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

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No 1:14-cv-01500-CKK
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Independence Institute, by and through undersigned counsel, moves this Court for a preliminary injunction. The Independence Institute asks that the Federal Election Commission ("FEC") be enjoined from enforcing provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. L. No. 107-155 § 201, 116 Stat. 81, 88 (2002) (codified at 52 U.S.C. § 30104(f)), and the BCRA's implementing regulations which, taken together, appear to require the Independence Institute to report its planned activity as an electioneering communication.

As set forth in the accompanying Memorandum of Law in Support of this Motion, if the Independence Institute is required to report its activity as an electioneering communication, it will be subject to burdensome registration and reporting requirements. These requirements violate the Independence Institute's First Amendment rights to free speech and free association.

Reasonably fearing that the FEC will enforce these provisions, the Independence Institute will not speak absent an injunction from this Court.

While a copy of the Summons and Complaint has been mailed to the FEC and various other officers of the United States, service upon the FEC and the United States has not yet been effectuated, nor has Defendant entered an appearance in this case. Nevertheless, Plaintiff has informally provided electronic copies of filings in this case to the FEC's Office of General Counsel, and intends to do the same here. Plaintiff expects that this Motion will be opposed.

Respectfully submitted this 4th day of September, 2014.

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MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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**Admission* pro hac vice *pending*

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Introduction

This case asks whether a communication that in no way "electioneers" may nonetheless be labeled an "electioneering communication" and regulated as such.

The Independence Institute—a well-established Colorado think tank—wishes to produce an advertisement that asks Senator Mark Udall, together with his colleague from Colorado, to take action concerning federal sentencing reform. The advertisement takes no position whatsoever on Senator Udall as a political candidate. Nevertheless, the Bipartisan Campaign Reform Act ("BCRA") would classify this issue speech as an "electioneering communication," forcing the Institute to file reports publically identifying its donors. Because that requirement violates the First Amendment rights of the Institute and its supporters, a preliminary injunction is appropriate.

Facts

Founded in 1985, the Independence Institute is one of the oldest state-based think tanks in the country. Focusing on Colorado public policy, the Independence Institute conducts research and educates the public on issues including taxation, health care, and justice policy. It is organized under Internal Revenue Code (26 U.S.C.) § 501(c)(3), and is a charitable foundation. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (foundation status for revenue generated by donations from the general public).

Organizations exempt from taxation under § 501(c)(3) may not engage in activity supporting or opposing a candidate. 26 U.S.C. § 501(c)(3) (banning "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). The privacy of § 501(c)(3)

organizations' donors is protected by federal law. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A) (prohibiting "the disclosure of the name and address of any contributor to the [§ 501(c)(3)] organization").

"Public charity" § 501(c)(3) organizations *may* engage in limited lobbying activity—including "grassroots lobbying" where an organization encourages citizens to call their leaders and request official action. 26 U.S.C. § 501(c)(3) (decreeing that "no substantial part of [a § 501(c)(3) organization's] activities" shall consist of "carrying on propaganda, or otherwise attempting, to influence legislation"); 26 C.F.R. § 1.501(c)(3)-1(3). Since "substantial" is undefined and difficult to discern, Congress provided a safe harbor under 26 U.S.C. § 501(h), which permits a § 501(c)(3) organization to spend a defined portion of its budget on lobbying and grassroots lobbying. 26 U.S.C. §§ 501(h)(2)(B) and (D). The Independence Institute elects treatment under § 501(h).

Consistent with its § 501(h) designation, the Independence Institute wishes to run an advertisement calling for Coloradoans to support federal sentencing reform. The advertisement will encourage Coloradoans to call Senators Mark Udall and Michael Bennet and request that they support the Justice Safety Valve Act. The advertisement will be approximately 30 seconds in length, and be distributed over local broadcast radio in Colorado. Since this is an election year, but advertisements take time to produce, the advertisement will run after the start of BCRA's electioneering communications window for the general election.[1] The advertisement will be as follows:

[1] Since the general election is on November 4, 2014, sixty days prior to this year's general election is Friday, September 5, 2014. *See*, FEDERAL ELECTION COMMISSION, *Colorado 2014*

Independence Institute
Radio :60
"Let the punishment fit the crime"

Let the punishment fit the crime.

But for many federal crimes, that's no longer true.

Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.

And for what purpose?

Studies show that these laws don't cut crime.

In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.

Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619.

It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.

Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act.

Tell them it's time to let the punishment fit the crime.

Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

Radio advertisements are expensive. Running this advertisement will cost well in excess of $10,000—triggering BCRA's electioneering communication threshold. *See* 52 U.S.C. § 30104(f)(1). In order to fund this communication, the Independence Institute wishes to solicit donations. The organization will seek donations greater than $1,000 from individual donors to

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Federal Election Compliance Information http://www.fec.gov/info/ElectionDate/2014/CO.shtml (last accessed Sept. 4, 2014).

pay for the advertisement. But BCRA § 201 requires that such donors be disclosed on an electioneering communications report. 52 U.S.C. § 30104(f)(2)(E).

The Institute does not wish to disclose and report its donors and, as it is not engaging in electioneering, does not believe it may be constitutionally required to do so. Consequently, the Independence Institute faces a dilemma: it may remain silent on issues important to its mission, or it may speak on the issue of federal sentencing guidelines, but disclose its donors and destroy their associational privacy.

Facing that choice, the Independence Institute filed a Verified Complaint seeking declarations that BCRA's electioneering communications definition and accompanying disclosure system are overbroad as applied to the Independence Institute's planned activity. Because the general election—and consequently, the electioneering communications window—is rapidly approaching, the Independence Institute seeks a preliminary injunction from this Court allowing it to speak without disclosing its donors or facing legal sanctions for failing to do so.

Summary of the Argument

Speech about public issues lies at the core of the First Amendment. But the Bipartisan Campaign Reform Act of 2002 ("BCRA") does not exclude issue speech from its regulation of "electioneering communications." That term captures advertisements that merely mention a candidate within two months of the general election.

The Independence Institute's challenge presents two issues for this Court. First, whether BCRA's electioneering communications definition is overly expansive, reaching and chilling issue speech that does not, under any reasonable interpretation, advocate for or against a candidate for office. Second, whether the disclosure demanded by law in connection with

electioneering communications is insufficiently tailored to the government's legitimate interests, and consequently constitutes an unconstitutional violation of donors' privacy.

The Supreme Court in the civil rights era championed a fundamental principle: compelled disclosure threatens the freedom of association. The foundational campaign finance case—*Buckley v. Valeo*—specifically applied this principle to campaign finance disclosure. Recognizing the harm to associational liberties inherent in the forced disclosure of donors, the Court differentiated between candidate advocacy—which may be regulated—and issue advocacy, which generally may not. Under that decision, donors may be disclosed *only* when a group makes expenditures that expressly advocate a particular election result, or where the organization's major purpose is electoral advocacy.

After passage of the Bipartisan Campaign Reform Act of 2002, the Supreme Court reviewed a new form of regulated speech: the electioneering communication. *McConnell v. FEC* upheld the new regime facially, at least insofar as the regulated advertisements contain express advocacy or its functional equivalent. In *FEC v. Wis. Right To Life, Inc.*, the Court applied the "functional equivalent of express advocacy test" in the context of a ban on corporate electioneering communications. The Court, in an as-applied challenge, narrowed the law to reach only those advertisements that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

In *Citizens United v. FEC*, the Court briefly considered BCRA's disclosure regime and rejected Citizens United's request that disclosure be limited to communications containing the functional equivalent of express advocacy. But *Citizens United*'s terse language was dicta—the communications in question had already been found to be the functional equivalent of express

advocacy. Likewise, the advertisements were run by a § 501(c)(4)—not (c)(3)—organization known for its political advocacy.

The *en banc* D.C. Circuit's decision in *Buckley* provides further guidance. In a section of the opinion unmodified by the Supreme Court, the D.C. Circuit demanded a nexus between disclosure and direct political activity—mere incidental impact on elections is not enough. The Independence Institute's mention of Senator Udall does not create a sufficient nexus to an election to justify compelled disclosure. The D.C. Circuit's protection of issue speech remains good law.

But BCRA § 201 does not provide a limiting test for issue speech. The law does not distinguish between "electioneering communications" that in some way "electioneer" and those which merely mention a sitting officeholder who also happens to be a candidate for office. Therefore, the Institute's proposed advertisement exposes its donors to public disclosure of their names and addresses. This compelled disclosure is itself a grave First Amendment harm that cannot be remedied once imposed. Consequently, the Institute seeks this Court's protection before speaking.

The advertisement presented here is pure issue advocacy. It does not support or oppose Senator Udall's reelection, and in fact make no reference to his candidacy. Therefore, BCRA's electioneering communications definition and accompanying disclosure requirements are unconstitutional as applied to the Independence Institute and its specific advertisement. Plaintiff consequently has a substantial likelihood of success on the merits.

Satisfying the merits factor, the Independence Institute also satisfies the non-merits factors for a preliminary injunction. Restrictions on First Amendment rights, even for a minimal

time, do irreparable harm. Because an injunction would protect First Amendment freedoms *as applied* to the Independence Institute, the balance of interests favors the granting the injunction. Enforcing the First Amendment always serves the public interest.

