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

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	)	
Appellant,	)	
v.	)	Case No. 14-5249
FEDERAL ELECTION COMMISSION,	)	
Appellee.	)	

Appellant Independence Institute's Combined Motion for Summary Reversal and Response to Federal Election Commission's Motion for Summary Affirmance

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Introduction

Appellant Independence Institute hereby responds to the Federal Election Commission's ("FEC" or "Commission") Motion for Summary Affirmance. Additionally, Appellant moves for summary reversal of the district court's ruling and an order convening a three-judge district court pursuant to the Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. L. No. 107-155 § 403, 116 Stat. 81, 113-14 (2002) (codified at 52 U.S.C. § 30110 note).

The Independence Institute sought to air a radio advertisement in the weeks leading up to the 2014 election. That advertisement dealt solely with a legislative

issue: federal sentencing reform. The advertisement exhorted the listener to contact his or her United States senators and tell them to support a particular sentencing reform measure, the Justice Safety Valve Act. One of the two senators mentioned in the ad, Mark Udall, was seeking re-election. Even though the ad does not, in any sense, "electioneer," it falls within the Bipartisan Campaign Reform Act's definition of an "electioneering communication." Because of this fact, if the Institute runs its ad, federal law requires the Institute to publicly disclose its donors.

This raises two constitutional issues. First, in the campaign finance context, the Supreme Court has explicitly limited donor disclosure to situations where an organization's speech is "unambiguously campaign related," so as to protect issue speech from governmental regulation. While it is true that the Court has upheld donor disclosure for "electioneering communications" facially (in *McConnell v. FEC*, 540 U.S. 93 (2003)) and as-applied to commercial advertisements for a film critical of then-Senator Hillary Clinton's 2008 presidential candidacy (in *Citizens United v. FEC*, 558 U.S. 310 (2010)), it has never been asked to rule on an as-applied challenge concerning the sort of genuine issue speech involved here. Indeed, the last time the government sought to regulate issue speakers in a similar matter, the Supreme Court narrowed the reach of the statute to protect genuine issue speakers. *Buckley v. Valeo*, 424 U.S. 1, 44, 79-80 (1976).

Second, at the time of filing, the FEC insisted that only contributors who earmarked their contributions for "electioneering communications" would be publicly disclosed, pursuant to a Commission regulation. Mere hours after the FEC filed its Motion, a federal court struck down that regulation. This significantly raises the stakes in this case, as the Institute explicitly noted when it filed its lawsuit. If the ad at issue here were to air in sufficient proximity to an election, all donors who gave more than $1,000 to the Institute—a Section 501(c)(3) charity whose donors are kept private by operation of federal tax law—would be publicly disclosed. *See, e.g.*, 26 U.S.C. 6104(d)(3)(A) (a § 501(c)(3) Form 990 "shall not require the disclosure of the name or address of any contributor of the organization"); 26 U.S.C. § 6104(b) (providing for disclosure of the organization's name and address, but "[n]othing in this subsection shall authorize the Secretary [of the Treasury] to disclose the name or address of any contributor to any organization or trust"). This is, again, a circumstance the Supreme Court has never addressed, for the simple reason that this was not the law when *Citizens United* was decided. *Citizens United v. FEC*, 540 F. Supp. 2d 274, 280 (D.D.C. 2008) ("requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who

contributed $1,000 or more in aggregate to the corporation *for the purpose of furthering electioneering communications*") (emphasis supplied).

This is not a brief on the merits of either claim. That is because Congress has commanded that constitutional questions of this type must be heard by a three-judge district court. This is a novel challenge that deals with distinct facts and law that were not before the *Citizens United* Court. Consequently, the district court below erred in determining, without holding a hearing, that Supreme Court precedent necessarily forecloses the Institute's claims. The appropriate remedy is to summarily reverse that decision, and allow for full consideration of the merits as Congress intended. 52 U.S.C. § 30110 note (constitutional challenges "*shall* be filed in the United States District Court for the District of Columbia and *shall* be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code") (emphasis supplied).

Factual and Legal Background

I. In district court, the Independence Institute challenged BCRA's electioneering communication disclosure as applied to a proposed advertisement discussing federal sentencing reform.

