ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5249

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

INDEPENDENCE INSTITUTE,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

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

Plaintiff-Appellant's Reply Brief

Allen Dickerson (D.C. Cir. No. 54137)
Tyler Martinez (D.C. Cir. No. 54964)

Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org

Counsel for Plaintiff-Appellant

May 22, 2015

Table of Contents

Table of Authorities[1]

Cases

[1] Authorities upon which the Independence Institute chiefly relies are marked with asterisks.

Constitution

Statutes

Rules

Other Authorities

Glossary of Abbreviations

BCRA – Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)

FEC or Commission – Federal Election Commission

FECA – Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972) and the Federal Election Campaign Act of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974).

J.A. – Joint Appendix

WRTL – Wisconsin Right to Life, Inc., a litigant in two campaign finance cases before the Supreme Court and several other actions in lower courts.

Introduction

The FEC and the Independence Institute disagree on two substantive questions. First, when the Supreme Court reviewed commercial advertisements for a feature film designed to defeat Hillary Clinton's presidential candidacy, did the Court also address advertisements not before it that simply take a position on specific legislation? Second, did the substantial change in the scope of publicized donor disclosure imposed by *Van Hollen v. FEC*, No. 11-0766, 2014 U.S. Dist. LEXIS 164833 (D.D.C. Nov. 25, 2014), affect the Institute's right to have its case heard by a three-judge district court?

Statutes and Regulations

The relevant portions of the Bipartisan Campaign Reform Act of 2002 (codified at 52 § U.S.C. 30104(f) and 52 U.S.C. § 30110 note), 28 U.S.C. § 2284, and 11 C.F.R. § 104.20 are reproduced in the Addendum to the Independence Institute's Opening Brief.

Summary of the Argument

The Federal Election Commission believes that a small portion of a single case forecloses any challenge based upon the content of a particular electioneering communication. But *Citizens United v. FEC*, 558 U.S. 310 (2010), was an as-applied challenge involving facts distinguishable from the Institute's. In *Citizens United*, the Supreme Court examined a politically active § 501(c)(4) organization

which sought to run commercial advertisements for a film opposing the candidacy of Hillary Clinton for President. Here, a § 501(c)(3) educational organization is being painted with the same brush for seeking to air an advertisement that patently has nothing to do with an election.

To bolster its argument, the FEC relies on cases highly distinguishable from the case at bar. It conflates speech about public policy issues with speech about elections. It fails to note the difference between professional lobbyists on K Street and grassroots support on Main Street. And where the Commission cites campaign finance cases, they are simply inapposite.

At the same time, the FEC discounts relevant case law. Most notably, *Van Hollen v. FEC*, which radically changed the disclosure regime for organizations running ads that qualify as electioneering communications. In similar fashion, the FEC fails to grapple with existing law in this Circuit, including this Court's *en banc* decision in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975).

Finally, after explicitly stating in this very case that the Institute's case is "capable of repetition yet evading review," the Commission misapplies that exception to the mootness doctrine. This exception has been upheld repeatedly in election law cases generally and electioneering communications challenges specifically. The reason is obvious: an electioneering communications window of only 60 days is not enough time for the federal judiciary to provide a full hearing

of constitutional claims. The FEC has repeatedly made this argument, including more than once before the Supreme Court, and repeatedly lost.

The threshold for convening a three-judge court is low. Given the thin case law upon which the Commission relies, and the substantial—and, as a constitutional matter, never reviewed—change in the law wrought by the recent *Van Hollen* decision, this Court should reverse the District Court and order the important questions raised by the Institute be heard by a three-judge district court, as Congress intended. 52 U.S.C. § 30110 note.

Argument

I. The FEC's legal theory rests entirely on the as-applied challenge in *Citizens United*. Since that decision involved significantly different facts, the FEC's argument fails.

Unless the Independence Institute's constitutional claims have been necessarily foreclosed by a decision of the Supreme Court, this case must be heard by a three-judge district court. 52 U.S.C. § 30110 note (mandating three-judge court). As noted by all parties, the District Court correctly articulated this standard. Open. Br. at 15; Ans. Br. at 53 (applying *Feinberg v. Federal Deposit Insurance Corp.*, 522 F.2d 1335, 1338-39 (D.C. Cir. 1975).

The FEC argues that the omnibus facial challenge in *McConnell*, 540 U.S. 93 (2003), and an as-applied challenge in *Citizens United* together foreclose all future challenges based upon the content of an electioneering communications.

Ans. Br. at 21.[2] In its Opening Brief, the Institute argues that its facts differ substantially from those of *Citizens United*. *See, e.g.* Op. Br. at 12. The FEC considers these differences irrelevant.