Argument

I. The standard for granting a motion for preliminary injunction.

Entry of a preliminary injunction is appropriate where the movant establishes that "(a) he is likely to succeed on the merits; (b) that he is likely to suffer irreparable harm in the absence of preliminary relief; (c) that the balance of equities tips in his favor; and (d) that an injunction is in the public interest." *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011) (quoting and applying *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)). As established in the Verified Complaint, the Independence Institute's claims satisfy all four prongs.

II. The Independence Institute has a substantial likelihood of success on the merits in this as-applied challenge.

a. Because compelled disclosure infringes the freedom of association, disclosure laws must survive exacting scrutiny.

As a first principle, the disclosure of an organization's contributors is disfavored. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("*NAACP v. Alabama*") ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association…."). That is because there is a "vital relationship between freedom to associate and privacy in one's associations." *Id.*

The freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference" such as disclosure and its attendant sanctions for failing to disclose. *Bates v. City of Little Rock*, 361 U.S. 516, 523

(1960). The freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

In the campaign finance context, it has "long [been]… recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). It is not enough that the government have some interest—its interest must be substantial enough to pass "exacting scrutiny." *Id*.

Exacting scrutiny is "not a loose form of judicial review." *Wisc. Right to Life v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). In order for *any* disclosure law to survive this strong review, "the subordinating interests of the State must… [possess] a 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64 (quoting *NAACP v. Alabama*, 357 U.S. at 463). This tailoring requirement is a "strict test." *Id*. at 66.

b. In the foundational case of *Buckley v. Valeo*, the Supreme Court specifically protected organizations engaging in issue speech from the burdens of campaign finance disclosure.

Buckley v. Valeo serves as the starting point for all campaign finance jurisprudence in the modern era. *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. ___, ___, 134 S.Ct. 1434, 1444 (2014) (applying *Buckley* to aggregate contribution limits). *Buckley* specifically incorporated the civil rights cases' reasoning when dealing with campaign finance generally and disclosure specifically. *See, e.g.*, *Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460); *id.*

at 64-66 (applying associational privacy principles from cases such as *NAACP v. Alabama*, 357 U.S. at 460-61; *Bates*, 361 U.S. at 522-523; and *NAACP v. Button*, 371 U.S. at 438).

In *Buckley*, the Supreme Court examined the interplay between the government's desire for disclosure, and the First Amendment's robust protection of the freedoms of speech and association. The *Buckley* Court determined that "[t]he constitutional right of association…stem[s] from the…recognition that '[e]ffective advocacy of both public and private points of view…is undeniably enhanced by group association.'" *Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460). Acting to safeguard this associational liberty, the Court noted explicitly that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id*. at 66. The Court was further concerned with "the invasion of privacy of belief" generated by disclosure, given that "'[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id*. (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)).

Consequently, the Court placed the burden of defending a disclosure regime's constitutionality on the government. *Id.* at 65. And *Buckley* was no outlier: the Court incorporated the long-mandated rule that disclosure survive "exacting scrutiny." *Id*. at 64-65 (citing *NAACP v. Alabama*, 357 U.S. at 463). Therefore, the FEC must show a "relevant correlation" or "substantial relation" between the disclosure required and a sufficiently important governmental interest. *Id.* at 64 (internal citation omitted).

The Federal Election Campaign Act ("FECA"), the law challenged by the *Buckley* plaintiffs, required disclosure from "political committees"—a term defined only as organizations making "contributions" or "expenditures" over a certain threshold amount. *Id*. at 79. Both

"contributions" and "expenditures" were defined in terms of "the use of money or other objects of value 'for the purpose of… influencing' the nomination or election of any person to federal office." *Id.* at 63. Since such a vague definition "could be interpreted to reach groups engaged purely in issue discussion," the Court, performing its duty to save, if possible, legislative intent, promulgated the "major purpose" test. *Id*. at 79. The test is straightforward: the government may compel contributor information from "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. In this context, such an organization's expenditures "are, by definition, campaign related." *Id*.

However, in the context of an organization *without* "the major purpose" of supporting or opposing a candidate, the Court deemed disclosure constitutionally appropriate *only:*

> (1) when [organizations] make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when [organizations] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80. The Court narrowly defined the term "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id*. at 80 n. 108, incorporating by reference *id*. at 44 n. 52. Such communications have a "substantial connection with the governmental interests" in disclosure, because they involve "spending that is unambiguously related" to electoral outcomes. *Id*. at 80, 81.

To summarize, the *Buckley* Court held that compelled disclosure of contributors is constitutionally disfavored. Disclosure can only be required of groups that exist to actively advocate for a particular electoral result. And such disclosure regimes must withstand "exacting

scrutiny"—under which the burden of persuasion falls upon the state. *Buckley*, 424 U.S. at 25 (burden is on "the State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms").

c. The Supreme Court's decisions in *McConnell* and *Citizens United* do not predicate disclosure upon neutral, nonpartisan issue speech and do not overturn *Buckley*.

