was entirely different from the electioneering communication disclosure provisions, making its analysis inapplicable here. The provision reviewed by this Court, FECA § 308, required an organization to "file reports . . . as if [it] were a political committee," 519 F.2d at 869-70, if the organization was responsible for the following:

> (1) "any act directed to the public for the purpose of influencing the outcome of an election"; or (2) by "any material" "publishe(d) or broadcast() to the public" which "refer(s) to a candidate (by name, description, or other reference)" and which (a) "advocate(es) the election or defeat of such candidate," or (b) "set(s) 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 (c) is "otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate."

Id. (alterations in original).

Section 308 differs from the electioneering communication law here because it included the same vague language that resulted in the Supreme Court's creation of the express advocacy test in *Buckley*. Section 308 applied to "any act directed to the public for the purpose of influencing the outcome of an election," *id.* at 869, using terminology almost identical to the "for the purpose of . . . influencing" phrase that Supreme Court later found to raise constitutional vagueness concerns. *Buckley*, 424 U.S. at 79-80. This Court held that this language lacked the "precision essential to constitutionality." *Buckley*, 519 F.2d at 877-78. By contrast, the Supreme Court has described the electioneering communication

definition at issue here as "both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194 (citing 2 U.S.C. § 434(f), now codified at 52 U.S.C. § 30104(f)).

Second, section 308 required a group that engaged in covered activity to "file reports with the [Federal Election] Commission as if such person were a *political committee*." *Buckley*, 519 F.2d at 870 (emphasis added). Then, as today, political committee status meant *ongoing* quarterly reporting, regardless of whether the organization engaged in any election-related activity, as well as an array of organizational and record-keeping requirements. *See*, *e.g.*, Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, 1276; 52 U.S.C. § 30104(a)-(b) (quarterly and other ongoing reports), § 30102(h) (governing use of bank accounts), § 30103 (statements of organization and termination requirements). The electioneering communication disclosure requirement, by contrast, consists of an event-driven, one-time report that must be filed if and only if a group spends more than $10,000 on electioneering communications in a covered period. 52 U.S.C. § 30104(f). This requirement is not comparable to section 308, and consequently the appellate decision in *Buckley* does not bear upon its validity.

2. *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014)

The Institute also attempts to undermine the relevant Supreme Court precedents by invoking a Seventh Circuit case that characterized a section of *Citizens United* as "dicta." *See* Appellant Br. 40-41. But *Barland* provides no more support for the Institute than this Court's opinion in *Buckley*.

In *Barland*, the Seventh Circuit stated—incorrectly—that *Citizens United* had determined that the ads for *Hillary: The Movie* were the functional equivalent of express advocacy. 751 F.3d at 836. Based upon this faulty premise, *Barland* said that the Supreme Court's rejection of the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy" was "dicta." *Id*. The Institute, however, fails to acknowledge that the Seventh Circuit also recognized that it was *bound* by that dicta, and that *Citizens United* definitively required the conclusion (as the Seventh Circuit itself had held previously) "that the 'distinction between express advocacy and issue discussion does not apply in the disclosure context.'" 751 F.3d at 836 (quoting *Ctr. for Indv'l Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012)).

Barland adopted an express advocacy standard only with regard to a law that imposed ongoing reporting obligations, as well as organizational and recordkeeping requirements, on a "political committee." 751 F.3d at 836-38, *citing* GAB § 1.28(3)(b). At the same time, *Barland* recognized that in the "specific

context" of "the disclosure requirement for electioneering communications," *Citizens United* "declined to apply the express-advocacy limiting principle." *Id.* *Barland* is unequivocal on this point. It states plainly that "*Citizens United* approved event-driven disclosure for federal electioneering communications" and that "[i]n that specific ... context"—exactly the same as the context here—"the Court declined to enforce *Buckley*'s express-advocacy limitation." *Id.* *Barland* thus does not merely fail to support the Institute's claim; it is fatal to that claim.

In any event, no fair reading of *Citizens United* would support the conclusion that its discussion of express advocacy is dicta. The portion of the opinion that *Barland* cites discusses Citizen United's *movie*, not the ads for the movie. *See id.* at 824 (citing *Citizens United*, 558 U.S. at 324-25). As noted above, the parties and the lower court in *Citizens United* agreed that the ads were neither express advocacy nor its functional equivalent, and nothing in the Supreme Court's opinion remotely suggests any disagreement with this consensus.

