UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission respectfully moves this Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h). In support of this motion, the Commission is filing a Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment and a proposed order.

Respectfully submitted,

Daniel A. Petalas (D.C. Bar No. 467908)
Acting General Counsel
dpetalas@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel — Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak (D.C. Bar No. 496370)
Acting Assistant General Counsel
echlopak@fec.gov

/s/ Greg J. Mueller
Greg J. Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

July 19, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Daniel A. Petalas (D.C. Bar No. 467908)
Acting General Counsel

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

Kevin Deeley
Acting Associate General Counsel

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

Greg J. Mueller (D.C. Bar No. 462840)
Attorney

FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, DC 20463
(202) 694-1650

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Statutes and Regulations

Miscellaneous

INTRODUCTION

This case asks the Court to decide the constitutionality of event-driven disclosure requirements concerning the sources and financing of certain clearly and objectively defined "electioneering communications" ("ECs"). The challenged EC disclosure rules apply only to advertisements that refer to a clearly identified candidate for federal office, and that are (a) publicly distributed, (b) via certain specific mediums, (c) within a specified short period before a federal election, and (d) in a jurisdiction in which the identified candidate is running for office. The Supreme Court has twice upheld the Bipartisan Campaign Reform Act's ("BCRA") disclosure requirements for ECs and explicitly rejected the argument, which plaintiff Independence Institute seeks to relitigate here, that such disclosure requirements must be limited to communications that are express candidate advocacy or its equivalent. The Supreme Court's unambiguous decisions in *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010), clearly foreclose this challenge.

Indeed, in *Citizens United*, eight Justices of the Supreme Court held that "the public has an interest in knowing who is speaking about a candidate shortly before an election" and this "informational interest alone" is sufficient to uphold the constitutionality of the statutory disclosure requirements for federal ECs. *Citizens United*, 558 U.S. at 369. Those eight Justices also explicitly rejected an argument, which plaintiff attempts to repackage and present anew here, that BCRA's disclosure requirements for ECs "must be limited to speech that is the functional equivalent of express advocacy." *Id.* The Court in *Citizens United* was clear and unequivocal: it not only refused to impose a functional-equivalent-of-express-advocacy limitation on the federal EC disclosure rules, the Court also held that such disclosure requirements are constitutional "even" as applied to "ads [that] only pertain to a commercial transaction." *Id.*

Nine United States circuit courts of appeals have since invoked *Citizens United* in holding that other campaign-finance disclosure provisions need not be limited to candidate advocacy to survive First Amendment scrutiny, *see infra* pp. 18-21, including two recent decisions that rejected similar challenges to analogous state EC provisions by the same or similarly situated plaintiffs here. *See Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016) ("*Independence Institute II*"); *Del. Strong Families v. Attorney General of Del.*, 793 F.3d 304, 308 (3d Cir. 2015), *cert. denied sub nom. Del. Strong Families v. Denn*, No. 15-1234, 2016 WL 1275340 (June 28, 2016). *Independence Institute II* and *Delaware Strong Families* also illuminate the flaws of plaintiff's assorted attempts to distinguish directly controlling Supreme Court precedent, including based on plaintiff's tax status, or to concoct support for its already-rejected legal theories from alternative decisions. Plaintiff's cited cases are either inapposite or actually indicate that the disclosure requirements challenged here are permissible.

Even if this challenge were not foreclosed, plaintiff's claims fail for the additional reason that the organization cannot identify any unconstitutional burden arising from the narrow disclosure requirement it challenges. For these reasons and those detailed below, plaintiff's attempt to relitigate a constitutional question that the Supreme Court has clearly and conclusively resolved should be rejected and summary judgment should be awarded to the Commission.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

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 ("FECA"), 52 U.S.C. §§ 30101-30146, including the amendments added by BCRA. The Commission is empowered to "formulate policy" with respect to FECA,

52 U.S.C. § 30106(b)(1), and "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," *Id.* §§ 30107(a)(8), 30111(a)(8), (d).

A. The Origin of "Electioneering Communications"

FECA limits the amount individuals may contribute to candidates, their campaigns, and other political committees and parties. 52 U.S.C. § 30116(a). It also prohibits corporations and labor organizations from making contributions to federal candidates or their authorized committees, except through such entities' separate segregated funds (also known as political action committees). *Id.* § 30118(a), (b)(2)(C).[1] And, before the Supreme Court's decision in *Citizens United*, FECA prohibited corporations and unions from making any "expenditures," defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i); *see id.* § 30118(a). FECA also requires periodic disclosures of contributions and certain expenditures and disbursements to the FEC, which, in turn, makes the information publicly available. *Id.* § 30104.

In 1976, the Supreme Court generally upheld FECA's contribution limits and disclosure requirements against a facial challenge, but the Court struck down FECA's limits on expenditures by individuals and candidates. *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). When the Court analyzed FECA's then-$1,000 limit and disclosure requirements for expenditures by any person "relative to" a federal candidate, the Court construed "expenditure" narrowly to avoid invalidating those provisions on vagueness grounds and applied the term "only

[1] FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i).

to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44, 79 (footnote omitted).

Following *Buckley*, Congress amended FECA to define an "independent expenditure" as "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 52 U.S.C. § 30101(17)). FECA requires that all independent expenditures above $250 be timely reported to the Commission for disclosure to the public. 52 U.S.C. § 30104(c)(1).

Buckley did not consider the separate FECA provision prohibiting corporations and labor organizations generally from making independent expenditures using their general treasury funds, 52 U.S.C. § 30118. Following the Supreme Court's narrowing construction of independent "expenditure," corporations and unions generally could finance independent communications that discussed candidates with general treasury funds as long as they stopped short of express advocacy.

By the end of the 1990s, groups were spending millions of dollars on ads that avoided words of express advocacy and ostensibly advocated for or against an issue, but in essence urged the election or defeat of federal candidates. *See McConnell v. FEC*, 540 U.S. 93, 126-128 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Congress determined that because the express advocacy standard was easy to evade, corporations and labor unions were able "to fund broadcast advertisements designed to influence federal elections . . . while concealing their identities from the public." *Id*. at 196 (internal quotation marks omitted).

To address this and other developments in federal campaign finance, Congress enacted BCRA in 2002, which, *inter alia*, imposed new financing restrictions and disclosure requirements for "electioneering communications." BCRA §§ 201-204, 116 Stat. 88-90, 52 U.S.C. §§ 30104(f)(1)-(2), 30118(a), (b)(2); *see also McConnell*, 540 U.S. at 126.

BCRA defines an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, is 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 is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A); 11 C.F.R. § 100.29(a)(2). BCRA prohibited the financing of ECs with corporate or union general treasury funds. 52 U.S.C. §§ 30104(f)(3)(A)(i), 30118(a), (b)(2).

Congress also required disclosure concerning the sources and financing of ECs. Any "person" (defined to include any corporation, labor organization, or other group, 52 U.S.C. § 30101(11)) that spends over $10,000 to produce or air an electioneering communication must file a statement with the Commission. *Id.* § 30104(f)(1). The information required on the statement includes identification of the person making the EC disbursement and the amount and date of certain disbursements. 52 U.S.C. § 30104(f)(1), (2)(A)-(C).

BCRA provides two options for disclosing information about the funds used to finance ECs. If the disbursements were paid from a segregated bank account that contains only funds contributed directly to that account for electioneering communications (and solely by individual United States citizens, nationals, or lawful permanent residents), the statute requires disclosure only of the names and addresses of contributors that gave a total of $1,000 or more to the account between the beginning of the preceding calendar year and the disclosure date.

52 U.S.C. § 30104(f)(2)(E). Alternatively, if the disbursements were not paid with funds from such an account, the statute requires disclosure of the names and addresses of all contributors that gave a total of $1,000 or more to the person making the disbursement between the beginning of the preceding calendar year and the disclosure date. *Id.* § 30104(f)(2)(F).