In 2002, Congress overhauled the federal campaign finance laws, creating a new category of speech called "electioneering communications." Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155 § 201, 116 Stat. 81, 88 (2002) (definition codified at 52 U.S.C. § 30104(f)(3)(A)(i)); *McConnell v. FEC*, 540 U.S. 93, 189 (2003) *overruled in part by Citizens United v. FEC*, 558 U.S. 310, 366 (2010). In the federal system, such electioneering communications are

> [A]ny broadcast, cable, or satellite communication which--(I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. § 30104(f)(3)(A)(i). "Targeted to the relevant electorate" was defined to mean that "the communication can be received by 50,000 or more persons" in the relevant jurisdiction. 52 U.S.C. § 30104(f)(3)(C). These provisions, along with others from BCRA, became the background to several constitutional challenges, often in the context of bans on speech rather than disclosure requirements. The cases are instructive, however, in that they show the Supreme Court's continued commitment to protecting issue speech from undue capture by overbroad state regulation.

i. *McConnell* and its progeny limited state regulation to the "functional equivalent" of *Buckley's* "express advocacy" both facially and on an as-applied basis.

McConnell was an omnibus facial challenge to BCRA. 540 U.S. at 194. There, the Supreme Court reviewed the new federal regulation of "electioneering communications," and upheld a ban on electioneering communications by corporations and unions. *Id.* at 206 (examining BCRA § 203 (codified at 52 U.S.C. § 30118(b)(2)).

In its analysis, the Court noted that BCRA was a response to the rise of "sham issue advocacy…candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (internal quotations and citations omitted). It singled out a study in the *McConnell* record that found "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an electioneering purpose. *Id.*at 206. Therefore, because many ads "broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*," the electioneering communication definition had some constitutionally sound applications and withstood a facial challenge. *Id*. (emphasis added); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456 (2007) ("*WRTL II*") ("The [*McConnell*] Court concluded that there was no overbreadth concern to the extent the speech in question was the 'functional equivalent' of express campaign speech") (applying *McConnell*, 540 U.S. at 204-205, 206).

But the *McConnell* Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*," and thus left open the possibility for future, as-applied challenges. *Id.* at 206, n. 88 (emphasis added). The Court would hear just such an as-applied challenge when a nonprofit corporation, Wisconsin Right to Life

wished to run advertisements discussing the Senate's filibuster of federal judicial nominees. *WRTL II*, 551 U.S. at 458-59.[2] The proposed ads in *WRTL II*, like the Independence Institute's proposed advertisement, simply referenced a (then) current political issue—the confirmation of judicial nominees—and encouraged viewers to contact their senators. *Id*. at 458-459.

Chief Justice Roberts's controlling opinion in *WRTL II* expounded upon *McConnell*'s holding, and demarcated the difference between the functional equivalent of express advocacy—the "sham issue" advertisements that *McConnell* addressed—and genuine issue speech. *Id*. at 470. The *WRTL II* Court held that the government could only regulate the former. In particular, the Court found that the relevant governmental "interest [could] not justify regulating" the nonprofit's advertisements. *Id*. at 479. They were "*not* the functional equivalent of express advocacy." *Id.* at 478 (emphasis in original). Consequently, the statute flunked the required tailoring analysis.

The controlling opinion defined the functional equivalence of express advocacy as a communication which is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70. Furthermore, the Chief Justice noted the difficulty in divining the line "between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other…" and therefore declined to "analyz[e] the question in terms 'of intent and of effect'" as doing so "would afford 'no security for free discussion.'" *Id*. at 467 (quoting *Buckley*, 424 U.S. at 43). Accordingly, to determine whether speech is the

[2] *Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)("*WRTL I*") focused on whether *McConnell* had foreclosed as-applied challenges to the corporate electioneering communications ban. A unanimous Supreme Court determined "[i]n upholding [BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges." *Id*. at 411-12.

functional equivalent of express advocacy, courts must look no further than the "four corners" of a proposed advertisement. *Id*. at 461 (internal quotation marks and citation omitted).

WRTL II arose in the context of a ban on speech, not a forced disclosure regime. But it nonetheless serves as strong authority for the continued vitality of *Buckley*'s separation of issue speech from express advocacy and, while acknowledging that some issue speech may indeed be a "sham," provides an authoritative roadmap for courts seeking to make that determination. A communication is the "functional equivalent of express advocacy" only if—within the four corners of the communication—no reasonable person can read it as anything other than as an appeal to vote in a particular way.

ii. The disclosure upheld in *Citizens United* was for donors who explicitly contributed for a communication that is the functional equivalent of express advocacy—not genuine issue speech.