The Independence Institute is a Denver, Colorado-based nonprofit corporation organized under the Internal Revenue Code and Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status) and 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public);

COLO. REV. STAT. §§ 6-16-103(1) (defining "charitable organization"); 7-121-101 *et seq*. ("Colorado Revised Nonprofit Corporation Act") (2014). Established in 1985, the Independence Institute has a long history of conducting research and educating the public on various aspects of public policy, including taxation, education policy, health care, and justice policy.

To further this mission, the Institute wished to run a radio advertisement supporting the Justice Safety Valve Act. The ad would urge viewers to contact both of Colorado's sitting senators and express support for the Act, which is pending before the Senate. One of Colorado's senators, Mark Udall, also happened to be a candidate for reelection.[1] The proposed advertisement did not discuss or refer to his candidacy in any way. Nevertheless, the Institute's proposed ad would qualify as an electioneering communication under BCRA, simply because it mentioned Udall's name within 60 days of the general election.

Much of the FEC's motion for summary affirmance seeks to apply *Citizens United* to the facts of this litigation. *See* Mot. for Summ. Affirm. at 16. Since both cases are as-applied challenges, it is helpful to compare the ads at issue in each.

[1] The Institute brought the action just before the BCRA's electioneering communications window. The 2014 election passed. But the Institute agrees with the FEC: this case fits "within the exception to mootness for disputes capable of repetition, yet evading review." Mot. for Summ. Affirm. at 10 n.2. (citing *FEC v. Wis. Right to Life*, 551 U.S. 449, 461-64 (2007) ("*WRTL II*")).

Independence Institute's Ad[2]	Citizens United's Ad[3]
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.	The script for the television advertisement, "Wait" reads as follows: [Image(s) of Senator Clinton on screen] "If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." [Film Title Card] [Visual Only] Hillary: The Movie. [Visual Only] www.hillarythemovie.com

[2] V. Compl. ¶ 35, ECF 1; *cf* Mem. Op. at 2 n.2 ECF 24.
[3] *Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 n.2 (D.D.C. 2008) *aff'd in part and rev'd in part*, 558 U.S. 310.

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.	

While the *Citizens United*'s "Wait" ad overtly discussed then-Senator Hillary Clinton and made implications about her fitness for office, Citizens United wished to run two other ads that spoke in an even more "pejorative" fashion about her candidacy.[4] *Citizens United v. FEC*, 558 U.S. at 320 ("Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton…").

[4] As the *Citizens United* district court described the other ads:

> The script for the television advertisement, "Pants" reads as follows:
> [Image(s) of Senator Clinton on screen]
> "First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."
> "Now, a movie about the [*sic*] everything else."
> [Film Title Card]
> [Visual Only]
> Hillary: The Movie.
> [Visual Only] www.hillarythemovie.com
>
> The script for the television advertisement, "Questions" reads as follows:
> [Image(s) of Senator Clinton on screen]
> "Who is Hillary Clinton?"
> [Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is…"
> [Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda…"

II. BCRA mandates disclosure of the Independence Institute's donors if it runs the proposed advertisement.

BCRA defines electioneering communications as

> [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).

Any entity—including a nonprofit corporation—that spends over $10,000 on a qualifying communication must file a disclosure report with the FEC. 52 U.S.C. § 30104(f)(1). The report discloses the names and addresses of all donors who gave more than $1,000 to the nonprofit. 52 U.S.C. § 30104(f)(2)(E) and (F). Under BCRA and the FEC's regulations, *any* mention of a candidate within 60 days of a general election triggers such disclosure, regardless of context. *See*, *e.g.*, 11 C.F.R. § 100.29(b)(2).

> [Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist"
> "If you thought you knew everything about Hillary Clinton… wait 'til you see the movie."
> [Film Title Card]
> [Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.
> [Visual Only] www.hillarythemovie.com

Citizens United, 530 F. Supp. 2d at 276 nn.3 and 4 (*sic* notation supplied).

Thus, the Institute's challenge is twofold. BCRA's electioneering communication definition is overbroad as applied to the Independence Institute. V. Compl. ¶114 (challenging 52 U.S.C. § 30104(f)(3)(A)(i)). Further, the disclosure requirements, which violate donor privacy for communications having nothing to do with a federal election, are overbroad as applied to the Institute's proposed ad. V. Compl. ¶129 (challenging 52 U.S.C. § 30104(f)(1)-(2)). These claims have not been foreclosed by Supreme Court precedent. Nevertheless, the district court denied the Independence Institute's application for a three-judge court and reached the merits of the case. Mem. Op. at 6.