At the outset, it is settled law that *facial* challenges do not foreclose future, as applied challenges—particularly in the context of electioneering communications. *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) ("*WRTL I*") ("[i]n upholding [BCRA] § 203 against a facial challenge, we did not purport to resolve future as-applied challenges"). Indeed, later challenges can highlight constitutional infirmities not present "on the basis of [a facial challenge's] factually barebones recor[d]" *Citizens United*, 558 U.S. at 332 (internal quotation marks and citation omitted, second bracket in original).

This leaves the as-applied challenge in *Citizens United*. The question is whether the facts of that case are sufficiently similar to those at bar to foreclose as-applied review.

a. The *Citizens United* Court examined the ads at issue as commercial advertisements.

Contrary to the Commission's assertions, the *Citizens United* Court examined ads that were commercial speech, namely, communications promoting

[2] *Amici* Campaign Legal Center, et al., likewise focus only on *McConnell*'s facial challenge and *Citizens United*'s as-applied challenge, claiming that those decisions mandate disclosure for "the entire range of electioneering communications." Br. of *Amici Curiae* Campaign Legal Center *et. al.* at 4.

the underlying anti-Clinton film. *Id*. at 320. These ads were "pejorative" about a candidate for president.[3] *See* Op. Br. at 41 (reproducing the *Citizens United* ads). As explained in the Opening Brief, commercial speech can be more heavily regulated than issue speech. *See* Op. Br. at 42 (collecting cases).

The FEC did not meet this argument in its Answer Brief, instead asserting that *Citizens United* is not limited to commercial transactions. Ans. Br. at 27-28. But *Citizens United* was nevertheless situated explicitly in the context of commercial speech. *See, e.g.*, *id*. at 368 ("Citizens United argues … that the governmental interest in providing information to the electorate does not justify requiring disclaimers for any commercial advertisements"). This is merely one of many differences between its communication and the Institute's.

b. Tax status matters because it highlights the organizational differences between Citizens United and the Institute.

In line with its overall theme that *Citizens United* controls all as-applied challenges to electioneering communication regulations, the FEC argues that "the [*Citizens United*] majority did not even identify the particular section of the tax code under which Citizens United was organized." Ans. Br. at 37. Therefore, the

[3] Contrary to the Answer Brief's misreading of the Institute's arguments before the District Court and this Court (Ans. Br. at 36-37), the Institute has not abandoned the argument that the *Citizens United*'s discussion of the functional equivalent of express advocacy for the ads was *dicta*. Op. Br. at 40.

Commission argues, there is no "authority that such a distinction would be required by the First Amendment." *Id*. at 38 (quoting the District Court, J.A. 48).[4]

But the Supreme Court and Congress have long treated § 501(c)(3) organizations differently from other nonprofits, at least in part because they are the only organizations for which donations are tax deductible. *See, e.g.*, *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983) (noting that § 501(c)(3) organizations are limited in lobbying activity because "Congress is not required by the First Amendment to subsidize lobbying" but allowing § 501(c)(4) organizations to lobby). The Internal Revenue Code protects public disclosure of nonprofit donors, particularly § 501(c)(3) organizations. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A)) (specifically enhancing protection for § 501(c)(3) donor privacy). Further, the FEC's citation to cases regulating the businesses activities of nonprofits is unpersuasive. The issue before this Court is the particular constitutional harm of mandatory government reporting and publicity of a § 501(c)(3)'s donor list. This is not an antitrust matter, and so *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) is unhelpful. Nor has there ever been any question as to the legitimate nonprofit nature of the Institute, and consequently both *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d

[4] The Institute has consistently cited the cases where disclosure of nonprofit donors is itself a harm under the First Amendment's right of association. *See, e.g.*, J.A. 30 ¶ 120 (citing civil rights era cases).

473 (1st Cir. 2005) and In re *Grand Jury Proceedings*, 633 F.2d 754 (9th Cir. 1980) are beside the point. In any event, both antitrust concerns and the validity of the Institute's nonprofit status are well outside both the FEC's mission and the facts of this case, which concern a constitutional right.

Similarly unrelated to public disclosure of donors based upon alleged political activity, the FEC cites *Center for Competitive Politics v. Harris*, ___ F.3d ___, No. 14-15978, 2015 U.S. App. LEXIS 7239 (9th. Cir. May 1, 2015). Ans. Br. at 39. In *Harris*, plaintiff challenged the California attorney general's practice of demanding the donor lists of all § 501(c)(3) organizations pursuant to her power to regulate charitable solicitations. *Harris* is not a campaign finance case, nor a case where the government asserted a right to publicize a donor list. *Id*. at *3-4; 21 ("disclosure would *not be public*") (emphasis added). In stark contrast, electioneering communications reports are disclosed not only publicly, but world-wide on the Internet. 52 U.S.C. § 30112.

The FEC also relies upon *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012), which, while a campaign finance case, is nonetheless inapposite. Ans. Br. at 38. *Madigan* was a *facial* challenge to an Illinois statute regulating, *inter alia*, "electioneering communications" and PAC status. *Id*. at 470. Unlike federal law, the Illinois statute specifically exempts § 501(c)(3) speech from regulation as electioneering communications. 10 ILL. COMP.