Accordingly, every Circuit to have addressed the permissible scope of political disclosure has recognized that *Citizens United* found that disclosure is not limited to express advocacy, even the Seventh Circuit. *See Madigan*, 697 F.3d at 484 ("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.").

See also Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 132 (2d Cir. 2014); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010). This Court should follow the consensus of the other Circuits that *Citizens United* means what it says.

II. The Supreme Court Has Repeatedly Approved of Measures Requiring Disclosure in Connection with "Issue Advocacy."

The Supreme Court's decisions holding that the EC disclosure requirements are constitutional without regard to whether they apply to express advocacy or issue advocacy are not anomalies. *McConnell* and *Citizens United* are fully consistent with longstanding Supreme Court precedent recognizing that the broad public interest in knowing the identity of those financing political advocacy extends far beyond express advocacy or its functional equivalent.

A. Disclosure Laws Are Not Limited by an "Unambiguously Campaign Related" Test.

Central to the Institute's appellate brief is the assertion of a new-found principle that disclosure laws can extend only to communications that are "unambiguously campaign related." *See*, *e.g.*, Appellant Br. 10, 17, 30-33, 36-37, 38, 39-40. This assertion appears to be nothing more than an attempt to rephrase the Institute's argument below—i.e., that disclosure laws cannot reach "pure issue advocacy"—because that argument is clearly foreclosed by *McConnell* and

Citizens United, as the district court correctly concluded. *See* J.A. 42 ("[I]n no uncertain terms, the Supreme Court rejected the attempt to limit BCRA's disclosure requirements to express advocacy and its functional equivalent.'"). Regardless of whether one draws the line between express advocacy and issue advocacy at the "functional equivalent of express advocacy" or "unambiguously campaign related" communications, the Supreme Court has repeatedly affirmed that disclosure laws *can apply on both sides of this line*.

In any event, the Institute's "unambiguously campaign related" test for disclosure has no basis in the law. The phrase appeared in *Buckley*, but was merely incidental to the Supreme Court's discussion of its narrowing construction of the term "expenditure" to encompass only express advocacy. 424 U.S. at 80.[3] The phrase certainly was not adopted as an independent constitutional test, and has never been mentioned, much less applied, in any subsequent Supreme Court case. The Institute is simply attempting to replace the actual jurisprudential approach to

[3] Reviewing the context in which the phrase "unambiguously campaign related" appeared in *Buckley* illustrates its ancillary nature. To address "serious problems of vagueness," the *Buckley* Court construed the term "expenditure" in FECA to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. The Court then stated that "this reading is directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate." *Id.* (emphasis added). It is clear that the only "test" created by the *Buckley* Court was the express advocacy standard, and the "unambiguously campaign related" language was not a separate test, but merely described the express advocacy test in this context.

the Court's review of disclosure requirements—*i.e.* an approach that analyzes whether there exists a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed"—with a test more to its liking. *Id*. at 64. This court should reject the Institute's invented standard, and adhere to the established Supreme Court precedent on the scope of permissible disclosure.

B. The Institute's Newly-Formulated "Unambiguously Campaign Related" Requirement Is Contradicted by Supreme Court Decisions Upholding Disclosure Laws in Non-Campaign Related Contexts.

Supreme Court decisions approving laws relating to lobbying and ballot measure advocacy confirm that the constitutionality of a disclosure requirement does not depend on whether the regulated speech is "unambiguously campaign related."

First, the Supreme Court has long approved of disclosure in the context of lobbying. *Citizens United*, 558 U.S. at 369 (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)). The Institute completely fails to acknowledge that *Citizens United* cited *Harriss* for the proposition that disclosure laws could extend beyond express advocacy, foreclosing its argument that advocacy that is not "unambiguously campaign related" is sacrosanct. *Id.*

In *Harriss*, the Supreme Court considered the Federal Regulation of Lobbying Act, which required all persons "receiving any contributions or

expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report information about their clients and their contributions and expenditures. 347 U.S. at 615 & n.1. After evaluating the Act's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests. The Court explained that "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected," and noted approvingly that the Act did not "prohibit these pressures" but "merely provided for a modicum of information" about them. *Id*. at 625. The fact that the Act was unrelated to candidate campaigns and instead pertained only to issue speech was not constitutionally significant: the disclosure it required served the state's informational interest and "maintain[ed] the integrity of a basic governmental process." *Id*.