In time, the Supreme Court struck down the corporate and union independent expenditure ban (both BCRA § 203 and other parts of 52 U.S.C. § 30118) in *Citizens United*, 558 U.S. 310, 372 (2010). As the Seventh Circuit recently noted, *Citizens United* discussed electioneering communication disclosure but "this part of the opinion is quite brief." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014).

In its truncated discussion, the Court noted Citizens United's claim "that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy." It then "reject[ed] this contention." *Citizens United*, 558 U.S. at 368-69. The Court held that disclosure is "a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) and

Buckley, 424 U.S. at 75-76). But as *Citizens United*, like this case, was an as-applied challenge, the specific facts of the case are dispositive.

Citizens United produced a film called *Hillary: The Movie* ("*Hillary*") and several advertisements to promote the film. *Id*. at 319-20. Because of the decision in *WRTL II*, a key question was whether *Hillary* and its supporting advertisements were express advocacy or its functional equivalent. *Id*. at 324-25. The Court explicitly held that *Hillary* was express advocacy. *Id*. at 325.

When the Court turned to the advertisements for *Hillary*, it found that "[t]he ads f[e]ll within BCRA's definition of an 'electioneering communication'" because "[t]hey referred to then-Senator Clinton by name shortly before a primary and contained *pejorative references* to her candidacy." *Id*. at 368 (emphasis added). Given that the Court already found *Hillary* to be the functional equivalent of express advocacy and the advertisements for that express-advocacy communication to be "pejorative," this holding does not address advertisements that are pure issue advocacy.

As the Seventh Circuit reasoned, "the Court declined to apply the express-advocacy limitation to the federal disclosure…requirements for electioneering communications…. This was dicta. The Court had already concluded that *Hillary* and the ads promoting it were the equivalent of express advocacy." *Barland*, 751 F.3d at 836 (citations omitted). Indeed,

> "[l]ifting the express-advocacy limitation more broadly would have been a major departure from *Buckley* and is not likely to have been left implicit. *Citizens United* approved event-driven disclosure for federal electioneering communications—large broadcast ad buys close to an election. In that specific and narrow context, the Court declined to enforce *Buckley*'s express-advocacy limitation, but it went no further than that."

Id.

As *Buckley* observed, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 at 42. Speech exists on a spectrum, and—importantly for this litigation—the *Citizen United* communications and the Independence Institute's proposed advertisement sit on different parts of that spectrum.

On one end sits express advocacy—candidate speech using *Buckley*'s magic words of "support" or "reject" or their synonyms. *See*, *id*. at 44 n. 52. Next to express advocacy sit communications that do not use *Buckley*'s magic words but nevertheless clearly advocate on behalf of or against a candidate—the "functional equivalent of express advocacy," as applied by *WRTL II*. 551 U.S. at 469-70. This category includes *Citizens United*'s "pejorative" communications. *Citizens United*, 558 U.S. at 325, 368; *Barland*, 751 F.3d at 823 ("The [*Citizens United*] Court began by holding that *Hillary* and the ads promoting it were the functional equivalent of express advocacy under *Wisconsin Right to Life II*").

But on the other end of the spectrum is pure issue advocacy—discussion of public policy in the context of asking leaders to take action. The Independence Institute's advertisement is pure issue advocacy—it educates the public about public policy and asks Coloradoans to seek action from their elected representatives. It does not support or oppose Senator Udall, or even allude to his candidacy.

The contrast with Citizens United's communications is marked. One advertisement began with "a kind word about Hillary Clinton," and after complimenting Mrs. Clinton's fashion sense, announced that *Hillary* was "a movie about the [*sic*] everything else." *Citizens United v. FEC*,

530 F. Supp. 2d 274, 276 n. 3 (D.D.C. 2008). Another advertisement claimed Senator Clinton was "the closest thing we have in America to a European socialist." *Id.* n. 4.

Electioneering communications considered by other courts have generally been in a similar vein. For instance, in one case, the Fourth Circuit was confronted with an advertisement called "Change." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012). The advertisement asked, "[j]ust what is the real truth about Democrat Barack Obama's position on abortion?" *Id*. After detailing alleged policy positions taken by then-candidate Obama, the advertisement ended, "Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?" *Id*. Another advertisement ended, "Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause." *Id*. at 547.