B. The Supreme Court's Resolution of Facial and As-Applied Constitutional Challenges to BCRA's Electioneering Communications Provisions

When BCRA's EC provisions were challenged as facially unconstitutional, the Supreme Court upheld the statutory definition of "electioneering communication" at 52 U.S.C. § 30104(f)(3)(A)(i), the related disclosure provision at 52 U.S.C. § 30104(f)(1)-(2), and (initially) the related spending prohibitions at 52 U.S.C. §§ 30118 and 30120. *See McConnell*, 540 U.S. at 194, 201-02, 207-08. The Court rejected the contention that the statutory definition of "electioneering communication" was infirm because it was not limited to "communications expressly advocating the election or defeat of particular candidates." *Id.* at 189-90. *Buckley*, the Court found, had not established a "constitutionally mandated line" between express candidate advocacy and issue advocacy. *Id.* (explaining that *Buckley*'s "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law"). The Court further observed that unlike FECA's definition of "expenditure," BCRA's definition of "electioneering communication" did not raise any vagueness concerns; on the contrary, its elements "are both easily understood and objectively determinable." *Id.* at 194.

As to BCRA's disclosure requirements, eight Justices agreed that such requirements 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 "do not prevent anyone from speaking." *Id*. at 196, 201 (brackets and internal quotation marks omitted). The Court thus

held that "*Buckley* amply supports application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'" *Id.* at 196.

Four years after *McConnell*, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Supreme Court considered an as-applied challenge to BCRA's prohibition on the *financing* of electioneering communications with corporate and union treasury funds and partially invalidated it. The controlling opinion held BCRA's ban unconstitutional as applied to a corporation's advertisements that did not constitute express advocacy or "the functional equivalent of express advocacy." 551 U.S. at 476, 478-79. A communication is the "functional equivalent of express advocacy," the controlling opinion explained, only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70. After *Wisconsin Right to Life*, all corporations and unions thus had the right to finance electioneering communications that did not contain express advocacy or its functional equivalent. *See* 551 U.S. at 480-81. The Court in *Wisconsin Right to Life* did not address BCRA's *disclosure* provisions.

Following the Supreme Court's decision in *Wisconsin Right to Life*, the Commission promulgated regulations that, *inter alia*, addressed the new category of permissible electioneering communications financed with corporate or union treasury funds. Consistent with the statutory requirements for unincorporated entities, the Commission's regulations provide that when a corporation finances an EC with funds from a segregated bank account established to pay for electioneering communications, the corporation paying for the communication need only identify those individuals who contributed $1,000 or more to the account itself. 11 C.F.R. § 104.20(c)(7). In the absence of a segregated account, the Commission's regulations require that a 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) (emphasis added).

In 2010, the Supreme Court revisited the constitutionality of prohibitions on using corporate and union general treasury funds to finance independent expenditures and electioneering communications, as well as the statutory disclosure requirements for electioneering communications. *Citizens United*, 558 U.S. 310. 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. *Id.* at 319-20. Citizens United also sought to distribute several short ads promoting the film. *Id.* at 320.

The Court found that Citizens United's movie was essentially "a feature-length negative advertisement that urge[d] viewers to vote against Senator Clinton for President." *Id.* at 325. Applying the "objective" "functional-equivalent test" articulated in the controlling opinion in *Wisconsin Right to Life*, the Court concluded that "there [was] no reasonable interpretation of [the movie] other than as an appeal to vote against Senator Clinton," and it was accordingly subject to the challenged financing prohibitions. *Id.* at 326. The court then invalidated FECA's prohibition on the use of corporate and union general treasury funds to finance independent expenditures, as well as BCRA's similar prohibition on the use of such funds to finance electioneering communications. 558 U.S. at 365-66.

In a portion of the opinion that eight Justices joined, however, the Court reaffirmed the part of *McConnell* that upheld BCRA's electioneering communication disclosure requirements on their face, and further upheld those disclosure requirements specifically as applied to both Citizens United's movie and its proposed advertisements. 558 U.S. at 366-71. Citizens United had sought to "import . . . into BCRA's disclosure requirements" a distinction similar to

Wisconsin Right to Life's limit on permissible financing restrictions, contending that "the disclosure requirements . . . must be confined to speech that is the functional equivalent of express advocacy." *Id.* at 368-69. Because "disclosure is a less restrictive alternative to more comprehensive regulations of speech," the Court "reject[ed]" that contention. *Id.* at 369 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)). Thus, despite not making any findings that Citizens United's promotional ads were the functional equivalent of express advocacy, the Court held that the government's "informational interest alone is sufficient to justify application of [BCRA's EC disclosure requirements] to these ads." *Id.*

II. INDEPENDENCE INSTITUTE'S CHALLENGE TO BCRA'S ELECTIONEERING COMMUNICATION PROVISIONS

Plaintiff Independence Institute is a nonprofit corporation that is organized and claiming exemption from income taxes under 26 U.S.C. § 501(c)(3), and that "conducts research and educates the public on various aspects of public policy," including by financing and distributing advertisements. (V. Compl. ¶ 2.) One such radio advertisement, which plaintiff had planned to run in Colorado during the months leading up to the November 2014 general election, advocated in favor of pending legislation concerning criminal justice reform and urged listeners to call then-Colorado Senators Mark Udall and Michael Bennet and "[t]ell them to support" the bill. (*Id.* ¶¶ 3, 31, 32, 35.) At the time, Udall was up for re-election and the advertisement would have qualified as an EC under BCRA. (*Id.* ¶¶ 105-07.)

On September 2, 2014, plaintiff filed a complaint challenging the constitutionality of BCRA's definition of "electioneering communication" and EC disclosure requirements as applied to non-express advocacy communications like plaintiff's proposed radio advertisement. (V. Compl. ¶¶ 1, 122.) It also filed an application for a three-judge court pursuant to BCRA's special judicial-review provision, 52 U.S.C. § 30110 note, which provides for three-judge district

courts to decide substantial constitutional challenges to BCRA, and for such decisions to be directly appealable to the Supreme Court. And it filed a motion for a preliminary injunction.

In light of the imminence of the November 2014 general election — plaintiff made these initial filings just a few days before the electioneering-communication period was to begin — the parties agreed to an expedited briefing schedule and, at the district court's suggestion, to consolidate briefing on the preliminary-injunction motion with merits briefing. (Minute Order (Sept. 9, 2014); Joint Stip. of Parties and Order (Docket No. 14) ("Joint Stip.").) The parties further stipulated, and the district 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." (Joint Stip. at 1.)

Plaintiff argues that its proposed advertisement "is genuine issue speech" and that the statutory definition of "electioneering communication" is unconstitutionally overbroad because it is not limited to communications containing "an appeal to vote for or against a specific candidate." (V. Compl. ¶¶ 113, 116.) It further contends that BCRA's disclosure requirements for electioneering communications cannot constitutionally be applied to groups that "do[] not have 'the major purpose' of political activity," and that "only communications that 'expressly advocate the election or defeat of a clearly identified candidate' are subject to disclosure." (*Id.* ¶ 122.)

III. THE SINGLE-JUDGE DISTRICT COURT DECISION

On October 6, 2014, the district court issued a 22-page opinion denying plaintiff's request to convene a three-judge district court and entering judgment for the Commission based on the court's conclusion that this case is "squarely foreclosed" by "the Supreme Court's clear instructions in *Citizens United*" and its rejection of all of plaintiff's attempts to limit or

distinguish that decision. *Indep. Inst. v. FEC*, 70 F. Supp. 3d 502, 506-13, 515 (D.D.C. 2014), *rev'd and remanded*, 816 F.3d 113 (D.C. Cir. 2016) (holding that the merits of plaintiff's challenge must be decided by a three-judge district court).