The Supreme Court has likewise expressed approval of statutes requiring disclosure of expenditures relating to ballot measures, although such statutes also lack a connection to candidates and thus do not constitute express advocacy or its functional equivalent. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on corporate expenditures to influence ballot measures, in part because the state's interests could be achieved constitutionally through the less restrictive means of disclosure: "Identification of the source of

advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. Citing *Buckley* and *Harriss*, the Court emphasized "the prophylactic effect of requiring that the source of communication be disclosed." *Id.*

The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to committees formed to support or oppose ballot measures. Again, the Court struck down the contribution limit, basing its holding in part on the disclosure that the law required from ballot measure committees. *See id.* at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

These precedents have led multiple circuits to conclude that requiring disclosure of donors financing ballot measure issue advocacy is constitutional, just as is disclosure of donors financing candidate advocacy. *See, e.g., Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) ("The [Supreme] Court has repeatedly acknowledged the constitutionality of state laws requiring the disclosure of funds spent to pass or defeat ballot measures."). In a challenge to

Florida's ballot measure disclosure law, for example, the Eleventh Circuit strongly rejected the "[c]hallengers' proposed distinction between ballot issue elections and candidate elections," emphasizing that this distinction was "not supported by precedent" and could not "compel a departure from *Citizens United*." *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2013); *see also Madigan*, 697 F.3d at 480.

These courts recognize what the Institute does not: that the informational interest in disclosure recognized by *Buckley* applies equally to the disclosure of ballot measure advocacy even though this latter activity is not "unambiguously related" to candidate campaigns. Given the weight of the case law, "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Human Life*, 624 F.3d at 1016.

III. The Institute's As-Applied Challenge to the BCRA Disclosure Provisions Fails.

A. The Institute's "As-Applied" Challenge Is Indistinguishable from the Claims Brought in *McConnell* and *Citizens United*.

Although the Institute bills its case as an "as applied" challenge, it rests on the same theory as the facial challenge to the electioneering communication provisions that was rejected in *McConnell*. The Institute highlights little about its proposed ad that would serve as grounds for an as-applied exemption, other than the claim that its ad is unambiguously campaign related. But the petitioners in

McConnell likewise challenged the electioneering communication disclosure provisions because they extended beyond express advocacy, and their facial challenge was rejected. 540 U.S. at 190, 196. "A plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court), *aff'd*, 130 S. Ct. 3544 (2010).

Even if viewed as an as-applied challenge, the Institute's claim must fail given *Citizens United*'s dismissal of an as-applied challenge that rested on exactly the same theory as here: that an ad should be exempted from disclosure on an as-applied basis because it did not constitute express advocacy or its functional equivalent. The Supreme Court adamantly "reject[ed] that contention." *Citizens United*, 558 U.S. at 369. It recognized only one constitutionally mandated as-applied exemption from a facially valid political disclosure law: where there is "a reasonable probability that [a] group's members would face threats, harassment, or reprisals if their names were disclosed." *Id*. at 370; *see also Buckley*, 424 U.S. at 74. Here, the Institute has expressly disclaimed any concerns about harassment. *See* J.A. 34-35. It has thus failed to claim the one as-applied exemption from a facially valid campaign finance disclosure law recognized by the Supreme Court.

B. The Institute Fails to Distinguish the Circumstances of its Case from Those of *Citizens United* and *McConnell*.

1. The Institute's Status as a Section 501(c)(3) Organization Is Immaterial to the Constitutionality of a Disclosure Requirement.

The Institute highlights that it is a group organized under Section 501(c)(3) of the Internal Revenue Code, *see* 26 U.S.C. § 501(c)(3), whereas the plaintiff in *Citizens United* was a Section 501(c)(4) organization, and insinuates that the distinction in tax status somehow affects the First Amendment analysis. Appellant Br. 43-47. But the Supreme Court has never suggested that the constitutionality of a disclosure law turns on the tax status of the groups subject to the law; to the contrary, the Court has criticized campaign finance laws that discriminate "based on the speaker's identity." *Citizens United*, 558 U.S. at 350.

No exemption from disclosure for 501(c)(3) organizations is constitutionally required. In *McConnell*, the Supreme Court sustained the electioneering communication disclosure provisions even though they contained no exemption for 501(c)(3) groups. 540 U.S. at 194-96. And after *McConnell*, when the FEC created an exemption for 501(c)(3) groups by regulation, the exemption was invalidated. *Shays v. FEC*, 337 F. Supp. 2d 28, 124-28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The district court found this 501(c)(3) exemption to be arbitrary and capricious because "the [FEC] did not fully address whether the tax

code . . . preclude[s] Section 501(c)(3) organizations from making" the communications that BCRA "requires be regulated." *Id*. at 128. No court has imposed such an exemption as a matter of constitutional law.