Advertisements like these were the sort of "sham issue advocacy" described in *McConnell*. These communications encourage a specific electoral outcome—namely, the defeat of Hillary Clinton or Barack Obama. The *Citizens United* Court recognized this. It described the organization's advertisements for *Hillary* as "pejorative," and held that *Hillary* itself functioned as a "feature-length negative advertisement." *Citizens United*, 558 U.S. at 368; *id*. at 325. By contrast, the Independence Institute's proposed advertisement is genuine issue speech. From within the "four corners" of the proposed advertisement, one would not know that Senator Udall is seeking office; indeed, he is listed equally with Senator Bennet, who is not. Instead, the advertisement is focused on federal sentencing reform, the Independence Institute's belief that the Justice Safety Valve Act should be passed, and encourages the viewer to contact her senators—who have the ability to support or oppose bills introduced in the Senate.

iii. *Citizens United* did not discuss the particular burden of disclosing donors to a § 501(c)(3) organization.

Citizens United is, and at the time of its case was, a § 501(c)(4) organization. *Citizens United*, 530 F. Supp. 2d at 275. The Independence Institute is organized under § 501(c)(3). These two sections of the tax code, while differing by only one digit, describe markedly different types of organizations. These differences exacerbate the burdens of forced donor disclosure.

Consistent with this difference in permitted activity, donors to § 501(c)(4) organizations are generally offered less protection than those to § 501(c)(3) groups. *See*, *e.g.*, 26 U.S.C. § 6104(c)(3) (differentiating between disclosure to state officials of donors to § 501(c)(3) organizations and other § 501(c) organization types). The tax code specifically protects § 501(c)(3) donor lists from public disclosure. 26 U.S.C. § 6104(d)(3)(A). Indeed, the *Citizens United* Court specifically noted that that organization had disclosed its donors in the past, something the Independence Institute has not done, and will not do. *Citizens United*, 558 U.S. at 370 ("Citizens United has been disclosing its donors *for years*") (emphasis added).

d. The D.C. Circuit recognized the need to protect issue speech in *Buckley v. Valeo,* which remains binding precedent in this Circuit.

In *Buckley v. Valeo*, prior to the Supreme Court's decision, the D.C. Circuit *en banc* rejected FECA's attempt to reach organizations

> who publish[] or broadcast[] to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, *or other official acts (in the case of a candidate who holds or has held Federal office),* or otherwise designed to influence individuals to cast their votes.

Buckley v. Valeo, 519 F.2d 821, 869-870 (D.C. Cir. 1975) (emphasis added) (quoting 2 U.S.C. § 437a (repealed by Federal Election Campaign Act Amendments of 1976 Pub. L. 94-283 § 105 90

Stat. 475, 481 (1976))) *aff'd in part and rev'd in part* 424 U.S. 1 (1976). This portion of the Circuit's decision was not appealed. *Buckley*, 424 U.S. at 11 n. 7. Consequently, it remains the law of this Circuit.

The *Buckley* decision noted that "section 437a [was] susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from *completely nonpartisan public discussion of issues* of public importance." *Buckley*, 519 F.2d at 870 (emphasis added). For example, the court highlighted that the statute "also demand[ed] disclosure by plaintiff New York Civil Liberties Union" among other examples of established public policy organizations. *Id*. at 871. Despite the civil liberty organization's internal ban on supporting or opposing to candidates, § 437a would still have triggered disclosure because "[t]he organization also publicize[d] in newsletters and other publications the civil liberties voting records, positions and actions of elected public officials, some of whom [were] candidates for federal office." *Id*. at 871.

Left unchecked, the statute in *Buckley* would have reached the issue-focused activity of groups such as "Common Cause, the American Conservative Union, the American Civil Liberties Union and… environmental groups." *Id*. at 877 (quoting floor statement of Rep. William Frenzel, 120 CONG. REC. H. 10333 (daily ed., Oct. 10, 1974)). Judge Tamm, writing separately, said he could "hardly imagine a more sweeping abridgement of first amendment associational rights… I can conceive of no governmental interest that requires such sweeping disclosure of all groups who take a stand on a public issue or report voting records…." *Id*. at 914 (Tamm, J. concurring in part and dissenting in part).

Like the subsequent Supreme Court opinion, the D.C. Circuit's *Buckley* opinion recognized that "compelled disclosure…can work a substantial infringement on the associational rights of those whose organizations take public stands on public issues." *Id*. at 872 (citing *NAACP v. Alabama*, 357 U.S. at 462; *Bates*, 361 U.S. at 522-524). Even though "discussion of important public questions can possibly exert some influence on the outcome of an election," organizations engaged in such speech may have only a "tenuous" connection to elections when compared to explicitly political groups. *Id*. at 872-73. Simply put, "groups seeking only to advance discussion of public issues or to influence public opinion cannot be equated to groups whose relation to political processes is direct and intimate." *Id*. at 873. And where it *does* equate these groups, the government fails to tailor its interest in an informed electorate to the infringement of a donor's right to anonymously associate with non-electoral entities.

