UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLEE FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY AFFIRMANCE

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

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

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

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

LEGAL AND FACTUAL BACKGROUND

I. THE FEC AND THE FEDERAL ELECTION CAMPAIGN ACT

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

II. BCRA'S DISCLOSURE REQUIREMENTS FOR ELECTIONEERING COMMUNICATIONS

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

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

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

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

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

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

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

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

III. APPELLANT INDEPENDENCE INSTITUTE

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

IV. THE DISTRICT COURT PROCEEDINGS

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

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

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

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

STANDARDS OF REVIEW

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

/s/ Erin Chlopak
Erin Chlopak (D.C. Bar No. 496370)
Acting Assistant General Counsel

Michael A. Columbo (D.C. Bar No. 476738)
Attorney

November 25, 2014

FOR THE APPELLEE
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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

CERTIFICATE OF SERVICE

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

Allen Dickerson, adickerson@campaignfreedom.org
Center for Competitive Politics
124 S. West Street
Suite 201
Alexandria, VA 22314

/s/ Erin Chlopak
Erin Chlopak (D.C. Bar No. 496370)
Acting Assistant General Counsel
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463