The Institute offers no substantive reason why 501(c)(3) organizations are situated differently than 501(c)(4) organizations for purposes of disclosure. It states that "§ 501(c)(3) organizations like the Institute enjoy greater donor protection," citing 26 U.S.C. § 6104(c)(3) and § 6104(d)(3)(A) for this proposition. Appellant Br. 44. The former section concerns IRS cooperation with state enforcement efforts concerning "the solicitation or administration of the charitable funds or charitable assets," 26 U.S.C. § 6104(c)(3), and has nothing to do with public disclosure. With respect to the latter section, the Institute is simply wrong. Section 6104(d)(3)(A) provides that *all* tax-exempt groups organized under 501(c) except private foundations have no obligation under federal tax law to disclose their donor information to the public. 26 U.S.C. § 6104(d)(3)(A) ("In the case of an organization which is not a private foundation (within the meaning of section 509 (a)) or a political organization exempt from taxation under section 527, [the law] shall not require the disclosure of the name or address of any contributor to the organization . . . ."). This provision encompasses both 501(c)(3) and 501(c)(4) organizations. Thus, the tax code provision upon which the Institute relies itself

fails to make the distinction between 501(c)(3) and 501(c)(4) groups that the Institute advances.

The Institute also argues that 501(c)(3) organizations should be exempted from disclosure because they are "barred, by federal law, from carrying out any candidate-centered electioneering." Appellant Br. 43-44. To be sure, 501(c)(3) groups are prohibited from "intervening" in a "political campaign" under 26 U.S.C. § 501(c)(3). But the IRS's definition of campaign intervention, *see, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421, is used to determine whether a group meets the criteria for a tax status under Section 501(c)(3), not whether the group should be subject to disclosure under federal election law. The IRS' definition is not—and was not intended to be—coterminous with the activity regulated under FECA. *See, e.g.*, *Shays*, 337 F. Supp. 2d at 124-28 (criticizing FEC for deferring to the IRS standard because "the IRS in the past has not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are . . . considered [to be political activities]" under federal campaign finance law). Moreover, that the Tax Code itself imposes more stringent limits on political activity by 501(c)(3) groups than by 501(c)(4) groups suggests, if anything, that section 501(c)(3) groups are entitled to *less* constitutional protection for their political activities.

2. The Supreme Court Has Made Clear that Donor Disclosure Need Not Be Limited to Donors Who "Earmark" Their Funds for Election Ads.

In 2007, the FEC promulgated a regulation limiting donor disclosure under the federal electioneering communication disclosure law to only "those persons who made a donation aggregating $1,000 or more *specifically for the purpose of furthering* electioneering communications made by that corporation or labor organization." Explanation and Justification for Final Rules on Electioneering Communications ("E & J"), 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007) (emphasis added); 11 C.F.R. § 104.20(c)(9). This regulation narrowed the donor disclosure required by the statute, which on its face requires groups spending over $10,000 on electioneering communications to either establish a segregated bank account and disclose *all* contributors of $1,000 or more to that account, *see* 52 U.S.C. § 30104(f)(2)(E), or use their general treasury account and disclose *all* contributors of $1,000 or more to the group, *see id.* § 30104(f)(2)(F). The regulation was challenged by Representative Chris Van Hollen (D-MD) under the Administrative Procedures Act and was recently vacated. *Van Hollen v. FEC*, No. 11-0766, 2014 WL 6657240 (D.D.C. Nov. 25, 2014).[4]

The Institute now claims this "intervening" district court decision and "change in the law" serves to distinguish *Citizens United* from its case and

[4] Attorneys for *amici* Campaign Legal Center, Democracy 21 and Public Citizen are part of the legal team representing Van Hollen in the litigation.

"necessitates new, as applied review by a three-judge court." Appellant Br. 48. But *Van Hollen* does no such thing.

First, the Institute's claims are premature, to say the least. The district court decision in *Van Hollen* is under appeal, *see* Notice of Appeal, *Van Hollen v. FEC* (No. 15-5017). By arguing that the recent *Van Hollen* decision necessitates the convening of a three-judge court, the Institute suggests that the continued existence of 11 C.F.R. § 104.20(c)(9) is essential to the constitutionality of the electioneering communication disclosure requirement. Even if this Court were to agree and rest its holding on this rationale, its decision would remain in limbo until the *Van Hollen* litigation was fully resolved.