STAT. § 5/9-1:14(b)(4). Were the Institute seeking to run an ad encouraging an Illinois state senator to support a criminal justice reform in Springfield, no Illinois law would compel the disclosure and publication of the Institute's donors.

The problem of regulating § 501(c)(3) donor disclosure is not new, as recognized by all parties—indeed, the FEC once attempted to exempt § 501(c)(3) organizations from the electioneering communication regulations. Op. Br. at 45; Ans. Br. at 40 (both discussing 11 C.F.R. § 100.29(c)(6) and *Shays v. FEC*, 337 F. Supp. 2d 28, 125 (D.D.C. 2004) *aff'd by* 414 F.3d 76, 96 (D.C. Cir. 2005)). The Commission and District Court both highlighted the "potential problems that might emerge by effectively delegating the enforcement of election law to the IRS." Ans. Br. at 40 (quoting J.A. 48 n.12). But the Institute does not ask for reliance on Internal Revenue Service enforcement of the tax code. Instead, the Institute merely notes that § 501(c)(3) donor disclosure is a specific, special harm recognized by the courts and Congress. This affects the required constitutional analysis, and further distinguishes this case from *Citizens United*, which involved a § 501(c)(4) organization that already disclosed the donors responsible for its political messaging. That decision did not address the special status of § 501(c)(3) organizations. Consequently, it could not have foreclosed an argument based upon that distinction.

II. The FEC cites inapplicable cases to bolster its claims that the Institute's challenge is foreclosed.

a. Cases concerning state ballot elections are not applicable to speech on topics not before the electorate.

The Commission conflates *ballot measure advocacy* with *issue speech*. Ans. Br. at 31-34. Speaking about an active ballot measure is likely "unambiguously campaign related," but speaking about an issue not before the electorate is not.[5]

Speech supporting or opposing ballot measures is subject to similar disclosure as speech supporting or opposing candidates. That is because both are related to *campaigns*. Even then, *ballot issues* campaigns have fewer regulatory burdens than candidate campaigns. *See, e.g.*, *Sampson v. Buescher*, 625 F.3d 1247, 1256-1258 (10th Cir. 2010) (examining the similarities and differences in candidate speech and ballot issue speech). For example, ballot measure campaigns are not subject to contribution limits because there is no risk of *quid pro quo* corruption. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999). But the Supreme Court has never held that discussion of issues—that is, public policy not on the ballot—can be regulated under the campaign finance regime. Following the ballot issue cases cited by the FEC would result in conflating

[5] Contrary to *amici curiae*'s assertion, the "unambiguously campaign related" standard is not "newly formulated." Br. of *Amici Curiae* Campaign Legal Center et. al. at 19. As the Opening Brief detailed, besides the *Buckley* Court, courts from the Fourth, Fifth, and Tenth Circuits have applied this standard. Op. Br. at 33.

"discussion of issues" with campaigning—a result rejected by the Supreme Court since *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

Indeed, ballot measures often involve designated campaign organizations dedicated to supporting or opposing the question before the voters—as highlighted by the cases the Commission cites. *See Doe v. Reed,* 561 U.S. 186, 193 (2010) (detailing *Doe* plaintiff's ballot-access activities in context of a referendum); *Am. Constitutional Law Found.*, 525 U.S. at 188 (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 767 (1978) (detailing corporation's challenge to state's ban on ballot issue advocacy).

All of the FEC's cases concerning state initiatives and referenda are inapplicable to the Institute's issue speech about a bill pending before the United States Senate. The voters of Colorado could not vote on federal sentencing reform—it was up to their Senators to do so. The Institute's ad was not about any campaign—candidate or otherwise.

b. Direct lobbying cases are similarly inapposite.

The Commission's cases discussing direct lobbying are similarly unhelpful. In *United States v. Harriss*, the Court in fact narrowed the Regulation of Lobbying Act to apply only to lobbyists *who were paid* to directly communicate with members of Congress for the express purpose of encouraging those members to cast specific votes on pending legislation. Ans. Br. at 32-33; *United States v.*

Harriss, 347 U.S. 612, 625 (1954). Indeed, the *Buckley* Court cited *Harriss* specifically as authority permitting a *narrowing* construction of an overly-broad law, and not as *carte blanche* for federal disclosure provisions. 424 U.S. at 78-79. That is, the public may have an interest in knowing *who is paid* to meet with members of Congress behind closed doors, *or in who pays others to do* so on their behalf.[6]

The Institute's donors, on the other hand, are funding an issue ad to the public—not paying a registered lobbyist to speak with Senator Udall in private. Such public speech presents no danger of corruption.

c. The FEC's attempt to show that other circuits have upheld broad donor disclosure for issue advocacy is unpersuasive.