These principles—unmodified by the subsequent Supreme Court decision—remain good law in this Circuit. As a group that advances the discussion of issues, the Independence Institute "cannot be equated to groups whose relation to political processes is direct and intimate." *Id*. at 873. Yet by running an issue advertisement, the organization is caught in the net of BCRA's electioneering communications definition and disclosure provisions. That result is unconstitutional.

e. BCRA's electioneering communications definition and disclosure regulations unconstitutionally burden the rights of the Independence Institute and its donors to freedom of speech and association.

The Independence Institute's planned advertisement is genuine issue speech. Because of BCRA's expansive definition of "electioneering communication," mere mention of a candidate in an advertisement 30 days before a primary or 60 days before a general election triggers

reporting and disclosure requirements. *See* 52 U.S.C. § 30104(f)(3)(A)(i). Issue speech is not exempted or otherwise protected.

Further, the electioneering communications disclosure law impermissibly burdens the freedom of association of the Independence Institute's donors. Their privacy is destroyed by the public disclosure of their names and addresses. 52 U.S.C. § 30104(f)(2)(F).

i. BCRA fails to tailor its disclosure demand to an appropriate governmental interest

The Independence Institute concedes that speech advocating for an electoral result may constitutionally trigger disclosure. *Buckley*, 424 U.S. at 80 ("as construed [the statute] bears a sufficient relationship to a substantial governmental interest… for it only requires disclosure of those expenditures that expressly advocate a particular election result"). In such instances, there is a "strong" governmental interest in "disclosure [which] helps voters to define more of the candidates' constituencies." *Id*. at 81. But BCRA captures too much speech for too little purpose, and accordingly, is not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. The Institute is not a "constituency" of any candidate. Issue speech, such as the Independence Institute's proposed advertisement, does not encourage an electoral outcome.

Without a valid informational interest in the Institute's donors, the electioneering communication regime fails exacting scrutiny, which "demand[s] a close fit between ends and means… [to] prevent[] the government from too readily sacrificing speech for efficiency." *McCullen v. Coakley*, 573 U.S. ___, ___, 134 S. Ct. 2518, 2534-2535 (2014) (internal citation and punctuation omitted). American voters may have an interest in knowing who is supporting and opposing candidates—a valid "end"—but that interest is not implicated here. And the chosen

"means"—disclosure of donors to an educational nonprofit that merely mentions a state's sitting U.S. senators—has no connection, in this case, to that ephemeral interest.

ii. BCRA's electioneering communication definition is overly broad and makes no exception for genuine issue speech.

Because of BCRA's expansive definition of electioneering communication, mere mention of a candidate in an advertisement 60 days before a general election triggers reporting and disclosure requirements. 52 U.S.C. §§ 30104(f)(3)(A)(i); 11 C.F.R. § 100.29. This provision impermissibly blurs the line between candidate advocacy, which may be regulated, and issue advocacy, which generally cannot. *See Buckley,* 424 U.S. at 42-44. Thus, the law chills the Independence Institute's speech by forcing the organization to register and report its advertisement as an electioneering communications in order to engage in issue advocacy.

It is true that the line between issue advocacy and the candidate advocacy may not always be clear. *Buckley*, 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application"). But the express advocacy and functional equivalent of express advocacy tests, as articulated by the Supreme Court, are designed to prevent campaign finance law from capturing issue speech. The D.C. Circuit's *Buckley* opinion demonstrated this, by requiring a nexus between the disclosure and actual political activity—not the mere mention of a candidate, his voting record, or his policy positions. *Buckley*, 519 F.2d at 872-73.

BCRA § 201 fails this test. By regulation, the use of a candidate's nickname, likeness, or photograph qualifies as mention of a clearly identified candidate. 11 C.F.R. § 100.29(b)(2). This leaves the Independence Institute with the difficult choice between remaining silent on an important issue, or risking regulation and disclosure under the electioneering communications

provisions of BCRA. Even though the proposed advertisement is not an appeal to vote for or against Senator Udall, nor is it pejorative, the nonprofit is regulated as if it is conducting electoral activity. BCRA chills speech because it fails to exempt the genuine issue speech of the Independence Institute, and thus fails the "strict test" of exacting scrutiny. *Buckley*, 424 U.S. at 66.

All of this might make sense in the context of actual "electioneering." But the Independence Institute is prohibited by the tax laws from advocating for or against candidates. Its advertisement does not do so. Put differently, the constitutional objection to donor disclosure can be put aside for "political committees" or "election" advertisements. But as the Institute is not a political committee, and its advertisement does not even allude to an election, the governmental interests undergirding these burdensome requirements simply do not apply.

iii. BCRA's electioneering communication disclosure system is burdensome to the Independence Institute and its donors.