III. The recent decision in *Van Hollen v. FEC* increases the burdens of disclosure for nonprofit organizations that may incidentally mention a candidate.

The FEC's motion, like its briefing below, assumes that disclosure of donors' identifying information is limited to those who specifically support (or "earmark" their funds for) an organization's electioneering communications:

> As relevant here, if the EC is financed by a corporation, the corporation must report "the name and address of each person who made a donation aggregating $1,000 or more to the corporation . . . for the purpose of furthering electioneering communications."

Mot. for Sum. Affirm. at 4 (quoting 11 C.F.R. § 104.20(c)(9)). The FEC's motion asserting this earmarking limitation was filed mere hours before the United States District Court of the District of Columbia vacated the earmarking provision of 11

C.F.R. § 104.20(c)(9). *Van Hollen v. FEC*, No. 11-0766 slip op. at 3 (D.D.C. Nov. 25, 2014) (attached as Exhibit 3).

In its filings in district court, the Independence Institute repeatedly highlighted the possibility that *Van Hollen* might strike down the earmarking regulation promulgated by the Commission. As the Institute noted, such a ruling would intensify the unconstitutional burdens of disclosure. *See, e.g.* V. Compl. ¶¶ 55 and 124; Mem. in Sup. for Mot. for Prelim. Inj. 24, ECF 5-1.

As a result of the *Van Hollen* ruling, any advertisement that mentions a candidate—even in an issue ad focused on official action—triggers disclosure if run within 30 days of a primary or 60 days of the general election. This disclosure will include *all* donors who gave more than $1,000 to the organization—regardless of the donor's knowledge of or position on the advertisement.

Argument

I. Standards of Review

The FEC correctly observes that this Court reviews the district court's summary judgment ruling *de novo*. Mot. for Summ. Affirm. at 9.

a. A three judge court must be convened unless the Supreme Court has "foreclose[d] the subject" and left "no room for the inference that the question sought to be raised can be the subject of controversy."

The showing required to convene a three judge court is minimal, akin to that required to survive a motion to dismiss under Federal Rule of Civil Procedure

12(b)(6). *Goland v. United States*, 903 F.2d 1247, 1257-1258 (9th Cir. 1990) (comparing § 437h certification standard to the three judge court provision of 28 U.S.C. § 2284, and describing the showing required as "closely resemble[ing] that applied under Rule 12(b)(6)").

In *Feinberg v. FDIC*, 522 F.2d 1335 (D.C. Cir. 1975), this Court explained the circumstances under which a constitutional question is "substantial" enough to merit consideration by a three judge court. A three judge court is to be convened unless prior Supreme Court decisions have "foreclose[d] the subject" and left "no room for the inference that the question sought to be raised can be the subject of controversy." *Id*. at 1339 (citations omitted). Consequently, this Court's sister circuits have found narrow, as-applied challenges to be sufficiently "substantial" for such consideration under similar provisions. *Cao v. FEC*, 688 F. Supp. 2d 498, 533 (E.D. La. 2010) *aff'd som. nom. Republican Nat'l Comm. v. FEC (*In re *Anh Cao)*, 619 F.3d 410 (5th Cir. 2010).

For the FEC to prevail on its motion for summary affirmance, one facial challenge, *McConnell v. FEC*, 540 U.S. 93 (2003), and one as-applied challenge, *Citizens United*, must wholly foreclose all future as-applied challenges to BCRA § 201's regulation of electioneering communications. The FEC so argues. Mot. for Summ. Affirm. at 9-11. But the Supreme Court explicitly held that *McConnell* does *not* foreclose future as-applied challenges. *Wis. Right to Life, Inc. v. FEC*, 546

U.S. 410, 411-12 (2006) ("*WRTL I*") (holding that *McConnell* did not foreclose future challenges to BCRA § 203's regulation of electioneering communications). Further, as discussed *infra*, the communications at issue in *Citizens United* differ substantially from the Independence Institute's proposed advertisement. Here, this Court must decide whether those two cases close the courthouse door to all speakers wishing to mention a candidate—whatever the context—during the electioneering communications window. That is a particularly difficult burden to carry in light of *Van Hollen*.

b. Summary affirmance is disfavored.