As this Court's sister circuits have noted, and contrary to the FEC's assertion (Ans. Br. at 23), *McConnell* likewise did not alter *Buckley*'s campaign speech/issue speech distinction. The Ninth Circuit has explicitly held that "*McConnell* 'left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.'" *ACLU of Nev. v. Heller*, 378

[6] As progeny of *Harriss*, *National Association of Manufacturers v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009), and *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11th Cir. 1996) are similarly inapposite because the Institute's ad is not professional lobbying.

F.3d 979, 985 (9th Cir. 2004) (quoting *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004)).

The Answer Brief claims sister circuits have approved of electioneering communications disclosure in situations similar to the Institute's. Ans. Br. at 30-31. They have not. The FEC's cases are highly distinguishable—in most cases, the ads at issue in those cases *were* unambiguously campaign related.

In *Real Truth About Abortion v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012), the organization hired an actor to voice then-candidate Obama and state how his election "would change America," including with regard to several of Mr. Obama's policy positions. The Real Truth ad is focused on the candidacy of then-Senator Obama. It began, "Just what is the real truth about Democrat Barack Obama's position on abortion?" *Id*. Even in the opening line, the ad stakes out the political affiliation of the candidate. The ad then, using an "[a]ctor's voice mimicking Obama's voice," details alleged policy positions of the candidate—including that he would "[a]ppoint more liberal Justices on the U.S. Supreme Court," a point that only makes sense in the context of a campaign for the Presidency and that office's appointment power. *Id*.; U.S. CONST. art. II, § 2. The ad, called "Change,"[7] ends, "Now you know the real truth about Obama's position

[7] The name of the ad is a play on President Obama's 2008 campaign messaging—which from the beginning focused on the need for "change" in Washington. *See, e.g.*, ASSOCIATED PRESS, "Obama officially announces run for the White House"

on abortion. Is this the change you can believe in?" *Id*. The ad bears no resemblance to the Institute's.

The Commission's remaining case law is similarly inapposite. Ans. Br. at 30-31. *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (case challenging the constitutionality of an FEC regulation defining "express advocacy"); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (Maine "electioneering communications"-like statute did not require disclosure of *any* donors, merely a report that a communication was made, ME. REV. STAT. tit. 21-a, § 1019-B); *Madigan*, 697 F.3d at 485 (upholding electioneering communications with the caveat that "Illinois's definition of 'electioneering communication' is limited by language nearly identical to that used in [*WRTL II*] to define the functional equivalent of express advocacy"); *but see Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1018 (9th Cir. 2010) (splitting from other Circuits in holding that ballot measure speech is less protected than candidate speech, but noting that "the potential of the Disclosure Law to incidentally regulate issue advocacy, to which Human Life objects, would engender far more concern if the relevant election involved a *candidate*") (emphasis added).

CHICAGO BUSINESS NEWS Feb. 7, 2007 *available at* http://web.archive.org/web/20090220201332/http://www.chicagobusiness.com/cgi-bin/news.pl?id=23835.

Likewise, in *Wisconsin Right to Life, Inc. v. Barland*, the Seventh Circuit upheld a Wisconsin law that regulated as "electioneering communications"

> only [communications] contain[ing] either *Buckley*'s magic words or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate or, alternatively, is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

751 F.3d 804, 838 (2014) (internal citations and quotation marks omitted). That is, the *Barland* court only upheld the provisions of the Wisconsin law that had a nexus to campaigns. In doing so, it used a combination of tests—from *Buckley*'s magic words to the Supreme Court's functional equivalence test. Under *Barland*'s understanding of Wisconsin law, genuine issue advocacy would not trigger the burdens of electioneering communications disclosure.

d. The FEC fails to distinguish relevant case law.

The FEC contends that the "Independence Institute (and its *amici*) insist that court decisions concerning entirely different provisions… are more instructive than either of the two Supreme Court decisions upholding the precise statute at issue here…" Ans. Br. at 41. But the complex universe of campaign finance law is not limited to the FEC's preferred cases.

This Court's decision in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (*en banc*) ("*Buckley '75*") *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), examined a very similar law. As discussed at length in the Opening Brief, the original

formulation of FECA attempted to regulate, in the name of campaign finance disclosure, practically all issue communications and compel disclosure of all of a group's significant donors. *Buckley '75*, 519 F.2d at 869-870. This is the same scope of regulation contemplated by the FEC's interpretation of BCRA. The only distinction the FEC can make is that BCRA is "temporal[ly] limit[ed]." Ans. Br. at 50. Of course, those temporal limits extend over a quarter of the year. More importantly, this portion of *Buckley '75* was unreviewed by the Supreme Court or subsequent *en banc* meeting of this Court and remains good law. *Buckley*, 424 U.S. at 11 n.7.[8] It cannot be so easily put aside, as this court has not held that mere presence of "temporal limitations" invalidates the reasoning of that *en banc* decision.

