IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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**Admission* pro hac vice *pending*

September 26, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

INTRODUCTION

Since *Buckley v. Valeo*, the Supreme Court has required courts to apply exacting scrutiny when reviewing government efforts to compel the disclosure of private donors. This heightened standard of review requires the government to demonstrate that its law serves a "sufficiently important" state interest *and* that its regulatory response is "closely drawn" to serve that interest. The Federal Election Commission ("FEC" or "Commission") has not met this burden. Indeed, because it incorrectly insists that there cannot be any valid as-applied challenge to the Bipartisan Campaign Reform Act's ("BCRA") disclosure requirements, it makes little attempt to defend that statute as it is applied to Plaintiff's specific advertisement.

The Commission cannot demonstrate a valid interest in the names and addresses of contributors to the Independence Institute, an organization that does not advocate any electoral outcome, based upon an advertisement that patently advocates solely for a legislative issue unrelated to any election. Its attempt to do so, which consists mostly of selected quotes from *McConnell v. FEC* and *Citizens United v. FEC*, is unavailing. Neither of these authorities permits the government to pry open the private donor lists of a § 501(c)(3) group if that group decides to run a genuine issue advertisement mentioning an incumbent officeholder who happens to be a candidate for office. Because the FEC's citations are not applicable here, and Plaintiff relies upon the longstanding precedent of *Buckley v. Valeo*—which foresaw this precise circumstance—summary judgment should be entered for the Independence Institute. *See SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("As we have observed in other contexts, something outweighs nothing every time") (punctuation altered, citation omitted).

ARGUMENT

I. *Buckley v. Valeo* requires exacting scrutiny to make certain that the damage compelled disclosure inflicts upon associational liberties is appropriately tailored to the government's informational interest.

It is undisputed that compulsory disclosure of an organization's donors imposes a constitutional injury. *Buckley v. Valeo,* 424 U.S. 1, 64 (1976). It is further undisputed that there is an "informational interest" in providing the public with knowledge about "'who is speaking about a candidate shortly before an election.'" Op. at 1, 9 (quoting *Citizens United v. FEC*, 558 U.S. 310, 369 (2010)). The Supreme Court first reconciled these competing values in *Buckley v. Valeo*, where it balanced them by "requir[ing] that the subordinating interests of the State must survive exacting scrutiny." 424 U.S. at 64. That is, the Court "insisted that there be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 65 (citations and quotation marks omitted).

In the electoral context, the government's interest lies in "increas[ing] the fund of information concerning those who support the candidates." *Id*. at 81. *Buckley* concluded, logically enough, that this interest is only furthered where the activity at issue is "unambiguously campaign related." *Id.* As discussed at some length in the Institute's opening brief, the Court limited compelled disclosure to those groups which "make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80; *see also* Pl's Mem. at 8-11. In only those cases does donor disclosure "bear[] a sufficient relationship to a substantial governmental interest. 424 U.S. at 80.

This holding arose from the concern of both the *en banc* D.C. Circuit and the Supreme Court that FECA might compel disclosure from groups "whose only connection with the elective process arises from completely nonpartisan," or even partisan, "public discussion of issues of

public importance." *Buckley v. Valeo*, 519 F.3d 821, 870 (D.C. Cir. 1975); 424 U.S. at 80 (narrowly construing FECA to prevent disclosure from "reach[ing] all partisan discussion"). Thus, the Supreme Court's decision, mindful that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," construed FECA to prevent disclosure regulations from capturing the precise kind of issue speech that Plaintiff wishes to engage in here. *Buckley*, 424 U.S. at 42.

Plaintiff's advertisement implicates none of *Buckley*'s rationales for the informational interest. It does not—even by inference or suggestion—support or oppose Senator Udall or Senator Bennet. It is not "unambiguously campaign related" (nor could it be, given the Institute's tax status). Its subject is not a candidate, but an issue. Plaintiff's contributors are not members "of the candidates' constituencies." Even in the cases upon which the Commission relies, the Court has never understood the informational interest to extend to any communication that mentions a candidate under any circumstance.

Most fundamentally, "it is the *government's* burden to show that its interests…are substantial, that those interests are furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. 2014) (citations and quotation marks omitted, ellipses and emphasis original). *See also* Op. at 18 (once a sufficiently important interest has been identified, the government must still demonstrate that the disclosure demanded is "substantially related" to that interest) (capitalization altered). Yet, despite the ad's failure to implicate any of the components of the informational interest identified in *Buckley*, the Commission makes no attempt to demonstrate a link between the government's interest and compelled publication of Plaintiff's donors.