In contrast to the minimal showing required to empanel a three-judge court, this Court has consistently set a high bar for the extraordinary relief of summary affirmance. The "party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). In order to summarily affirm the district court, "this [C]ourt must conclude that *no benefit* will be gained from further briefing and argument of the issues presented." *Id*. at 298 (citing *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985)) (emphasis added). Consequently, summary disposition is disfavored. *See, e.g.*, *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (collecting cases on the limited circumstances appropriate for summary

disposition).

Because of this high standard, summary affirmance is appropriate only if "the merits of this action have been given the fullest consideration necessary to a just determination." *Sills*, 761 F.2d at 794 (collecting cases). At no point in these proceedings has any court given the Independence Institute's claims "the fullest consideration." Instead, the district court declined to convene a three-judge court on the pleadings and without a hearing. Here, the FEC asks for a ruling without briefing or oral argument.

Granting summary affirmance after such a truncated review would deny the "fullest consideration" of the constitutional claims at issue here. Speech in and around elections is governed by a complex interplay of lengthy Supreme Court decisions. And much is at stake where, as here, the question is whether the state may lawfully intrude upon the privacy of association for engaging in non-electoral speech.

c. Summary reversal and an order to convene a three judge court would give full effect to Congress's clear intent with respect to constitutional challenges to BCRA.

The Independence Institute moves this Court for summary reversal, which, like summary affirmance, is disfavored. *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) ("a party who seeks summary disposition of an appeal must demonstrate that the merits of his claim are so clear as to justify expedited action")

(citing *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969)). But granting the Independence Institute's motion for summary disposition does not require a merits determination. The Institute simply requests an opportunity to present its case to a three-judge district court, as Congress envisioned.

BCRA requires such a hearing in any action for declaratory or injunctive relief that "challenge[s] the constitutionality of any provision of [BCRA] or any amendment made by [BCRA]." BCRA § 403(a), 116 Stat. at 113-14 (codified at 52 U.S.C. § 30110 note). Such challenges "*shall* be filed in the United States District Court for the District of Columbia and *shall* be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code." BCRA § 403(a)(1) (emphasis supplied).

Under 28 U.S.C. § 2284(b)(3), a single judge cannot decide the merits of this case. Summary reversal would not do so either. It would simply require that the district court follow the path Congress explicitly laid out in 52 U.S.C. § 30110 note and 28 U.S.C. § 2284.

II. Both the District Court and the FEC mistake the Independence Institute's argument.

At issue is whether a mention of a candidate can trigger campaign regulations as an "electioneering communication" when the speech does not, in fact, electioneer. The FEC and district court assume that one facial challenge and one as-applied challenge foreclose *all* future challenges to BCRA § 201. But since

neither the holdings of *McConnell* nor *Citizens United* apply to genuine issue speech, this cases falls within the clear language of *Buckley v. Valeo*, 424 U.S. 1 (1976). The Supreme Court has not heard an as-applied challenge similar to the Independence Institute's case, as shown in the reproduction above of the Independence Institute's advertisement compared to advertisements at issue in *Citizens United*.

a. At its core, this case is about proper tailoring of disclosure requirements: the Constitution does not countenance compelled disclosure simply for speaking about issues of public policy.

The Independence Institute acknowledges the informational interest in providing the public with knowledge about "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. But the existence of the informational interest is not the question before this Court. The question is whether, *in this instance*, BCRA's electioneering communications disclosure regime survives exacting scrutiny's requirement that disclosure be properly tailored to serve that interest. "In the First Amendment context, fit matters." *McCutcheon v. FEC*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1456 (2014).

Buckley recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley v.*

Valeo, 424 U.S. at 42. Candidates run for office, where they are vested with public authority. A call for a candidate—*especially* an incumbent—to take official action is materially different from speaking about the candidate's fitness for office.

The *Buckley* Court therefore sought to protect issue speech by requiring that campaign finance disclosure survive exacting scrutiny. This level of review is high, for the Supreme Court has long "recognized that [the] 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." *Id*. at 64 (collecting cases). Therefore, the government must show "'a relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. (citing *Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.) (three judge court), *aff'd*, 393 U.S. 14 (1968) (*per curiam*)).