III. The *Van Hollen* decision changed the legal landscape for electioneering communications disclosure.

The FEC argues that *Van Hollen v. FEC*, No. 11-0766, 2014 U.S. Dist. LEXIS 164833 (D.D.C. Nov. 25, 2014), is "irrelevant" to the Institute's claims.

[8] The Commission's attorneys consider the Institute's citations to the Supreme Court's decision in *Wisconsin Right to Life* "misleading." Ans. Br. at 42. This is hyperbolic and unsupportable. The Institute has been careful to note that *WRTL II* involved a speech ban. *See, e.g.* J.A. 21 ¶ 75 (Verified Complaint explicitly noted this aspect of the case). The Institute cites *Wisconsin Right to Life* for two purposes: 1) *McConnell*'s facial challenge does not preclude future as-applied challenges (*See, e.g. WRTL I*, 546 U.S. at 411-12) and 2) the Supreme Court has consistently protected issue speech from campaign finance regulation, in that case, using the "functional equivalent of express advocacy" test (J.A. 22 ¶¶ 76-79)—a standard a number of states have also embraced. *Madigan*, 697 F.3d at 485. These are unremarkable uses of case law.

Ans. Br. at 47. To the contrary, *Van Hollen* substantially broadened the scope of donor disclosure beyond that in place for the *Citizens United* case. Because disclosure requirements must be carefully tailored, such a major shift in the law necessarily changes an exacting scrutiny analysis. And because *Citizens United* is the FEC's sole binding authority, its failure to consider that change requires the convening of a three-judge court.

First, the FEC argues that "BCRA and FEC regulations continue to permit corporations and others…to limit the scope of their donor disclosure by financing such communications from a segregated account." Ans. Br. at 48. But forcing organizations to set up accounting schemes merely to speak on issues is burdensome. When faced with similar arguments, the *Citizens United* Court noted that "a PAC created by a corporation can still speak" but held that "PACs are burdensome alternatives" because PACs "have to comply with these regulations just to speak." 558 U.S. at 337-38. More importantly, setting up new accounts can take time, and "a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign." *Id*. at 339. This reasoning has been in place since *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253 (1986) (Brennan, J. for the plurality) (noting organizational and accounting requirements for a "separate segregated fund"). The Commission has

repeatedly attempted this line of attack, and it has been repeatedly rebuffed by the Supreme Court.

Second, the Commission argues that 11 C.F.R. § 104.20(c)(9) is "irrelevant" because the statutory scheme for electioneering communications disclosure was upheld in a *facial* challenge—*McConnell*. Ans. Br. at 48-49. As discussed in the Opening Brief, a facial challenger carries a "heavy burden" and must show that the law is unconstitutional in almost every application. Op. Br. at 35. The *McConnell* plaintiffs could not show that "*all* enforcement of the law should… be prohibited." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456 (2007) ("*WRTL II*") (emphasis in original). A facial ruling is not a basis for holding an as-applied challenge foreclosed.

Knowing that it requires as-applied authority to foreclose the Institute's claim, the Commission argues that *Citizens United* "upheld the statutory provisions without relying on, let alone considering or even mentioning in passing, the regulation" and therefore did not "rel[y] on a particular limiting constructions of the statute it upheld." Ans. Br. at 48-49. But the record before the Court, including a specific reference in the district court's opinion, clearly explained the earmarking provisions of the FEC's regulation. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2010). Indeed, in explaining the law to the Supreme Court, the Commission itself noted the limitations of 11 C.F.R. 104.20(c) a number of times.

Brief for Appellee at 5, *Citizens United v. FEC*, No. 08-205 (U.S. Feb. 17, 2009) ("The statement must identify… all those who contributed '$1,000 or more to the corporation…for the purpose of furthering electioneering communications.' 11 C.F.R. 104.20(c)"); *id*. at 30 ("During discovery, [Citizens United] disclosed *only* those donations of $1000 or more that were made or pledged for the purpose of furthering the production or public distribution of appellant's films regarding then-Senators Clinton and Obama. *See*…11 C.F.R. 104.20(c)(9)" (emphasis in original)). The *Citizens United* Court listened, and noted that the disclosure statement required by BCRA required only "the names of certain contributors." 558 U.S. at 366.

Accordingly, *Citizens United* did not deal with the burdens of establishing, raising money especially for, and maintaining an "Electioneering Communications Fund." Instead, *Citizens United* held that requiring extra layers of organizational structure is incompatible with the First Amendment. *Citizens United*, 558 U.S. at 339. Sister circuits still follow this bedrock principle of First Amendment law.