IV. INDEPENDENCE INSTITUTE'S APPEAL

A. Proceedings Regarding Mootness

At the time of the appeal, plaintiff's proposed advertisement no longer fell within BCRA's definition of "electioneering communication." The Commission argued in a brief before the Court of Appeals that plaintiff's challenge was moot because plaintiff had not "to date identified any specific intention to broadcast any electioneering communications in the future." Appellee Br., *Indep. Inst.*, No. 14-5249, at 46-47 (D.C. Cir. May 8, 2015 (Docket No. 1551586)). In its appellate reply brief, plaintiff asserted for the first time it "will wish to run similar advertisements in the future," and thus that its alleged injury falls within the capable-of-repetition-yet-evading-review exception to mootness. Appellant's Reply Br., *Indep. Inst.*, No. 14-5249, at 24-27 (D.C. Cir. May 22, 2015 (Docket No. 1553771)). To support that assertion, plaintiff later supplemented the record on appeal with a press release describing its intention "to run substantively similar advertisements to the one at issue here" in future EC periods. Appellant's Mot. to Supplement R., *Indep. Inst.*, No. 14-5249, at 2 (D.C. Cir. Sept. 24, 2015 (Docket No. 1574833)); Order, *Indep. Inst.*, No. 14-5249 (D.C. Cir. Oct. 13, 2015 (Docket No. 1577832)) (granting motion to supplement the record). At oral argument in the Court of Appeals, counsel for the FEC stated that in light of plaintiff's representations in its press release, the FEC no longer disputed that plaintiff's claims fall within the capable-of-repetition-yet-evading-review exception to mootness (*see* Pl.'s Mem. at 5 & n.2).

B. The Panel's Opinions Regarding the District Court Decision Not to Convene a Three-Judge Court

On March 1, 2016, a panel of the Court of Appeals for the District of Columbia Circuit issued a majority opinion holding that the merits of plaintiff's challenge must be decided by a three-judge district court and reversing the decision below with instructions that a three-judge district court be convened. *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016). Judge Wilkins issued a dissenting opinion concluding that plaintiff's claims should have been dismissed for lack of jurisdiction. *Id.* at 117-19 (Wilkins, J., dissenting) (finding that plaintiff's central argument depends on a "fatal" "misreading of *Buckley v. Valeo*" that "is squarely foreclosed by subsequent Supreme Court precedent"). Presumably because the court was satisfied that it possessed jurisdiction, neither the majority nor the dissenting opinion discussed whether plaintiff's claims were moot.

After the single-judge court issued its opinion here, the Supreme Court had issued *Shapiro v. McManus*, 136 S. Ct. 450 (2015) and clarified the standard for determining whether a three-judge court must be convened under 28 U.S.C. § 2284. In the majority opinion in plaintiff's appeal, Judges Kavanaugh and Griffith relied on *Shapiro* in concluding that plaintiff's claims were not "'essentially fictitious'" or "'obviously frivolous'" and that plaintiff's factual allegations were sufficiently distinct from those in past Supreme Court cases to clear the "low bar" for obtaining a three-judge court. *Indep. Inst.*, 816 F.3d at 116-17 (quoting *Shapiro*, 136 S. Ct. at 456). The majority made clear that it was not "suggest[ing] that Independence Institute's argument is a winner," but merely holding that "[s]ection 2284 'entitles' the Institute to make its case 'before a three-judge district court.'" *Id.* at 117 (quoting *Shapiro*, 136 S. Ct. at 456). The court accordingly reversed the judgment of the single-judge district court and remanded the case

with directions to convene a three-judge district court.

ARGUMENT

I. AS THE SUPREME COURT HAS HELD, THE EC DISCLOSURE PROVISIONS CHALLENGED HERE ARE CONSTITUTIONAL

A. The Challenged EC Provisions Are Subject to Intermediate Scrutiny

Disclosure provisions "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201); *see also SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"). Thus, as plaintiff acknowledges (Pl.'s Mem. at 13), "First Amendment challenges to disclosure requirements in the electoral context . . . [are] reviewed . . . under what has been termed 'exacting scrutiny.'" *Doe v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases). "That standard 'requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Citizens United*, 558 U.S. at 366-67).

Plaintiff contends that the Commission must "demonstrate 'that a [sufficiently important] interest supports *each application* of a statute restricting speech.'" (Pl.'s Mem. at 13 (quoting *Wis. Right To Life, Inc.*, 551 U.S. at 478).) But that is the standard for a "court applying strict scrutiny," as the opinion in *Wisconsin Right to Life* makes plain, thus the need for plaintiff to replace "compelling" with "[sufficiently important]" in the quotation. 551 U.S. at 478. To survive intermediate scrutiny, the fit between the governmental objective and the means employed in a disclosure provision need only be "substantial," not perfect.

The "Supreme Court has not limited the government's acceptable interests" in the disclosure context; "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirement." *SpeechNow*,

599 F.3d at 696 (quoting *Citizens United*, 558 U.S. at 366).

B. The EC Disclosure Provision Furthers Important Governmental Interests, Including Providing the Electorate with Information

The Supreme Court has repeatedly concluded that "important state interests" generally sufficient to uphold disclosure laws include "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196 (discussing *Buckley*). Plaintiff's contention that "[u]nder *Buckley*'s exacting scrutiny, the government's only legitimate interest is informational" is thus flat wrong. (Pl.'s Mem. at 13.)

More specifically, the Supreme Court concluded in *McConnell* that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full to BCRA." *McConnell*, 540 U.S. at 196. And, even after the Court had struck down the electioneering communications financing provisions in *Citizens United*, it held that BCRA's disclosure requirements for ECs continue to serve informational interests. 558 U.S. at 369.[2]

Similarly, even in the context of disclosure about expenditures for which courts have struck down expenditure limits, "requiring disclosure" of "who is funding" candidate-related speech "deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals." *SpeechNow*, 599 F.3d at 698; *see also Yamada v. Snipes*, 786 F.3d 1182, 1187, 1197 (9th Cir. 2015) (holding, in a case in which one contribution limit was held unconstitutional as applied, that "disclosure requirements provide a valid means of detecting violations of valid contribution limitations, . . . including rules that bar contributions by foreign corporations or individuals") (citations omitted). After *Citizens*

[2] The Supreme Court in *Citizens United* declined to consider "'other asserted interests'" only because "'the informational interest alone [wa]s sufficient to justify application'" of the disclosure provisions in that case. *Citizens United*, 558 U.S. at 369.

United, federal law continues to prohibit foreign nationals from financing ECs. *See* 52 U.S.C. § 30121(a)(1)(C). Disclosure of the funders of ECs thus continues to serve not only the informational interest, but also enables "gathering [of] the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196.

C. The Supreme Court Has Made Clear That EC Disclosure Requirements for Advertisements That Are Not Functionally Equivalent to Express Candidate Advocacy Are Substantially Related to Important Interests

In *McConnell*, the Supreme Court explicitly held, in the specific context of the statutory disclosure requirements for ECs, that *Buckley* "'amply supports application of [those] disclosure requirements to the *entire range* of 'electioneering communications.'" *McConnell*, 540 U.S. at 196 (emphasis added). In that portion of the decision, eight Justices agreed that requiring disclosure for *all* ECs serves "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 196-97 (internal quotation marks and citation omitted).

The Court acknowledged that whereas FECA had "limited the coverage of [its] disclosure requirement to communications expressly advocating the election or defeat of particular candidates," BCRA's definition of "'electioneering communication' is not so limited." 540 U.S. at 189. The Court clarified that *Buckley* did not establish a "constitutionally mandated line" between express candidate advocacy and issue advocacy and *Buckley*'s "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *Id.* at 190. The Court found that BCRA's precise and objective definition of "electioneering communication" did not raise any of the vagueness concerns that had led the *Buckley* Court to create its "express advocacy" construction of the otherwise vague statutory definition of "expenditure." *McConnell*, 540 U.S. at 194. Because the elements of the "electioneering

communication" definition "are both easily understood and objectively determinable . . . the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite" in evaluating the constitutional scope of BCRA's definition of electioneering communications. *Id.* (citation omitted).

More recently, in *Citizens United*, eight Justices again agreed that BCRA's EC definition is constitutional in the disclosure context, and held that "the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. The Court explicitly "reject[ed] th[e] contention" that the statutory disclosure requirements for ECs "must be confined to speech that is the functional equivalent of express advocacy." *Id.* at 368-69.