As the Ninth Circuit recognized, the Supreme Court's exacting scrutiny is a "strict test." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. Cal. 2014) (quoting *Buckley*, 424 U.S. at 66). Therefore, "the mere assertion of a connection between a vague interest and a disclosure requirement is insufficient." *Id*. Tailoring matters.

Buckley held that the relevant governmental interest in disclosure was to "increase[] the fund of information concerning those who support [] candidates." *Buckley*, 424 U.S. at 81. Spending by outside groups may implicate the

informational interest, but disclosure of donors must be intended to "help[] voters to define more of the candidates' constituencies." *Id*. Consequently, the informational interest is inextricably linked to "shed[ding] the light of publicity on spending that is unambiguously campaign related." *Id*.

This is the crux of the Institute's claims: in this application, BCRA regulates speech that is not "unambiguously campaign related." This is not a facial challenge. The Institute acknowledges the interest of the government in disclosure of information concerning communications that support or oppose a candidate. But this case presents the situation where merely mentioning a candidate in an issue advertisement triggers the full disclosure of all significant donors to a nonprofit organization. The law does so even though donors may not be aware of the advertisement or approve of its message, and even though the advertisement may be a miniscule portion of the nonprofit's overall activity. The Institute seeks proper tailoring of BCRA, nothing more.

b. A single facial challenge, *McConnell*, and a single as-applied challenge, *Citizens United*, do not foreclose a challenge based on pure issue speech.

The FEC's reliance on *McConnell* in its motion for summary affirmance is misplaced. *McConnell* was a facial ruling upholding, *inter alia*, BCRA's electioneering communication disclosure regime. It is unsurprising that *McConnell* upheld BCRA's disclosure requirements "to the entire range of 'electioneering

communications.'" *McConnell*, 540 U.S. at 196. It would be remarkable if a facial ruling did *not* uphold the statute in a wide range of circumstances. *WRTL II*, 551 U.S. at 466 (Roberts, C.J., controlling opinion) (noting the *McConnell* plaintiff's "'heavy burden of proving' that [BCRA] was facially overbroad and could not be enforced in *any* circumstances") (quoting *McConnell*, 540 U.S. at 207) (emphasis in *WRTL II*). But the existence of a facial constitutional ruling does not foreclose as-applied challenges to the same statute. *WRTL I*, 546 U.S. at 411-12. New ads garner their own analysis. *WRTL II*, 551 U.S. at 464 (Roberts, C.J., controlling opinion).

The *McConnell* Court facially upheld BCRA's disclosure regime on a record where "the vast majority of ads" which fell into BCRA's electioneering communication definition "clearly had" an electioneering purpose. *McConnell*, 540 U.S. at 206. *Citizens United* went no further than *McConnell*. Indeed, *all* of the communications at issue in *Citizens United* were unambiguously campaign related—a fact glossed over by both the district court and the Commission.[5]

By contrast, the Institute's proposed advertisement is not the equivalent of a

[5] In fact, just "[f]our days after Senator Barack Obama won the Iowa presidential caucuses, Plaintiff [Citizens United] announced its intent to produce and broadcast a 'documentary' film about Senator Obama, as well as television advertising for that film." FEC Mem. of Law in Supp. of its Mot. for Summary Judgment, *Citizens United v. FEC*, No. 07-2240 at 5 (D.D.C. June 6, 2008) ECF 56. It is unlikely that *Hillary: The Movie* and its ads would have existed if Hillary Clinton had decided against running for President in 2008.

two-hour film aimed at convincing viewers that "[Colorado] would be a dangerous place in a [Senator Udall] world, and that viewers should vote against [him]." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 279 (D.D.C. 2010). Nor is the radio ad similar to promotional advertisements for *Hillary*—which suggested, for example, that the only "kind word" that could be said about Senator Clinton was "[s]he looks good in a pant suit," and were unambiguously related to her Presidential campaign. *Id*. at 276, n.3. Instead, the Institute supports a specific piece of legislation—the Justice Safety Valve Act—and merely seeks to encourage *both* Colorado senators to support it. As the ad comparison chart on page 5 shows, the Institute's ad focuses *entirely* on the public policy of implications of a bill before the Senate. The ad offers no view on Senator Udall—indeed, it ignores his candidacy entirely. It is consequently, on its face, markedly different from Citizens United's advertisements.