Third, the FEC claims that the *Van Hollen* court invalidated the Commission's regulation based on *Citizens United*. Ans. Br. at 49. As noted above, to the extent the district court did so, it erred. But the *Van Hollen* decision is better understood as an administrative law ruling. *Van Hollen*, No. 11-0766, 2014 U.S. Dist. LEXIS 164833 at *66 ("the Court cannot conclude that the FEC examine[d]

the relevant data and articulate[d] a satisfactory explanation for its action...") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (brackets in *Van Hollen*, internal quotation marks omitted). In any event, the district court's opinion of *Citizens United* cannot bind this Court.

Fourth, while the FEC says the "Independence Institute is wrong" to fear that running its ads will trigger disclosure of all its donors, the FEC fails to explain why. It only mentions the "Act's carefully tailored temporal limits" that are not applicable once the election is over. Ans. Br. at 50. That is little comfort. Already, groups like the Institute must either remain silent for a quarter of the year or else, despite the protections of federal tax law, open their entire donor disclosure to public inspection. And under the Commission's view, Congress could expand the electioneering communications window at any time without constitutional difficulty.

Moreover, the FEC believes it is acceptable to have *greater* regulation for an ad saying "Vote for Udall" than an ad asking "Senator Smith, support S. 619, the Justice Safety Valve Act." Ans. Br. at 50. Under this rationale, there is no need for a nexus between elections and the regulation of speech—at least for a quarter of the year. The Commission cites no authority upholding this baffling approach.[9] Its

[9] In this vein, the Commission confusingly cites to public interest in the financial support for a particular scholar researching gun control policy for the Institute. Ans. Br. at 29 n.7. That public interest may or may not exist—there is no record on

citation to *McConnell* is merely to the Court's description of BCRA's legislative history. In that facial challenge, the Court noted that some organizations were created with an electoral purpose—and misleading names. *McConnell*, 540 U.S. at 128-29. Of course, that is clearly not the case here.

Fifth, the FEC argues that the Institute "would not have avoided disclosure even *pre-Van Hollen*" because "corporations were still required to disclose donations 'made for the purpose of furthering electioneering communications.'" Ans. Br. at 50 (citing 11 C.F.R. § 104.20(c)(9)) (emphasis FEC's).[10]. Of course—and the Institute believes that even earmarked disclosure is unconstitutional as applied to this communication. But post-*Van Hollen*, *all* of the Institute's donors are now subject to the possibility of disclosure, not just those who earmark their contribution to fund the Institute's proposed speech. Nothing in the Supreme Court's terse discussion of disclosure in *Citizens United* indicates that the Court would have approved of such a far-reaching scheme as applied to a nonprofit's genuine issue speech. If nothing else, this change in the law necessitates new, as-applied review by a three-judge court. The Supreme Court cannot foreclose that which it has not reviewed.

---

this point. But it has nothing to do with the Commission's mandate or with this case. And it again suggests that the Commission believes mere public curiosity, and not connection to an election, should be the trigger for public disclosure.

[10] In the Complaint, the Institute averred that it intended to raise funds specifically for the proposed ad. J.A. 13 ¶¶ 36-37

The Commission's approach to *Van Hollen* is especially puzzling given its strong reliance on 11 C.F.R. § 104.20(c)(9) in this very case. In its earlier attempts to defeat the Institute's claims, it stated that the regulation "remaine[d] valid, in force, and binding on the Commission." FEC Opp. to Pl. App. for a Three-Judge Court (Dist. Ct. Dkt. No. 16) at 9 n.5. It stated that "[t]he disclosure requirements for [the Institute], however, are even narrower than the statute, because…FEC regulations limit the scope of disclosure." FEC Mem. of Law in Opp. to Pl.'s Mot. for Prelim. Injunction (Dist. Ct. Dkt. No. 19) at 33. And the Commission attempted to limit the constitutional harm, and have the Institute's case dismissed, by stating that "[t]o the extent plaintiff's alleged injury is fear of having to disclose every donor who gives more than $1,000 to the organization even if such donors do not earmark their donation or have no knowledge of the particular electioneering communication, that fear is baseless." *Id*. (second emphasis added, citation and quotation marks omitted). In fact, the Commission maintained that "the applicable regulation, 11 C.F.R. § 104.20(c)(9), expressly preclude[d] such an interpretation." *Id*.

Contrary to the FEC's assertions at this stage of the litigation, *Van Hollen*'s removal of the Commission's rule 11 C.F.R. § 104.20(c)(9) is highly relevant and materially changes the exacting scrutiny analysis. These issues were not considered by the District Court. They should not be decided here, in the first instance, by the

Court of Appeals. Rather, a three-judge court should be convened to consider these important arguments.

IV. Disclosure imposes a First Amendment burden regardless of whether a group or its donors are faced with specific threats, harassments, or reprisals.