II. Defendant's authorities do not demonstrate that the electioneering communication disclosure provisions are tailored to the informational interest presented in this case.

The parties agree that exacting scrutiny applies here, but disagree about what that means. In the FEC's view, the Supreme Court has held that BCRA's disclosure regime is *always* appropriately tailored, regardless of a communication's specific message and content. Plaintiff, on the other hand, relies upon *Buckley* in arguing that this burden cannot be carried absent Defendant's showing that, on the facts of this case, disclosure furthers the informational interest.

The Commission argues that Plaintiff's case is necessarily foreclosed because "The Supreme Court Resolved Facial and As-Applied Constitutional Challenges to BCRA's EC Provisions in *McConnell*, *WRTL [II]*, and *Citizens United*." Op. at 6. This is true, so far as it goes, but none of those cases reaches the narrow question presented here.

As Plaintiff explained in its brief requesting a three judge court, *McConnell* was a facial ruling, and cannot dictate the outcome of this as-applied challenge.[1] In fact, the Supreme Court explicitly and unanimously held that that it is "incorrect" to read *McConnell* "as foreclosing any 'as-applied' challenges to the prohibition on electioneering communications." *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411 (2006) ("*WRTL I*") (citing *McConnell v. FEC*, 540 U.S. 93 (2003)). Instead, *McConnell* "merely notes that because [the Court] found BCRA's primary definition of 'electioneering communication' *facially* valid when used with regard to BCRA's disclosure and funding requirements, it was unnecessary to consider the constitutionality of the backup definition Congress provided. *In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges*." *WRTL I*, 546 U.S. at 411-12 (citing *McConnell*)

[1] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007) ("*WRTL II*") (noting that *McConnell* was a facial challenge, where the "Court considered the possible facial overbreadth of § 203," and was able "to conclude, on the record before it, that the plaintiffs had not 'carried their heavy burden of proving' that § 203 was facially overbroad and *could not be enforced in any circumstances*") (quoting *McConnell*, 540 U.S. at 207) (emphasis supplied).

(emphasis supplied). This unanimous opinion plainly applies here, and the FEC does not suggest otherwise.

WRTL II, the follow-on case to *WRTL I*, was an as-applied challenge, which—in the Commission's own words—"did not address BCRA's EC disclosure provisions." Op. at 7 (citing 551 U.S. 449). Thus, in this regard, *WRTL II* also could not possibly have foreclosed this case, which addresses a statutory provision never considered by the *WRTL II* Court.

Finally, *Citizens United* does not apply to the instant case, which deals with a communication that only refers to a candidate for office in relation to his ability to act as an officeholder—not as a candidate. We take the Commission's principal citations to *McConnell* and *Citizens United*—both of which applied the requisite exacting scrutiny—in turn.

A. *McConnell v. FEC*

i. *McConnell* does not resolve this case because it was a facial challenge based upon a lengthy record, whereas this case is an as-applied challenge that relies upon decidedly different facts.

In *McConnell*, the Court began by identifying the relevant interest: "providing the electorate with information." Op. at 19 (quoting *McConnell*, 540 U.S. at 196). Next, it recognized that applying disclosure to "the entire range of electioneering communications" would further this interest; it would, indeed, provide the electorate with information. Op. at 15 (quoting *McConnell* at 196) (quotation marks and emphasis omitted). But this was not the end of the inquiry. The Court still had to apply the tailoring prong of the exacting scrutiny analysis.

The Court did so based upon the district court's finding that "[t]he factual record demonstrates…abuse of the present law." *McConnell* at 196 (citation omitted). Based upon that record, the Court concluded that BCRA was sufficiently tailored, on its face, because "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an

"electioneering purpose." *Id.* at 206. The Court described these communications as broadcast ads which, rather than "urg[ing] viewers to 'vote against Jane Doe,'" simply "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 127. "Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* Thus, the Court referred to these communications as "so-called" or "sham issue advocacy"—these "issue" ads' true purpose was plainly to advocate the election of some candidates at the expense of others. *Id.* at 126, 128, 132.