The FEC suggests that because the *Hillary* promotional advertisements "proposed a commercial transaction—buy the DVD of *The Movie*," the *Citizens United* court meant to rule that genuine issue speech about legislation and legislators is not protected. Mot. for Summ. Affirm. at 12 (quoting *Citizens United*, 530 F. Supp. 2d at 280). This argument is poorly grounded. Commercial speech is less protected than issue speech, and may therefore be more stringently regulated. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 n.2

(1980)("[O]ur decisions have recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech") (internal quotation marks and citations omitted).

The district court's reasoning rests on a theory that *Citizens United* removed all protections for issue speech within the electioneering communications window. Mem. Op. at 7. But if *Citizens United* overruled *Buckley*'s issue speech protections under exacting scrutiny, it did not do so expressly. At most, the *Citizens United* Court held that the specific ads at issue triggered the "public['s]… interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369.

The Supreme Court's decisions have demonstrated that speech exists on a spectrum. One narrow band of speech is express advocacy—speech which uses the so-called "magic words" set forth in *Buckley*'s footnote 52. *Buckley*, 424 U.S. at 42, n. 52 (express advocacy constitutes phrases such as "cast your ballot for" or "Smith for Congress"). The Court has also recognized an analogous category of speech which, while falling short of express advocacy, functions in the same way. *McConnell*, 540 U.S. 93, 126-127 (2003) ("Little difference exist[s], for example, between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to

'call Jane Doe and tell her what you think'"). This speech, like the speech reviewed by the Supreme Court in *Citizens United*, is "unambiguously campaign related," and therefore may lawfully trigger donor disclosure. *Buckley*, 424 U.S. at 81 (disclosure acceptable as a means of determining the financial "constituencies" of candidates for office).

But the Independence Institute seeks to engage in speech that does not fall into the narrow band of speech regulable under *Buckley*, *McConnell*, or *Citizens United*. All parties to this case agree that the Institute's proposed communication is not express advocacy or its functional equivalent. Instead, the Institute's advertisement falls into a more highly protected class of speech: genuine issue advocacy—public policy communications that educate and persuade the public. *See WRTL II*, 551 U.S. 449, 470 (genuine issue speech "focus[es] on a legislative issue, take[s] a position on the issue, exhort[s] the public to adopt that position, and urge[s] the public to contact public officials with respect to the matter"). This form of speech has been protected since *Buckley v. Valeo*, and no intervening Supreme Court decision has overruled *Buckley*. Nevertheless, the FEC maintains that it may constitutionally compel the disclosure of the Institute's donors for engaging in genuine issue speech, and that the Institute is not entitled to its day in court for challenging that disclosure. Simply put, this cannot be the law.

It is true that the *Citizens United* Court stated that the "functional equivalent

of express advocacy" test was inapplicable to electioneering communications disclosure. *Citizens United*, 558 U.S. at 369. But the Court said nothing about speech that is not "unambiguously campaign related." Protections for *that* category of speech date back to *Buckley* and remain in effect. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent"). Even if the FEC and district court correctly foresee the trend of the Supreme Court's jurisprudence, it remains the Supreme Court's province to clarify its own rulings. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

c. After *Van Hollen*, the burdens imposed for speaking about a candidate are heightened because, without any earmarking provision, *all* donors are subject to disclosure.

The district court and FEC's theory of BCRA is remarkably broad and open-ended. If the district court's ruling is upheld, any speech that mentions a candidate within the sixty day window will trigger the full weight of the federal disclosure regime. Worse, after *Van Hollen* struck down the FEC's earmarking regulation, the law now mandates the Institute produce more private information than if the

Institute's proposed communication specifically said "vote for Senator Udall."

Under federal campaign finance law, an independent expenditure is "an expenditure by a person—(A) expressly advocating the election or defeat of a clearly identified candidate…" 52 U.S.C. § 30101(17). Independent expenditures are exempted from the definition of electioneering communications. 52 U.S.C. § 30104(f)(3)(B)(ii) ("The term 'electioneering communication' does not include…a communication which constitutes an expenditure or an independent expenditure under this Act"). Therefore, if an advertisement expressly advocates for a candidate, it is not an electioneering communication.