Under the FEC's theory, the only viable as-applied challenge is one where there is an *existing* probability that donors will be threated, harassed, or faced with reprisals. Ans. Br. 44-46. Moreover, the FEC states that the Institute "express[ly] waive[d] any such claim." Ans. Br. at 44 (citing joint stipulation). But the joint stipulation reads

> The Independence Institute's challenge does not rely upon the probability that its donors will be subject to threats, harassment, or reprisals as a result of the Institute's filing of an Electioneering Communications statement….. it has neither alleged nor introduced any evidence—nor will it allege or introduce any evidence—that there is a reasonable probability that its donors would face threats, harassment, or reprisals if their names were disclosed…

J.A. 34. This is not a mere technicality; it shows the FEC's fundamental misunderstanding of the law.

The Institute cannot know *before* speaking if disclosure of its donors will result in threats, harassment, or reprisals. Nor could a new organization possibly meet that burden. Yet, the FEC demands that the Institute prove disclosure is harmful by disclosing its donors first, and then seeing if harm befalls them. This is circular. Moreover, unlike the *Buckley*, *McConnell*, or *Citizens United* plaintiffs,

the Independence Institute is a non-political think tank that does not disclose its donors. Disclosure *itself* is the harm. *Talley v. California*, 362 U.S. 60, 65 (1960) (striking down disclosure statute); *id*. at 69 (Clark, J. dissenting) ("the record is barren of any claim, much less proof…that [plaintiff] or any group sponsoring him would suffer economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility") (citation and quotation marks removed, bracket in original).

While *Buckley* approved disclosure, it did so only after narrowing disclosure to organizations (or activities) that were unambiguously campaign related. 424 U.S. at 80. Because *Buckley* was a facial ruling, it could not have been premised upon a record concerning the threats, harassment, or reprisal of particular donors. Nor was it stating that this was the *only* grounds upon which an as-applied case could be brought. This is obvious from the as-applied challenges that were, in fact, subsequently brought on other grounds. *See*, *e.g.*, *Mass. Citizens for Life*, 479 U.S. 238 (challenge based on speech ban).

To counter this straight forward analysis, the FEC again cites the unrelated recent Ninth Circuit decision in *Harris*. Ans. Br. at 45. As examined, *supra*, *Harris* is not a campaign finance case, and did not involve public disclosure of donors.

V. The FEC misunderstands the mootness doctrine's "capable of repetition, yet evading review" exception.

The FEC, for the first time in this litigation, argues that the Independence Institute's claims are moot. Ans. Br. at 46. Indeed, initially the Commission specifically contradicted that argument in its Motion for Summary Affirmance before this Court, filed *after* the 2014 election. Mot. for Summ. Aff. at 10 n.2 (citing *WRTL II*, 551 U.S. 449, 461-464 (2007); V. Compl. ¶¶ 2, 127) (stating, "[n]evertheless, Independence Institute's challenge appears to fall within the "exception to mootness for disputes capable of repetition, yet evading review").

This new argument on mootness contravenes black letter law, and the Supreme Court and lower courts have repeatedly rejected the FEC's mootness claims. The electioneering communications window is far shorter than the timeline for federal litigation. Therefore, the federal courts have long recognized—often in cases involving the FEC itself—that election law cases are exempted from the mootness doctrine when the injury is capable of repetition, yet evading review.

In *WRTL II*, the Supreme Court noted that it would be "'entirely unreasonable . . . to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads' during the BCRA blackout periods" (the same time periods at issue here). 551 U.S. at 462 (quoting and approving *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 202 (D.D.C. 2006)). Therefore, the *WRTL II* Court held that electioneering communications challenges were "capable

of repetition, yet evading review." *Id*. at 462. This exception to mootness has two elements: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id*. (citation and quotation marks omitted).[11] In *WRTL* itself, "two BCRA blackout periods ha[d] come and gone during the pendency of th[e] action," nonetheless, the Supreme Court reached the merits. *Id*.

Indeed, in *WRTL*, "[t]he FEC argue[d] that in order to prove likely recurrence of the same controversy, WRTL must establish that it will run ads in the future sharing all the characteristics that the district court deemed legally relevant." *Id*. at 463. The FEC repeats a similar argument before this Court, arguing that because the relevant electioneering communications window has closed for 2014, the Institute is in no danger of triggering disclosure if it ran the ad today. Ans. Br. at 46. But the Supreme Court roundly rejected the assertion: "The FEC asks for too much. We have recognized that the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Id*.

[11] In *WRTL II*, the FEC argued that the two year period between elections allowed a sufficient opportunity to litigate claims. But the Supreme Court rejected that idea, because "groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period." *Id*.

(quoting *Storer v. Brown*, 415 U.S. 724, 737, n.8 (1974) (some internal quotation marks omitted).

The Court reaffirmed this view in *Davis v. FEC*, 554 U.S. 724, 736 (2008). The *Davis* Court clarified that the desire to repeat the relevant activity need not be specifically plead—a mere assertion in the press of a possibility of another run for office was enough to keep Davis's claims from being moot. *Id*. at 736. This result has been noted and followed in other cases. *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164-65 (5th Cir. 2009) (collecting cases) ("[t]he [Supreme] Court has not, however, dismissed an election case as moot where the plaintiff failed to allege that he would be governed by the same flawed law in the next election").