Here, however, plaintiff seeks to impose the same limitation on BCRA's disclosure requirements that the Supreme Court explicitly rejected in *Citizens United*. (*E.g.* V. Compl. ¶ 122; Pl.'s Mem. at 14, 37-38.) Plaintiff has sometimes referred to the purported extent of communications it views as subject to disclosure as "'express advocacy or its functional equivalent'" (Pl.'s Mem. 37; *see also, e.g., id.* at 14; V. Compl. ¶ 122;), and at other times repackaged that argument by referring to communications that are "unambiguously campaign related," (*e.g.*, Pl.'s Mem. at 13-17, 37). Whichever label plaintiff chooses for the erroneous disclosure standard it urges, the Supreme Court has rejected the argument.

Citizens United considered the same statutory disclosure requirements in a context directly analogous to the circumstances here. Like the advertisement at issue here, the ads at issue in *Citizens United* mentioned the name of a federal candidate — then-Senator Hillary Clinton — but "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); *see id.* at 276 nn. 2-4 (quoting scripts of Citizens United's proposed ads). Indeed, Citizens United itself emphasized the lack of any

express or implicit candidate advocacy in its movie ads and thus argued in favor of a standard limiting disclosure requirements to ads containing such advocacy.[3]

In any event, plaintiff's attempts to distinguish *Citizens United* by comparing the specific content of its proposed advertisement with the ads at issue in *Citizens United* are unavailing. Plaintiff insists that its advertisement is "genuine issue speech" that is "not express advocacy or its functional equivalent . . . no[r] even close to unambiguously campaign related," (Pl.'s Mem. at 37.) But those characteristics are beside the point.

There is no dispute that plaintiff's proposed ad — when it was intended to be broadcast — would have met the objective statutory definition of "electioneering communication," a definition the Supreme Court has upheld. *See Citizens United*, 558 U.S. at 321 (quoting definition of "electioneering communication"); *see also supra* pp. 56. Whether the ad also "functions as express advocacy" is irrelevant for determining the constitutional applicability of BCRA's disclosure requirements, because the Supreme Court expressly refused to draw a constitutional line between express advocacy and issue advocacy in the BCRA disclosure context. *Citizens United*, 558 U.S. at 368-69.

Plaintiff's argument (V. Compl. ¶ 113; Pl.'s Mem. at 14) that BCRA's definition of "electioneering communication" is overbroad to the extent it includes advertisements that do not "expressly advocate the election or defeat of a clearly identified candidate" or that are not

---

[3] *See, e.g.*, Reply Br. for Appellant, *Citizens United v. FEC*, No. 08-205, at 25 (S. Ct. Mar. 17, 2009), *available at* http://www.fec.gov/law/litigation/cu_sc08_cu_reply.pdf (describing Citizens United's advertisements, one of which "informs viewers that, '[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.' The other humorously presents a 'kind word about Hillary Clinton' from conservative commentator Ann Coulter — '[s]he looks good in a pant suit' — and then describes Hillary as 'a movie about everything else.'"; and observing that "[t]he advertisements do not mention an election, Senator Clinton's candidacy for office, her views on political issues — or anything else remotely related to the electoral process").

"unambiguously campaign related" conflicts directly with the Supreme Court's holdings to the contrary in *McConnell* and *Citizens United*, and simply ignores the Court's clarification that *Buckley* did not establish a "constitutionally mandated line" between express candidate advocacy and issue advocacy. *McConnell*, 540 U.S. at 190. This case is thus "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. 2010) (3-judge court). As the Supreme Court has explained, however, lower courts must leave to the Supreme Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Plaintiff's constitutional challenge is thus plainly foreclosed by *McConnell* and *Citizens United* and this Court should, accordingly, award summary judgment in the Commission's favor.[4]

D. The Courts of Appeals Have Confirmed the Permissibility of EC Disclosure Outside the Context of Express Advocacy Advertisements Many Times

Over the past six years, nine United States circuit courts of appeals have relied 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. Most recently, two federal courts of appeals concluded that *Citizens United* forecloses plaintiff's precise argument here, *i.e.*, that EC disclosure requirements may only constitutionally be applied to express candidate advocacy (or its functional equivalent) and cannot constitutionally be applied

[4] Plaintiff's "overbreadth" challenge fails for the separate reason that it is not a proper as-applied claim, and facial challenges to BCRA's EC definition were resolved more than a decade ago by *McConnell*, 540 U.S. at 196. *See New York v. Ferber*, 458 U.S. 747, 769 (1982) ("The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted."); *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) ("[W]e have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'").

to issue advocacy. In *Independence Institute II*, issued earlier this year, the Tenth Circuit rejected a similar First Amendment challenge — by the same plaintiff in this lawsuit (advancing many of the same arguments) — to an analogous state law provision. *See* 812 F.3d at 794 (explaining that the federal and Colorado EC disclosure requirements are "substantially similar"). The court upheld a Colorado statute requiring disclosure of the sources of financing of electioneering communications and concluded that "*Citizens United* is dispositive as to the constitutionality of Colorado's disclosure laws as applied to the Institute's ad." *Id.* at 799. The advertisement underlying Independence Institute's challenge in the Tenth Circuit had the same material features as the advertisement underlying its challenge here: 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 ad. *Compare id.* at 790-91 (describing proposed ad at issue in *Independence Institute II*), *with* V. Compl. ¶¶ 3, 31, 32, 35 (describing proposed ad at issue in this case).

In a decision issued last year concerning Delaware's similar EC disclosure rule, the Third Circuit Court of Appeals likewise recognized the Supreme Court's "consistent[]" holdings that "disclosure requirements are not limited to 'express advocacy' and that there is not a 'rigid barrier between express advocacy and so-called issue advocacy.'" *Del. Strong Families*, 793 F.3d at 308 (quoting *McConnell*, 540 U.S. at 193). The court concluded that "[a]ny possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United*." *Id.* Like the Tenth Circuit's holding described above, the Third Circuit's conclusion in *Delaware Strong Families* also

supports the Commission's central argument here: *Citizens United* is binding precedent upholding disclosure requirements for electioneering communications that lack express advocacy or its functional equivalent, and the decision "surely repudiate[s]" plaintiff's arguments to the contrary. *Id.*

In addition, the overwhelming majority of the courts of appeals that have considered the issue have similarly held that *Citizens United* forecloses an argument that other campaign-finance disclosure requirements must be limited to express candidate advocacy (or its functional equivalent). *See, e.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) (explaining that the Supreme Court in "*Citizens United* removed any lingering uncertainty concerning the reach of constitutional limitations" in the context of campaign-finance disclosure requirements when it "expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy'"), *cert. denied*, 135 S. Ct. 949 (2015); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1249 (11th Cir. 2013) (concluding *Citizens United* forecloses an argument that the government lacks an informational interest sufficient to require political committee disclosure requirements in the context of a ballot issue election); *Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir. 2013) (explaining that in *Citizens United*, "in addressing the permissible scope of disclosure requirements, 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)); *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) (citing *Citizens United* for the proposition that "the 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"); *SpeechNow*, 599 F.3d at 696, 698 (observing that the Supreme Court upheld BCRA's disclaimer and disclosure requirements as applied to Citizens United's ECs based on "the government's interest in providing the electorate with information" and holding that the FEC may constitutionally require SpeechNow to comply with political committee reporting and registration requirements). As the Seventh Circuit explained, "[w]ith just one exception, every circuit that has reviewed First Amendment challenges to disclosure requirements since *Citizens United* has concluded that such laws may constitutionally cover more than just express advocacy and its functional equivalents, and in each case the court upheld the law." *Ctr. For Individual Freedom*, 697 F.3d at 484 (footnote omitted); *see id.* at 484 n.17 (collecting cases).

E. There Are Important Interests in Disclosure Related to Advertisements That Reference Both Candidates and Legislation

The government's interests in disclosure about who is speaking about a federal candidate shortly before an election in an advertisement discussing a piece of proposed legislation, like plaintiff's proposed ad, is at least as "sufficiently important" as its interest in insuring the public can know who is speaking about a candidate in an advertisement that "only pertain[s] to a

commercial transaction." *Citizens United*, 558 U.S. at 369. Likewise, if disclosure of a commercial ad that "only attempt[ed] to persuade viewers to see [a] film" about a candidate was substantially related to the government's informational interest in *Citizens United, id.*, then disclosure of plaintiff's proposed advertisement must also be substantially related to the government's informational interest here. *See, e.g.*, *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 429-32 (E.D. Va. 2012) (explaining that "*Citizens United* 'upheld BCRA's disclosure requirements for all electioneering communications — including those that are *not* the functional equivalent of express advocacy,'" and concluding that certain communications discussing energy policy and the Affordable Care Act are subject to federal disclosure requirements for ECs (citing *Citizens United*, 558 U.S. at 366-67; quoting *Real Truth*, 681 F.3d at 551)).