Once triggered, BCRA's electioneering communication disclosure system is burdensome: speakers must reveal the names and addresses of donors who give $1,000 or more. 52 U.S.C. §§ 30104(f)(2)(E) and (F). It is particularly pernicious to § 501(c)(3) organizations, whose donors are usually protected from public disclosure by the Internal Revenue Code. 26 U.S.C. § 6104(b). The Independence Institute is left with the unconstitutional choice between staying silent on issues important to its mission or disclosure of its donors.

An organization must file an electioneering communications report once it spends more than $10,000 on qualifying communications. 52 U.S.C. § 30104(f)(1). The report is required within approximately 24 hours of the disbursement of funds. 52 U.S.C. § 30104(f)(1); 52 U.S.C. § 30104(f)(4) (defining "disclosure date" as "the first date during any calendar year by which a

person has made [qualifying] disbursements for… electioneering communications…; and any other date during such calendar year by which a person has made [qualifying] disbursements for… electioneering communications… since the most recent disclosure date for such calendar year"); *but see* 11 C.F.R. § 104.20(b) ("[e]very person who has made an electioneering communication, as defined in 11 C.F.R. 100.29… shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date").

The report requires the name and address of anyone who gives more than $1,000 for an electioneering communication—if the funds to pay for the electioneering communication came out of a special, segregated account described in 52 U.S.C. § 30104(f)(2)(E). But if the funds used to pay for the electioneering communication came from an account not described in 52 U.S.C. § 30104(f)(2)(E), then "the names and addresses of *all contributors* who contributed an aggregate amount of $1,000 or more to the person" must be disclosed. 52 U.S.C. § 30104(f)(2)(F) (emphasis added). While the FEC has interpreted BCRA disclosure under 52 U.S.C. § 30104(f)(2)(E) as limited to donations earmarked for electioneering communications, the status of the FEC's regulation is in doubt. 11 C.F.R. § 104.20(c)(9); *Center. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 112 (D.C. Cir. 2012) (ordering FEC to consider a proposed rulemaking to clarify the justification of the rule, or absent a new rulemaking, ordering the district court to perform a *Chevron* step two analysis). Thus an organization faces the very real possibility of being required to disclose *all* of its donors, should it disseminate an electioneering communication. But even disclosure of some of its donors poses grave First Amendment harm.

This harm is significant. If it wishes to run its advertisement, the Institute must choose whether to disclose its donors or risk violating the law.

III. First Amendment violations, even for a brief time, are irreparable harm.

The Supreme Court has directly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal citation and quotation marks omitted).

Here, federal electioneering communication disclosure laws impose an unconstitutional restriction on the activity of the Independence Institute by regulating as "electioneering" what is, in fact, a discussion of public policy with no connection to a political campaign. During the electioneering communications window, BCRA effectively silences the Independence Institute by forcing it to otherwise waive its First Amendment rights. This is no small constitutional curtailment. As the Supreme Court expressed in *Thomas v. Collins*:

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede.

323 U.S. 516, 543 (1945). The rights of the Independence Institute and its members are restrained by BCRA's broad electioneering communication regulation. Such injury is irreparable.

IV. The balance of interests favors granting the Independence Institute's motion.

Absent intervention by this Court, the Independence Institute fears its proposed advertisement will trigger regulation and disclosure as an electioneering communication. Without this Court's protection, it will have to remain silent. And while this case involves the very real and important rights the First Amendment guarantees, it examines only a small portion

of the nation's campaign finance laws: a challenge to the electioneering communication rules as applied to a particular issue advertisement. The injunction would reach no further than the specific activity of the Independence Institute.

Therefore, while the public interest in upholding the Independence Institute's rights is great, the relative impact on the administration of BCRA's campaign finance laws is slight. The balance of harms favors the Independence Institute.

V. The public interest is served by protecting the First Amendment rights to speech and association.

Since no party has an interest in the enforcement of an unconstitutional law, the public interest is best protected by issuing a preliminary injunction. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("the court acknowledged the obvious: enforcement of an unconstitutional law is always contrary to the public interest") (internal citations omitted).

Conclusion

For the foregoing reasons, a preliminary injunction should be issued preventing Defendant from enforcing BCRA's electioneering communications definitions and disclosure laws—52 U.S.C. § 30104(f) —as applied to the specified activity of the Independence Institute.

Respectfully submitted this 4th day of September, 2014.

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**Admission* pro hac vice *pending*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:14-cv-01500-CKK
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2014, the foregoing Motion for a Preliminary Injunction and Memorandum of Law in Support of Motion for a Preliminary Injunction were served on the following, via first class mail:

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