"Expressly advocating" is a term of art dating back to *Buckley*, which limited independent expenditure disclosure "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. The *Buckley* Court gave examples of express advocacy: words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Buckley*, 424 U.S. at 80 n.108 (incorporating by reference, *id*. at 44 n. 52). *Buckley*'s "magic words" identify when a communication contains express advocacy.

Independent expenditures, like electioneering communications, are subject to reporting requirements. 52 U.S.C. § 30104(c). But only the contributions earmarked for the independent expenditure are reported. 52 U.S.C. §

30104(c)(2)(C) (requiring "identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure"); 11 C.F.R § 109.10(e)(vi) (implementing 52 U.S.C. § 30104(c)(2)(C)).

Van Hollen vacated the Commission's regulation treating electioneering communications in a manner similar to independent expenditures. *See Van Hollen*, No. 11-0766 slip op. at 3). If an ad is an electioneering communication, disclosure is no longer limited to donors who gave "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). Post-*Van Hollen*, if an organization runs an electioneering communication, *all* donors who gave more than $1,000 to the organization will be publicly disclosed.

Suppose that the Institute's ad *had* supported Senator Udall's reelection by saying, "Senator Udall is the just the man we need in Washington. Support Udall, support federal sentencing reform." Under 52 U.S.C. § 30104(c)(2)(C), only the donors who specifically gave money for that advertisement would be disclosed.

But if the Independence Institute runs the ad as proposed in this case—without any candidate advocacy, express or implied—then *all* of the nonprofit's donors are subject to disclosure. This outcome is peculiar and troubling. It is also precisely the scenario the Independence Institute articulated in its Verified Complaint and its briefing in the district court.

The Supreme Court has repeatedly held such generalized donor disclosure to be unconstitutional. *See, e.g.*, *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 462 (1958) ("[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on the freedom of association"). Financial support "can reveal much about a person's activities, associations, and beliefs." *Buckley*, 424 U.S. at 66 (quoting *California Bankers Assn. v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)). Therefore, compelled disclosure of financial support "cannot be justified by a mere showing of some legitimate governmental interest." *Id*. at 64. Instead, the government bears the burden of showing both interest and proper tailoring. *Id*.

It is true that if the Institute paid for its proposed communication out of a "segregated bank account consisting of funds provided" by contributors, all of the Institute's donors would not be disclosed—merely those who gave to the separate segregated fund. 11 C.F.R. § 104.20(c)(7). Of course, given *Van Hollen*'s recent vintage, this issue was not considered by the district court. Nevertheless, the Institute objects to this point on two grounds: (1) the Institute maintains *any* disclosure for genuine issue speech is unconstitutional, and (2) it wishes to exercise its constitutional freedom to speak from its general treasury.

Citizens United, decided in 2010, did not anticipate *Van Hollen* and the

resulting regime. Accordingly, *Citizens United* did not deal with the burdens of establishing, raising money especially for, and maintaining an "Electioneering Communications Fund." But the Supreme Court has found that imposing similar burdens on nonprofits like the Institute is unconstitutional. In *FEC v. Massachusetts Citizens for Life*, the Court held that the formalized structures required for compliance with federal campaign finance law are unconstitutionally burdensome as applied to nonprofit organizations. 479 U.S. 238, 254-55 (1986)(Brennan, J., plurality opinion). In that case, Justice O'Connor concurred with the plurality, noting "the significant burden" of the "additional organizational restraints imposed" upon such speakers. *Id*. at 266 (O'Connor, J., concurring). Significantly, *MCFL* involved a nonprofit speaker that engaged in express advocacy. Sister circuits still follow this bedrock principle of First Amendment law. *See*, *e.g.*, *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (striking down Minnesota state requirement that independent speakers form a separate 'political fund' before engaging in independent express advocacy).

Summary affirmance in this case—after *Van Hollen*—would be inappropriate, as the Supreme Court has clearly never considered whether a single "electioneering communication" that does not "electioneer" may nonetheless serve as the trigger for disclosure of all substantive donors to a nonprofit educational

charity. Moreover, summary affirmance in this case would close the door to any future as-applied challenges to BCRA's electioneering communication disclosure requirements. By contrast, summary reversal would simply require the merits of the Independence Institute's constitutional claims to be fully considered by a three-judge district court, as Congress intended.

d. None of the FEC's reasons for summary reversal is sufficient.