In any event, *Citizens United* and *McConnell* are consistent with the Supreme Court's earlier decisions finding that the government's informational interest is sufficient to justify mandatory disclosure relating to two different forms of "pure" issue advocacy. First, the informational interest has been recognized extensively in the context of issue advocacy regarding ballot initiatives. *See, e.g.*, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999) (upholding requirement to disclose donations made to organizations to pay ballot-initiative petition circulators); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure . . . ."); *see also Worley*, 717 F.3d at 1249 ("[P]romoting an informed electorate in a ballot issue election is a sufficiently important governmental interest to justify the Florida PAC regulations."); *Brumsickle*, 624 F.3d at 1016 ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that

disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.").

The permissibility of disclosure about ballot-initiative activity is particularly noteworthy here because the Supreme Court has held that such activity is inherently issue-focused and does not have the same corruptive potential as spending to influence candidate elections. *Bellotti*, 435 U.S. at 790 ("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*). These cases further undermine plaintiff's claim that the government lacks a sufficiently important interest in requiring the disclosure of "issue advocacy": The government's legitimate disclosure interest necessarily extends to issue speech "so that the people will be able to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32; *see supra* 14-15.[5]

[5] For example, plaintiff's compliance with the EC disclosure requirements could help the public evaluate its advertisement. There has been long-standing public interest in plaintiff's funding even outside the electioneering context, confirming that the public uses funding sources to evaluate the messages it receives. David Kopel, *How Everytown's background check law impedes firearms safety training and self-defense*, The Volokh Conspiracy (Nov. 2, 2015) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/02/how-everytowns-background-check-law-impedes-firearms-safety-training-and-self-defense/?postshare=1446574890904 (last visited July 14, 2016) (blog post updated to disclose that "Independence Institute has received NRA contributions"); Timothy Johnson, *Wash. Post Volokh Conspiracy Blog Lets NRA-Funded Writer Attack Background Checks With Debunked Myths*, Media Matters For America (Nov. 3, 2015) http://mediamatters.org/blog/2015/11/03/wash-post-volokh-conspiracy-blog-lets-nra-funde/206595 (last visited July 14, 2016 (complaining that Volokh Conspiracy blog post "ignores Kopel's longstanding ties with the NRA, which include large grants given by the NRA to the Independence Institute"); Frank Smyth, *The Times Has Finally (Quietly) Outed an NRA-Funded "Independent" Scholar*, The Progressive, (Apr. 23, 2014), http://www.progressive.org/news/2014/04/187663/times-has-finally-quietly-outed-nra-funded-%E2%80%9Cindependent%E2%80%9D-scholar (last visited July 14, 2016) (questioning the independence of an Independence Institute scholar who has "establish[ed] himself as an independent authority on gun policy issues," including by testifying before Congress and writing opinion pieces for the Wall Street Journal, "even though he and his Independence Institute have received over $1.42 million including about $175,000 a year over eight years from the NRA").

Second, courts are nearly unanimous in upholding mandatory disclosure of 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. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) ("[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures."); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009) (rejecting a "constitutional challenge to Congress' latest effort to ensure greater transparency . . . [b]ecause nothing has transpired [since the Supreme Court decided *Harriss*] to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue"); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (upholding state lobbyist disclosure statutes in light of state interest in helping citizens "apprais[e] the integrity and performance of officeholders and candidates, in view of the pressures they face"); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 512 (8th Cir. 1985) (per curiam) (quoting *Harriss*).[6] Lobbying, like issue advocacy, typically does not involve candidate campaigns; it is issue-oriented political activity protected by the First Amendment. Thus, these cases make clear that the government's interest in providing information to the public extends beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues, just as plaintiff claims it wishes to do here.

[6] *See also Comm'n on Indep. Coll. & Univ. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 494-95 (N.D.N.Y. 1982) ("The lobby law serves to apprise the public of the sources of pressure on government officials, thus better enabling the public to access their performance." (footnote omitted)); *Am. Civil Liberties Union of N.J. v. N.J. Election Law Enf't Comm'n*, 509 F. Supp. 1123, 1129 (D. N.J. 1981) ("The voting public should be able to evaluate the performance of their elected officials in terms of representation of the electors' interest in contradistinction to those interests represented by lobbyists." (citation omitted)).

F. All of Plaintiff's Attempts to Minimize, Distinguish, or Disregard Citizens United Lack Merit

In apparent recognition that *Citizens United* directly and completely forecloses all of plaintiff's constitutional arguments, plaintiff has attempted to minimize the significance of the Supreme Court's eight-Justice disclosure holding. Plaintiff disregards the full scope of the Supreme Court's disclosure holding in *Citizens United* (Pl.'s Mem. at 15-16) and also purports to distinguish that holding based on inaccurate characterizations of the advertisements at issue in *Citizens United* and immaterial differences between Citizens United and plaintiff's own tax status (*id.* at 17-26). Indeed, based on such arguments, plaintiff apparently believes that *Citizens United*'s disclosure holding is not controlling here, and it urges the Court to rely instead on general principles articulated in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (per curiam) (en banc), a D.C. Circuit decision concerning an entirely distinct and since-repealed statutory provision that was issued decades before both the Supreme Court's decisions in *McConnell* and *Citizens United*, and nearly thirty years before the EC provisions at issue here were even enacted. (Pl.'s Mem. at 28, n.18 (declaring that the 1975 Court of Appeals decision in *Buckley* "remains one of the most directly relevant Court of Appeals cases"). As explained below, none of these arguments has any merit.

1. Plaintiff's Out-of-Circuit Authorities Confirm That *Citizens United* Forecloses This Challenge

Having eschewed *Citizens United* and *McConnell*, plaintiff attempts to rely (Pl.'s Mem. at 15-16) on several out-of-circuit decisions, none of which concerns the EC disclosure provisions at issue here (or even analogous state-law provisions). All of those decisions are either inapposite or actually confirm that *Citizens United* forecloses this challenge.

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014), an inapposite decision concerning the constitutionality of Wisconsin's organizational and reporting requirements for state political committees, is relevant only to the extent it confirms that *Citizens United* is dispositive of plaintiff's distinct claims here. In *Barland*, a panel of the Seventh Circuit Court of Appeals questioned the extent to which *Citizens United*'s holding regarding the permissible scope of disclosure requirements applies *outside the context of the EC disclosure requirements at issue in* Citizens United *(and here)*. 751 F.3d at 836. Importantly, the court distinguished the Supreme Court's analysis of BCRA's EC disclosure requirements from the broader political committee organizational and reporting requirements at issue in that case, and explicitly acknowledged that the Court in "*Citizens United* approved event-driven disclosure for federal electioneering communications — large broadcast ad buys close to an election," and "declined to enforce *Buckley*'s express-advocacy limitation" in that precise context. *Id.*[7] *Barland* thus supports the Commission's position here, not plaintiff's.