In short, the *McConnell* Court engaged with the facts before it. The same must take place here, based upon the markedly different communication Plaintiff wishes to make.

ii. To the extent that the Commission even suggests appropriate tailoring, it does so by conflating vagueness and overbreadth. This fails, because a law can be vague without being overbroad, overbroad without being vague (the case here), or both. In any such instance, that law is unconstitutional.

The Institute does not dispute that, on their face, "the elements of [BCRA's] EC definition 'are both easily understood and objectively determinable.'" Op. at 15 (quoting *McConnell* at 194). The Commission errs, however, in treating this lack of definitional vagueness as sufficient to demonstrate as-applied constitutionality.

The government first suggests that *Buckley* construed FECA principally to avoid unconstitutional vagueness. *See, e.g.*, Op. at 3 ("the [*Buckley*] Court struck down the Act's limits on expenditures by individuals and candidates…[and] construed 'expenditure' narrowly to avoid invalidating the provision on vagueness grounds.") The Commission characterizes the *McConnell* opinion, too, as facially upholding BCRA's electioneering communication provisions based solely upon their lack of vagueness. Op. at 15 ("[t]he [*McConnell*] Court found that

BCRA's EC definition did not raise any of the vagueness concerns that had led the *Buckley* Court to create its 'express advocacy' construction of the otherwise vague statutory definition of 'expenditure.' The Court concluded that because the elements of the EC definition 'are both easily understood and objectively determinable…the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite' in evaluating the constitutional scope of BCRA's definition of electioneering communications.") (quoting *McConnell* at 194).

But this ignores an important maxim: to be constitutional, a statute must be neither vague *nor* overbroad.[2] It also misunderstands *Buckley* and *McConnell*. In addition to ensuring that FECA was not impermissibly vague, the *Buckley* Court took care to ensure that the scope of its reporting requirements was "not impermissibly broad" by "constru[ing] 'expenditure' for purposes of that section…to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79. *See also Buckley* at 61 ("[w]e affirm the determination [below] on overbreadth and hold that [FECA's reporting and disclosure provision], *if narrowly construed*, also is within constitutional bounds") (emphasis supplied).

McConnell reiterated as much: "[o]ur adoption of a narrowing construction [in *Buckley*] was consistent with our vagueness and overbreadth doctrines." 540 U.S. at 192, n. 75 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972)). *See also McConnell* at 192 ("In narrowly reading the FECA provisions in

[2] *Grayned v. Rockford*, 408 U.S. at 109 ("where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked") (citations, brackets, ellipses, quotation marks omitted); *Virginia v. Black*, 538 U.S. 343, 367 (2003) (anti-cross burning statute overbroad because "prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut").

Buckley to avoid problems of vagueness and overbreadth, *we nowhere suggested that a statute that was neither vague nor overbroad* would be required to toe the same express advocacy line") (emphasis supplied). And *WRTL II* explicitly read *McConnell* as having "concluded that there was no overbreadth concern to the extent the speech in question was the 'functional equivalent' of express campaign speech." *WRTL II*, 551 U.S. at 456 (citing *McConnell*, 540 U.S. at 205-205, 206).[3]

The FEC has not shown that the electioneering communication provisions are not impermissibly broad as applied to the Institute. Instead, it makes much of *McConnell*'s notation that "*Buckley* did not establish a 'constitutionally mandated line' between express candidate advocacy and issue advocacy," and that "*Buckley*'s 'express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.'" Op. at 15 (quoting *McConnell*, 540 U.S. at 190). It consequently suggests that, because *McConnell* upheld the electioneering communication definition on its face, any application of that definition must be constitutional. Op. at 15 (disputing Plaintiff's argument that "*McConnell* upheld the disclosure portion of the EC 'regime' only 'insofar as the regulated advertisements contain express advocacy or its functional equivalent.'" (quoting Pl.'s Mem. at 6)).

It is no surprise that *Buckley*'s distinction between candidate and issue advocacy was an "endpoint of statutory interpretation": the Court was attempting to save a statute that was both vague and overbroad. Consequently, FECA failed exacting scrutiny and the Court fashioned a remedy—the issue speech versus political speech distinction—in order to create a statute that *was* appropriately tailored. The distinction is not obsolete. Courts have recognized that

[3] The Court also "assume[d]" that the interests it had found to "justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 206, n. 88.

"*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.'" *Am. Civil Liberties Union v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (quoting *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004)).