In its Motion, the FEC claims five reasons why the district court's decision is correct. Mot. for Summ. Affirm. at 13-16. In light of the discussion above, none is availing, and certainly none compels summary affirmance without "full consideration" by a three judge court. Each FEC claim is taken in turn.

First, the FEC, like the district court, focused on the "functional equivalent of express advocacy" test, and suggests that *Citizens United*'s statement that disclosure may go beyond the functional equivalent of express advocacy grants the Commission power to regulate genuine issue speech. *See* Mot. for Summ. Affirm. at 13. As discussed *supra*, this is not so, the Commission may only compel disclosure from speakers whose message is "unambiguously campaign related." *Citizens United* never addressed a communication akin to the one at issue here.

Second, the FEC misunderstood the Institute's argument about its tax status. Mot. for Summ. Affirm. at 14. The Institute mentioned its tax status as one of many distinguishing factors between its as-applied challenge and the facts of

Citizens United. Section 501(c)(3) organizations are expressly prohibited from engaging in politics. 26 U.S.C. §501(c)(3) (banning "participat[ion] in, or interven[tion] in… any political campaign on behalf of (or in opposition to) any candidate for public office"). In contrast, § 501(c)(4) organizations like Citizens United were permitted to interfere, intervene, endorse, oppose, or otherwise be engage in debate about elections—so long as it was not their primary purpose. *See* IRS Rev. Rul. 81-95 1981-1 C.B. 332 (discussing political activity by § 501(c)(4) organizations under the tax code).

The FEC incorrectly contends that the "distinction [between § 501(c)(3) and 501(c)(4) organizations] 'has no basis' because neither type of organization is obliged by federal tax law to disclose their donors." Mot. for Summ. Affirm. at 15. But this misses the Institute's point. Section 501(c)(3) organizations are barred from "unambiguously campaign related" activity, and therefore the government's asserted interest in publicizing a § 501(c)(3)'s donor list dissolves. So while "Citizens United… disclos[ed] its donors for years," and therefore held less interest in preserving donor anonymity, the Independence Institute has every reason to keep its donors private. *Citizens United*, 558 U.S. at 370.

Third, *Citizens United* did not baldly hold that "express advocacy or issue advocacy does not determine whether BCRA's disclosure requirement can be lawfully applied." Mot. for Summ. Affirm. at 15 (quoting Mem. Op. at 12-13). The

district court's assertion in the quoted section was uncited. *See* Mem. Op. at 13. As discussed, *supra*, *Citizens United*, an as-applied challenge, did not examine genuine issue speech and therefore does not control this case.

Fourth, the Commission misunderstands the Institute's point about the "'pejorative' tone" of the *Citizens United* ads. The key factor was that those ads contained pejorative works *about a candidacy*: then-Senator Hillary Clinton's bid for President. Mot. for Summ. Affirm. at 16. *Hillary* and its ads were clearly campaign related, as discussed *supra*. By contrast, the Institute's request that citizens simply urge their representatives to support a criminal justice reform was unambiguously *not* campaign related.

Fifth and finally, this Court's opinion in *Buckley v. Valeo* directly reviewed a provision that sought to regulate speech that merely mentioned candidates. 519 F.2d 821, 870 (D.C. Cir. 1975) (en banc) *aff'd in part and rev'd in part*, 424 U.S. 1 ("But section 437a is 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"). This Court struck down the provision, holding that disclosure laws cannot equate groups that discuss issues with groups "whose relation to the political process is direct and intimate." *Id*. at 873. The decision was not appealed to the Supreme Court and remains good law binding upon the district court. *Buckley*, 424 U.S. at 11 n.7. Furthermore, as

discussed, the *Citizens United* Court did not confront genuine issue speech and so it cannot possibly have overruled this decision or the Supreme Court's *Buckley* decision. Under this Court's own precedent, then, BCRA's disclosure regime may not be applied to the Institute.

Since none of the FEC's arguments are sufficient to justify the extraordinary relief of summary affirmance, its Motion should be denied.

Conclusion

For the forgoing reasons, Appellant Independence Institute respectfully requests that this Court summarily reverse the district court and order that this case be heard by a three-judge district court pursuant to BCRA § 403 (52 U.S.C. § 30110 note). As a necessary corollary the FEC's Motion for Summary Affirmance should be denied.

Respectfully submitted this 8th day of December, 2014.

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