In any event, the existence of the earmarking rule is in no way dispositive of the Institute's claims. As the Institute concedes, it brought the instant case prior to the recent *Van Hollen* decision and while the limiting regulation was still in effect, Appellant Br. 47-48, and the Institute would presumably continue litigating this challenge regardless of the outcome of *Van Hollen*. The Institute's challenge turns on the nature of its proposed electioneering communication—i.e. whether the ad is "unambiguously campaign related"—not the scope of donor disclosure. The Institution's position that advertisements that are not the functional equivalent of express advocacy cannot be subject to disclosure, if accepted (despite the Supreme Court's contrary holdings) would mean that the electioneering disclosure law was

unconstitutional regardless of whether the Institute had to disclose one donor or 100 donors. The earmarking rule is beside the point.

Most importantly, however, even if the earmarking regulation is ultimately invalidated and the Institute is required to report all of its significant donors,[5] courts have repeatedly held such comprehensive disclosure to be constitutional.

In *McConnell*, the Supreme Court upheld the statutory electioneering communication disclosure requirement on its face although it had not yet been modified by the FEC's 2007 earmarking rule. Evidently, the Court was not at all troubled that the statute required disclosure of "the names and addresses of *all* contributors" over a specified threshold. 52 U.S.C. § 30104(f)(2)(F) (emphasis added). The Institute is thus simply incorrect in arguing that the Supreme Court has cast doubt on "generalized donor disclosure." Appellant Br. 52.

The 2007 FEC rule was in effect when *Citizens United* was decided, but the "earmarking" limitation played no role in the Supreme Court's constitutional analysis and was never mentioned in the opinion. This Court has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, *3

[5] Contrary to the Institute's claim that the law would require disclosure of "*all* significant donors," Appellant Br. 49 (emphasis in the original), the statute provides the Institute with the option to disclose only the donors to a separate account from which it makes disbursements for electioneering communications. 52 U.S.C. § 30104(f)(2)(E).

(D.C. Cir. May 14, 2012) (unpublished). Thus, even if the Institute was not operating under the FEC's 2007 rule, comprehensive disclosure of donors—as required under the federal statute itself—is constitutional.

The courts of appeals have likewise upheld laws that require organizations to disclose all of their donors, even though a given contribution may not have been earmarked for the specific form of advocacy covered by a challenged disclosure law. *See, e.g.*, *Madigan*, 697 F.3d at 472; *Family PAC*, 685 F.3d at 803. Indeed, the Fourth Circuit recently reversed a district court precisely because it imposed an "earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Ctr. for Indv'l Freedom v. Tennant*, 706 F.3d 270, 291-92 (4th Cir. 2013). As noted by the Seventh Circuit, "an earmarking limitation would mean that groups that make electioneering communications need not disclose who has contributed to pay for those communications unless the donor is dumb enough specifically to direct the organization to use the money for a particular communication." *Madigan*, 697 F.3d at 490 n.27 (citations and internal quotation marks omitted). "The First Amendment does not require a state to build such an escape hatch into reasonable disclosure laws." *Id*. at 489.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Dated this 15th day of May, 2015.

Respectfully submitted,

/s/ J. Gerald Hebert
J. Gerald Hebert
ghebert@campaignlegalcenter.org
Tara Malloy
Lawrence M. Noble
Megan McAllen
THE CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, D.C. 20005
Tel.: (202) 736-2200

Charles Fried
1545 Massachusetts Avenue
Cambridge, MA 02138

Counsel for *Amici Curiae*

*Counsel of Record

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, D.C. 20036
Tel.: (202) 355-9600

Donald J. Simon
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, D.C. 20005
Tel.: (202) 682-0240

Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
Tel.: (202) 588-1000

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,836 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14 point font.

/s/ J. Gerald Hebert
J. Gerald Hebert
THE CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, D.C. 20005
Tel.: (202) 736-2200

Dated: May 15, 2015

CERTIFICATE OF SERVICE

I certify that on March 15, 2015, I electronically filed a copy of the foregoing Brief *Amici Curiae* with the Clerk of the United States Court of Appeals for the D.C. Circuit using the CM/ECF system, which will send notification of this filing to counsel of record.

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ J. Gerald Hebert
J. Gerald Hebert
THE CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, D.C. 20005
Tel.: (202) 736-2200

Dated: May 15, 2015