Indeed, *Citizens United* was decided long after the 2008 election. Yet in *Citizens United*, the Court noted:

> By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is "capable of repetition, yet evading review"…Here, Citizens United decided to litigate its case to the end…long after the opportunity to persuade primary voters has passed.

Citizens United, 558 U.S. at 334 (citations omitted). If Citizens United's claim involving a specific movie and specific candidacy was not moot years later, the Institute's claim is not moot now.

The "capable of repetition yet avoiding review" exception is applicable here.

As in *Citizens United*, and *Wisconsin Right to Life*, the BCRA electioneering communication window is too brief for full review of constitutional claims. The Institute brought this action just before the electioneering communications window opened. Ans. Br. at 13; J.A. 14 ¶ 41. The Institute sought every opportunity to aid in the quick resolution of the challenge—including limiting the scope of the issues, agreeing to expedited proceedings, and limiting discovery. *See, e.g.*, J.A. 34. The District Court did not release its opinion until just a few weeks before the election. J.A. 37. The Institute quickly appealed to this Court. J.A. 5.

The Institute is in the business of public education concerning issues, and it will wish to run similar advertisements in the future. As each claimant raising a constitutional objection to the federal electioneering communications regime has found, there is insufficient time to vindicate one's rights in court before the election passes. That is no reason for the FEC to consistently seek, unsuccessfully, to insulate itself from legal challenge. Nor is it sufficient reason for the Commission to conjure a mootness objection after previously conceding that none exists.

VI. The bar for a three-judge district court is low, and has been met here.

The Institute addressed the standard for a three-judge district court in its Opening Brief. With slight differences, the parties agree that *Feinberg* states the test for determining if a constitutional claim is foreclosed by Supreme Court

precedent. Op. Br. at 15; Ans. Br. at 53 (both applying *Feinberg*, 522 F.2d at 1338-39).[12]

Under that and similar standards, courts have permitted expedited review of as-applied challenges that have not been previously considered. For instance, in *Cao v. FEC*, a case relied upon by the Commission, the district court certified several constitutional questions to the *en banc* Fifth Circuit Court of Appeals despite finding others frivolous. 688 F. Supp. 2d 498, 549 (E.D. La. 2010) *aff'd som. nom. Republican Nat'l Comm. v. FEC (*In re *Anh Cao)*, 619 F.3d 410, 413 (5th Cir. 2010). The same is true for *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 171 (2013) (Wilkins, J.), where the district court certified a narrower as-applied question, despite finding a facial challenge foreclosed. These cases demonstrate that as-applied challenges to the 40 year old campaign finance regime can still be substantial. In that light, the Commission's attempt to explain away its decision to permit *McCutcheon v. FEC* to be heard by a three-judge court while opposing that same outcome here, is puzzling. Order on Motion for a Three-Judge Court, *McCutcheon v. FEC*, No. 12-1034 (D.D.C. June 25, 2012) (Dkt. No. 10) ("Plaintiffs here have filed an unopposed request for a 3-judge court"). As the

[12] The Commission asserts that "it is not true that the Supreme Court… reversed a denial of an application for a three-judge court" in the *Wisconsin Right to Life* cases. Ans. Br. at 56 (citing Op. Br. at 14). The FEC is correct. In *WRTL*, the three-judge court was convened, and it was the three-judge court that initially denied relief based on *McConnell*'s facial challenge and was subsequently overruled. *WRTL I*, 546 U.S. at 411. The Institute regrets this error.

Institute has already noted, aggregate limits, the subject of the *McCutcheon* challenge, had also been previously upheld. Op. Br. at 15; *Buckley*, 424 U.S. at 38 (upholding aggregate contribution limit).

None of the Commission's authority is sufficient to evade the core of this case. The Supreme Court has never permitted donor disclosure, and especially the general disclosure required after *Van Hollen,* for an advertisement unrelated to any campaign.

Conclusion

For the foregoing reasons and those stated in the Plaintiff-Appellant's Opening Brief, the judgment of the District Court should be reversed. The merits of the Independence Institute's constitutional claims should be heard by a three-judge district court pursuant to 52 U.S.C. § 30110 note.

Respectfully Submitted,

s/ Allen Dickerson

Allen Dickerson (D.C. Cir. No. 54137)
Tyler Martinez (D.C. Cir. No. 54964)
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org
Counsel for Plaintiff-Appellant

Dated: May 22, 2015

Certificate of Compliance

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,944 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 22, 2015

s/ Allen Dickerson
Allen Dickerson

Certificate of Service

I hereby certify that on May 22, 2015, I electronically filed the foregoing using the court's CM/ECF system which will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

s/ Allen Dickerson
Allen Dickerson