Plaintiff's reliance on other out-of-circuit cases involving challenges to an organization's registration and *ongoing* disclosure obligations (Pl.'s Mem. at 15-16) is similarly misplaced. *See North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 289-90 (4th Cir. 2008) (rejecting on constitutional grounds "political committee designation—and its associated burdens," while recognizing that the state could and did constitutionally "impose one-time reporting requirements . . . based on the communication, not the organization"); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (concluding that state political committee registration and

[7] As described above, *see supra* p. 20, two years before the *Barland* decision, a separate panel of the Seventh Circuit Court of Appeals had held more broadly, in the context of a constitutional challenge to various state campaign-finance disclosure requirements, that the First Amendment permitted disclosure beyond express advocacy. *Ctr. for Individual Freedom*, 697 F.3d at 484.

ongoing reporting requirements could not be applied to two organizations); *Nat'l Right to Work Legal Def. and Ed. Found. v. Herbert*, 581 F. Supp. 2d 1132, 1154 (D. Utah 2008) ("*National Right to Work*") (invalidating state law that imposed "political committee burdens" on "a multi-faceted organization simply because one of its 'apparent purposes' — as perceived by the state of Utah — is to influence elections"). *Cao v. FEC*, 688 F. Supp. 2d 498 (E.D. La. 2010), upon which plaintiff also purports to rely (Pl.'s Mem. at 16), is even farther afield. *Cao* involved political party and candidate contribution and expenditure limits, and *does not address disclosure requirements at all*. None of these cases alters *Citizens United*'s holding regarding the permissible scope of BCRA's event-driven, EC disclosure requirements. Indeed, *North Carolina Right to Life* and *National Right to Work* were both decided *before Citizens United*. Plaintiff is thus unable to identify a single decision supporting its novel argument that this Court should decline to apply *Citizens United*'s disclosure holding here.

2. Whether Plaintiff's Proposed Advertisement Contains "Pejorative" References to a Candidate Is Irrelevant

In arguing about the tailoring and burden associated with the EC disclosure requirement, plaintiff repeatedly emphasizes that the proposed advertisements at issue in *Citizens United* were "pejorative" (Pl.'s Mem. at 15, 22, 31-36), but the subjective way in which an EC references a candidate has no bearing on the extent to which *Citizens United* and the cases upon which it relies are controlling here. Indeed, plaintiff makes too much of the Supreme Court's subjective, parenthetical description of the ads at issue in *Citizens United* as being "in [the Court's] view, pejorative." Pl.'s Mem. at 31; V. Compl. ¶ 87; *Citizens United*, 558 U.S. at 320. The Court quoted the objective statutory definition of "electioneering communication" and at no point purported to limit the scope of that definition, or the disclosure requirements attendant to it, to communications that the Court or anyone else subjectively views as pejorative (or

complimentary). *Citizens United*, 558 U.S. at 321 ("An electioneering communication is defined as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election. The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is 'publicly distributed.'") (quoting 52 U.S.C. § 30104(f)(3)(A)); 11 C.F.R. § 100.29(a)(2)).

Plaintiff may view a "pejorative" statement about a candidate as "the functional equivalent of express advocacy" (V. Compl. ¶ 87; Pl.'s Mem. 34-35), but the Supreme Court requires more. "[T]he functional-equivalent test is objective: 'a court should find that [a communication] is the functional equivalent of express advocacy *only if [it] is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate*.'" *Citizens United*, 558 U.S. at 325 (quoting *WRTL*, 551 U.S. at 469-70) (emphasis added); *id.* at 326 (explaining that Citizens United's movie "qualifies as the functional equivalent of express advocacy" because "there is no reasonable interpretation of [it] other than as an appeal to vote against Senator Clinton").

Plaintiff's arguments here illuminate the reasons for Congress's adoption of such an objective test. As described above, *see supra* p. 17 n.3, one of the ten-second ads at issue in *Citizens United* stated only "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; *see* Pl.'s Mem. at 31 (quoting ad). Plaintiff infers that such an ad was "intended to elicit a judgment about Sen. Clinton's fitness to be president as someone (in Citizens United's view) whose background was filled with hidden skeletons and scandal," and was "certainly related to Senator Clinton's candidacy." (Pl.'s Mem. at 34-36.) But the Supreme Court itself made no finding that Citizens

United's promotional ads were the equivalent of express candidate advocacy, *see Indep. Inst.*, 70 F. Supp. 3d at 510, and the vague advertisement quoted above does not contain any express description of Hillary Clinton or reference any "hidden skeletons or scandal." Another viewer of the ad surely could have made a different inference about the response it was "intended to elicit." The subjective "pejorative" standard plaintiff advocates here is thus plainly at odds with the Supreme Court's upholding of BCRA's definition of "electioneering communication" precisely because the elements of the definition "are both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194.

3. The Informational Interest Does Not Vary According to an Advertiser's Tax Status

The fact that plaintiff is organized under a different subsection of the tax code than Citizens United does not render this case "distinctly different" from *Citizens United*, as plaintiff suggests (V. Compl. ¶ 126; Pl.'s Mem. at 17-26, 27 (characterizing *Citizens United* as inapplicable to organization organized under 26 U.S.C. 501(c)(3)).) The majority opinion in *Citizens United* simply describes that organization as "a nonprofit corporation," *Citizens United* 558 U.S. at 319, a broad category that includes plaintiff as well. Indeed, the opinion does not even mention which particular section of the tax code Citizens United was organized under, and it certainly does not purport to limit its holding to any particular group of advertisers or subset of nonprofit corporations. Nothing in *Citizens United* (or any other case) limits the Supreme Court's disclosure holding to certain types of organizations and plaintiff fails to identify any authority supporting its contention that the First Amendment requires this Court to draw such a distinction.

Moreover, the categorical exemption for 501(c)(3) nonprofits that plaintiff advocates here would be inconsistent with the Supreme Court's broad holding in *Citizens United* regarding the

importance of providing the public with access to information about who is funding pre-election advertising that references candidates. 558 U.S. at 369. The public's interest in knowing who financed and distributed an electioneering communication is not altered based on which subsection of the Internal Revenue Code that entity relies on for its tax exemption. As the Seventh Circuit Court of Appeals has observed, "the voting 'public has an interest in knowing who is speaking about a candidate shortly before an election,' whether that speaker is a political party, a nonprofit advocacy group, a for-profit corporation, a labor union, or an individual citizen." *Ctr. for Individual Freedom*, 697 F.3d at 490 (quoting *Citizens United*, 558 U.S. at 369).

In recognition of the irrelevance of an organization's tax status to evaluating the constitutionality of EC disclosure requirements, the Third Circuit expressly refused to rely on another "organization's status with the Internal Revenue Service" to determine the constitutionality of Delaware's similar EC disclosure rule. *Del. Strong Families*, 793 F.3d at 308-09. As that Court of Appeals recognized, the EC disclosure rule "and § 501(c)(3) . . . are separate and unrelated," and there is "no compelling reason to defer to the § 501(c)(3) scheme in determining which communications require disclosure under" the separate statutory provisions regulating ECs. *Id.* at 308.

Another court's concerns about problems that could arise from the Commission's "effective delegation" of its authority over campaign finance regulation to the IRS were part of why that court invalidated a former FEC regulation that created the very exemption plaintiff advocates here. *See Indep. Inst.*, 70 F. Supp. 3d at 509-10 n.12 (discussing the FEC's 2003 regulation that exempted 501(c)(3) organizations from BCRA's EC disclosure requirements and explaining that the rule was invalidated after failing review under the Administrative Procedure

Act (citing *Shays v. FEC*, 337 F. Supp. 2d 28, 128 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005)). As the court in *Shays* explained, "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." 337 F. Supp. 2d at 127. Section 501(c)(3) organizations, in fact, have engaged in extensive spending on ECs. *See, e.g.*, Conciliation Agreement, *In the Matter of S. All. for Clean Energy*, Pre-MUR 575, ¶ IV, http://eqs.fec.gov/eqsdocsMUR/16044394917.pdf (describing an electioneering communication of approximately $370,000 by a 501(c)(3) organization).[8]

Tax status is generally not dispositive of an organization's compliance with other federal laws. *See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) (holding nonprofit tax status does not exempt organization from antitrust laws); *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473, 478 (1st Cir. 2005) (explaining that the Federal Trade Commission "determines, without reference to a target organization's tax-exempt status, whether the organization *in fact* operates as a nonprofit and is therefore beyond its jurisdiction"); *In re Grand Jury Proceedings v. Hutchinson*, 633 F.2d 754, 757 (9th Cir.1980) (holding that "treatment for tax purposes is largely irrelevant to the determination of whether it is an organization separate and apart from its creator").

Plaintiff points to general differences in tax treatment between nonprofits organized under section 501(c)(3) of the Internal Revenue Code and nonprofits organized under section 501(c)(4), but fails to establish any material differences undercutting the governmental interests in EC disclosure. The relevant disclosure obligations, for example, are no different: Neither type of nonprofit organization is obligated by federal tax law to disclose donor information. *See*

[8] Under plaintiff's view, the public has no interest in learning who financed the advertisement at issue in that matter, which urged viewers to "[t]hank Senator Hagan for fighting for commonsense air quality protections" shortly before her re-election. *Id.* The First Amendment requires no such result.

26 U.S.C. § 6104(d)(3)(A). The Supreme Court referred to the disclosure of donors by Citizens United in that organization's case, but was referring to donors to its connected political committee or PAC. 558 U.S. at 370. Donors to Citizens United proper, the 501(c)(4) organization, are not publicly disclosed and plaintiff's attempt to distinguish itself from such (c)(4) organizations thus fails. (Pl.'s Mem. at 22-23.)

In any event, and as the Ninth Circuit recently explained, even if Congress limited the disclosure obligations of certain entities under the Internal Revenue Code, federal tax-law provisions "do not broadly prohibit other government entities from seeking that information directly from the organization. Nor do they create a pervasive scheme of privacy protections. Rather, [the Internal Revenue Code provisions] represent exceptions to a general rule of disclosure." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1319 (9th Cir.), *cert. denied*, 136 S. Ct. 480 (2015) (declining to preliminarily enjoin enforcement of a state law imposing certain disclosure requirements on charitable organizations).

There is no constitutional basis for distinguishing between different types of nonprofits for purposes of determining the applicability of BCRA's EC disclosure obligations. And plaintiff's related attempt to distinguish *Citizens United* based on its claim that what it and Citizens United actually do "is vastly different" (Pl.'s Mem. at 22), is just an attempt to inject subjectivity into BCRA's EC definition, contrary to the Supreme Court's explicit preference for a clear and objective standard. *See McConnell*, 540 U.S. at 194; *supra* p. 6.

II. DECISIONS REGARDING VERY DIFFERENT PROVISIONS SUCH AS FINANCING RESTRICTIONS AND IN-PERSON LEAFLETTING ARE INAPPOSITE

Plaintiff (and its amici) insist that court decisions concerning entirely different provisions, including laws that *prohibited* certain speech, are more instructive than either of the

two Supreme Court decisions upholding the precise statute at issue here and rejecting the same arguments plaintiff advances in this case. (*See* Amicus Br. of Free Speech Defense and Educ. Fund, *et al.*, at 5-15 (Docket No. 38-1).) The opinions to which plaintiff cites provide no escape from the binding precedent that foreclose its claims.

In particular, plaintiff's reliance (Pl.'s Mem. at 13-14) on the portion of the Supreme Court's opinion in *Buckley* that considered FECA's then-$1,000 limit and disclosure requirements for expenditures by any person "relative to" a federal candidate is entirely misplaced. As the Supreme Court later explained in *McConnell*, in that context, the *Buckley* Court distinguished between express advocacy and issue advocacy "to avoid problems of vagueness and overbreadth" presented by the phrase "relative to" in the original statutory definition "expenditure." 540 U.S. at 191-92 *McConnell* (citing *Buckley*, 424 at 40-44). The Court in *Buckley* thus construed "expenditure" narrowly to encompass only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44, 79. Plaintiff simply ignores the Supreme Court's independent holding in *McConnell* that BCRA's EC definition, unlike FECA's original definition of "expenditure," is neither vague nor overbroad; instead, its elements are "both easily understood and objectively determinable." 540 U.S. at 194; *cf. Wis. Right to Life*, 551 U.S. at 476 n. 8 ("[I]n deciding this as-applied challenge [to BCRA's definition of EC], we have no occasion to revisit *McConnell*'s conclusion that the statute is not facially overbroad."). *Buckley*'s statutory construction is plainly inapplicable to BCRA and provides no support for plaintiff's assertion that BCRA's EC disclosure requirement must be limited to express advocacy and its functional equivalent. Instead, and as explained *supra* p. 15, *Buckley* "amply supports

application of [BCRA's] disclosure requirements to the *entire range* of 'electioneering communications.'" *McConnell*, 540 U.S. at 196 (emphasis added).

Plaintiff's reliance on the Supreme Court's decision in *Wisconsin Right to Life* (*e.g.* Pl.'s Mem. at 6, 8, 24, 28 29) is equally misplaced. In that case, the Court narrowed the permissible scope of BCRA's former *prohibition* on certain electioneering communications, but did not at all address BCRA's *disclosure* requirements for such communications. 551 U.S. at 455-56, 476. Plaintiff's suggestion that this Court should apply *Wisconsin Right to Life*'s functional-equivalent-of-express-advocacy standard to BCRA's disclosure requirements is the same argument that the Supreme Court explicitly rejected in *Citizens United*. *See Citizens United*, 558 U.S. at 368-69 (explaining that the Court in *Wisconsin Right to Life* limited BCRA's former ban on corporate independent expenditures "to express advocacy and its functional equivalent," and "reject[ing] th[e] contention" advocated by Citizens United that the First Amendment requires that "a similar distinction" must be "import[ed] . . . into BCRA's *disclosure* requirements" (emphasis added)).

Plaintiff also errs in relying on the D.C. Circuit's 27-year-old analysis of a dramatically different (and far broader) disclosure provision that has since been repealed. Far from serving as "one of the most directly relevant Court of Appeals cases" to this challenge (Pl.'s Mem. at 28 n.18), the D.C. Circuit's 1975 *Buckley* decision is entirely inapposite. In that case, the Court of Appeals upheld a range of disclosure requirements, while invalidating a broad, catch-all provision on overbreadth and vagueness grounds. 519 F.2d at 874-78. The catch-all provision required any group that "commits any act directed to the public for the purpose of influencing the outcome of an election . . . [to] file reports with the Commission as if such [group] were a political committee." *Id.* at 869-70 (quoting former 2 U.S.C. § 437a). Indeed, the breadth of

former section 437a was central to the court's analysis, which "emphasize[d] that [its] holding on statutory vagueness and overbreadth rests on the peculiar context of § 437a." *Id.* at 878 n.142. That provision "bears no resemblance to the disclosure requirements in BCRA section 201 and sheds no light on the Court's consideration of them," as Judge Kollar-Kotelly correctly concluded. *Indep. Inst.*, 70 F. Supp. 3d at 514-15 n.17.

Finally, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), upon which amici rely (Br. Amicus Curiae of Free Speech Defense and Educ. Fund, *et al.*, at 5-12), is also completely inapposite. *McIntyre* concerned a state law requiring in-person identification of pamphlet distributors and was decided long before both Congress's enactment of BCRA and the Supreme Court's two decisions upholding its disclosure requirements. The Court's earlier invalidation of an entirely distinct state law plainly does not supersede its more recent holdings on the precise issue here. Indeed, the *McIntyre* Court distinguished the "anonymous campaign literature" at issue there from the financial disclosures required by FECA. *McIntyre*, 514 U.S. at 353. And the Court expressly limited its holding to "leaflets of the kind Mrs. McIntyre distributed," disclaiming any application to "communications uttered over the broadcasting facilities of any radio or television station." *McIntyre*, 514 U.S. at 338 n.3. Broadcasting is, of course, the exclusive medium for ECs.

Courts have distinguished the mandatory in-person identification at issue in *McIntyre* from other provisions requiring after-the-fact filings with a government agency and held that the latter are reviewed under a lower standard. *See, e.g.*, *Am. Constitutional Law Found.*, 525 U.S. at 198 (striking down statute requiring petition-circulators to wear name badges but upholding statute requiring them to file affidavits identifying themselves); *Worley*, 717 F.3d at 1247 (distinguishing *McIntyre*); *Majors v. Abell*, 361 F.3d 349, 353-54 (7th Cir. 2004) (same). As the

Supreme Court has explained, the in-person, "one-on-one" nature of the communication was crucial to its decision in *McIntyre*. *Am. Constitutional Law Found*., 525 U.S. at 199. *McIntyre* has no bearing here.

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

A. There is No Reasonable Probability That Plaintiff's Compliance with the EC Disclosure Requirements Will Result in Threats, Harassment, or Reprisals

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). Plaintiff has stipulated, and the Court has ordered, however, that this case does not include *any* allegations or evidence that there is a "reasonable probability" that complying with the challenged disclosure provisions will subject plaintiff's donors to any threats, harassment, or reprisals. (Joint Stip. at 1.) *Buckley*, *McConnell*, and *Citizens United* recognized harassment as a *potential* burden, but specifically found no evidence or danger of *actual* harassment of the plaintiffs in those cases and held that such evidence would be required to mount an as-applied First Amendment challenge to the Act's disclosure provisions. *Buckley*, 424 U.S. at 69 ("No record of harassment on a similar scale was found in this case.") (footnote omitted); *McConnell*, 540 U.S. at 199 (upholding lower court finding that "concerns" of plaintiffs regarding harassment were unsupported due to "lack of specific evidence"); *Citizens United*, 558 U.S. at 367 (same). The Joint Stipulation and Order in this case conclusively establishes the absence of any evidence or danger of threats, harassment, or reprisals as a result of complying with the challenged disclosure requirements here.

B. Plaintiff Has Failed to Show that the EC Disclosure Requirements Otherwise Burden its First Amendment Rights

Citizens United and *McConnell* also clearly foreclose plaintiff's generalized claim that "BCRA's regulation of electioneering communications chills discussion of public policy issues." (V. Compl. ¶ 6; *see* Pl.'s Mem. at 11 (claiming that BCRA's EC disclosure requirements "chill[] . . . issue speech").) But even if such a claim were not foreclosed, plaintiff fails even to allege, let alone offer evidence of, any specific manner in which the EC disclosure requirements would "chill" its ability to exercise its First Amendment rights.

The Ninth Circuit recently rejected precisely the same arguments in a constitutional challenge to state-law disclosure requirements brought by the organization and counsel that represent plaintiff here. *See Ctr. for Competitive Politics*, 784 F.3d at 1312-17. That Court of Appeals held, under the *Buckley* framework, that when an organization 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 the challenged disclosure requirement, it had "not demonstrated any 'actual burden,' . . . on its or its supporters' First Amendment rights." *Id.* at 1314 (citation omitted). The court further held that "contrary to CCP's contentions, no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." *Id.* at 1316.

C. Plaintiff Need Not Disclose All of Its Donors In Order to Air ECs

Plaintiff also exaggerates the scope of its disclosure obligations under BCRA's disclosure scheme. Plaintiff's claimed concern about "the very real possibility of being required to disclose *all* of its donors" (Pl.'s Mem. at 10 n.3) fails to account for the statutory and regulatory provisions permitting those who finance and distribute ECs to limit the scope of their donor disclosure by financing their ECs with funds from a "segregated bank account established to pay

for electioneering communications," 52 U.S.C. § 30104(f)(2)(E); 11 C.F.R. § 104.20(c)(7). Under those provisions, only those individuals who contributed $1,000 or more to the account itself must be disclosed. 52 U.S.C. § 30104(f)(2)(E); 11 C.F.R. § 104.20(c)(7). As the Seventh Circuit's *Barland* decision, on which plaintiff relies, described them, BCRA's statutory EC requirements are "specific and narrow." *Barland*, 751 F.3d at 836.

In addition, plaintiff's alleged fear of having to disclose "*every* donor who gives more than $1,000 to the organization" (V. Compl. ¶ 124) is baseless because, as plaintiff acknowledges, "*the Commission does not read the statute in this manner*." (*Id.* (emphasis added); *see also* Pl.'s Mem. at 9 n.3.) The applicable regulation, 11 C.F.R. § 104.20(c)(9), provides that corporations need only disclose those who donated "for the purpose of furthering electioneering communications," and the Court of Appeals recently upheld the rule as a "reasonable" construction of the FEC's "wide latitude" to interpret BCRA's EC disclosure requirements. *Van Hollen v. FEC*, 811 F.3d 486, 492-94 (D.C. Cir. 2016).

Plaintiff's page-long footnote (Pl.'s Mem. at 9-10 n.3) about the burdens it *could* face *if* the Court of Appeals (1) grants the pending petition for rehearing en banc in *Van Hollen*, and (2) reverses the appellate panel's unanimous decision in that case and invalidates the Commission's regulation, fails to identify any *actual and imminent harm* to plaintiff sufficient to support Article III standing (regarding *those* harms) or to show an actual controversy ripe for adjudication. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (future injury must be "at least imminent," in the sense that it is "certainly impending"); *Williams v. Lew*, 819 F.3d 466, 474 (D.C. Cir. 2016) (dismissing case where plaintiff "fail[ed] to allege future harms that are certainly impending"). Plaintiff's speculation about harm resulting from a possible rehearing and reversal in *Van Hollen* fails "to ensure that [this Court] does not render an advisory opinion in 'a

case in which no injury would have occurred at all.'" *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting *Lujan*, 504 U.S. at 564 n.2). For the same reasons, such speculation also fails to present a controversy sufficient for judicial intervention under the prudential ripeness doctrine. *See Gates v. Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir. 2011) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all'") (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Finally, and setting aside this Court's inability to decide a constitutional question premised on speculation about what the Court of Appeals *might* do in another case, *McConnell* and *Citizens United* make clear that the *statutory* disclosure requirements for ECs survive First Amendment scrutiny without regard to the presence or absence of the Commission's regulation challenged in *Van Hollen*, 11 C.F.R. § 104.20(c)(9). Plaintiff simply ignores the fact that the Supreme Court in *McConnell* considered and upheld BCRA's disclosure requirements for ECs in 2003, before the regulation at issue in *Van Hollen* was promulgated, as well as the fact that the regulation has never applied to entities that are neither unions nor incorporated. *See supra* p. 7-8. Plaintiff similarly disregards *Citizens United*'s upholding of the statutory provisions without relying on, let alone considering or even mentioning in passing, the Commission's regulation. Notably, that part of *Citizens United*'s holding rested on Congress's goal of addressing through BCRA's EC provisions "a system without adequate disclosure" and to create one with "effective disclosure" that is especially "informative" given today's technology. 558 U.S. at 370. *Citizens United* itself thus belies any suggestion that the Supreme Court in that case *sub silentio* relied on a particular limiting constructions of the statute it upheld.

IV. THE FEC DOES NOT DISPUTE THAT PLAINTIFF'S CLAIMS SATISFY THE CAPABLE-OF-REPETITION-YET-EVADING-REVIEW EXCEPTION TO MOOTNESS

As described above, *see supra* p. 11, at oral argument regarding plaintiff's procedural appeal, counsel for the FEC stated that in light of plaintiff's representations in its press release that it intends "to run substantively similar advertisements to the one at issue here" in future EC periods, Appellant's Mot. to Supplement R., *Indep. Inst.*, No. 14-5249, at 2 (D.C. Cir. Sept. 24, 2015 (Docket No. 1574833), the FEC no longer disputed that plaintiff's claims fall within the capable-of-repetition-yet-evading-review exception to mootness (*see* Pl.'s Mem. at 5 & n.2). The Commission maintains that position here. *See generally Wis. Right to Life*, 551 U.S. at 462. Plaintiff has further suggested that its claims are now live for the additional reason that Senator Bennet is referenced in the proposed advertisement at issue here and currently up for reelection, but plaintiff has not alleged its continuing intent to distribute *that* particular advertisement. (Pl.'s Mem. at 41 n.32.) Setting aside that contention, plaintiff's press release and other theories for satisfying the exception to mootness appear sufficient under prevailing law, particularly the Supreme Court's holding in *Wisconsin Right to Life*.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's cross-motion for summary judgment, deny plaintiffs' motion for summary judgment, and award judgment to the FEC.

Respectfully submitted,

Daniel A. Petalas (D.C. Bar No. 467908)
Acting General Counsel
dpetalas@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel — Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak (D.C. Bar No. 496370)
Acting Assistant General Counsel
echlopak@fec.gov

/s/ Greg J. Mueller
Greg J. Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

July 19, 2016