Thus, we return to the lengthy record at issue in *McConnell*. BCRA's electioneering communication definition was not facially overbroad because the vast majority of covered ads were sham issue advocacy, and not the type of issue speech that led the *Buckley* Court to dramatically narrow FECA. The Institute's ad, on the other hand, is exactly the type of issue speech that gave rise to *Buckley*'s narrowing construction. *McConnell* is consequently unhelpful here.

B. *Citizens United v. FEC* does not resolve this case.

i. *Citizens United* is distinct because it contemplated advertisements which could fairly be characterized as the functional equivalent of express advocacy.

The FEC's assertion that *Citizens United* was decided "in a context directly analogous to the circumstances" here is overstated. Op. at 19. Citizens United funded a full-length feature film, *Hillary: The Movie*, which argued that Hillary Clinton should not be elected President. All nine Justices agreed that the film expressly advocated Senator Clinton's defeat. Obviously, the Institute's advertisement is not the equivalent of a two-hour film aimed at convincing viewers that "[Colorado] would be a dangerous place in a [Senator Mark Udall] world, and that viewers should vote against [him]." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2010).

While the ads for *Hillary* presented a closer question, they were not remotely similar to the ad at issue here. Both ads mention the name of a candidate, but the commonalities end there.

The advertisements for *Hillary* were communications *about* Hillary Clinton, a Presidential candidate. The ads reflected the film they promoted, and, according to the *Citizen United* majority, spoke pejoratively about Senator Clinton's *candidacy*. 558 U.S. at 368 (citing 530 F. Supp. 2d at 276, n. 2-4).

The Seventh Circuit Court of Appeals noted that the *Citizens United* opinion considered the ads for *Hillary: The Movie* the functional equivalent of express advocacy. *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 823 (7th Cir. 2014) ("The [*Citizens United*] Court began by holding that *Hillary* and the ads promoting it were the functional equivalent of express advocacy under *Wisconsin Right to Life II* and thus fell within BCRA's ban on corporate electioneering communications") (citing *Citizens United*, 558 U.S. at 324-325). Both the Commission and *amici* hand-wave this finding. *See, e.g. Amicus* Br. of CLC, *et al.*, at 14 ("no fair reading of *Citizens United* would support the conclusion that" the Seventh Circuit came to). This blithe dismissal of a Federal Court of Appeals' finding is odd: neither the FEC nor *amici* spend much time dissecting, refuting, distinguishing, or citing authority counter to this precise portion of *Barland*, which is the portion of the case Plaintiff relies upon. They simply assert that it is incorrect.[4] But at the very least, this appellate ruling suggests that the Institute's case is far from "necessarily foreclosed."

The most the FEC attempts to do is to argue that Plaintiff "offers no explanation of how" one advertisement for *Hillary*, "Pants," could meet the *WRTL II* test for determining whether or

[4] Indeed, the FEC strenuously objects to the Institute's characterization of *Citizens United*'s discussion of the ads for *Hillary* as "brief." Op. at 23. But Plaintiff has not constructed this reading from whole cloth, it echoes the Seventh Circuit's reading of the case. *Barland*, 751 F.3d at 824 ("[t]he Court took a different approach to the disclaimer and disclosure requirements, although this part of the opinion is quite brief"); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (giving less weight to *Buckley*'s limited discussion of the "$25,000 aggregate limit under FECA" than other holdings of that opinion which "had been separately addressed at length by the parties") (punctuation omitted).

not a communication functions as express advocacy. Op. at 24. "Pants" suggested that the only "kind word" that could be said about Senator Clinton was that "[s]he looks good in a pant suit." *Id*. at 276 n. 3. In fact, "Pants" is a classic example of the difference between the "functional equivalent of express advocacy" and a genuine issue ad.

First, the ad's content is not "consistent with that of a genuine issue ad." *WRTL II*, 551 U.S. at 470. It does not "focus on a legislative issue, take a position on that issue, extort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id*. Second, the communications contains "indicia of express advocacy." *Id.* It certainly "mentions a[]…candidacy…or challenger"—Hillary Clinton was not an incumbent President. Furthermore, it "do[es]…take a position on a candidate's character, qualifications, or fitness." *Id*. If the only nice thing that could be said about a candidate is that she wears a suit well, it follows that the candidate is of poor moral character and unqualified for office.

In any event, the ads for *Hillary* cannot be divorced from their immediate context. They aimed to convince viewers to purchase a film that unquestionably functioned as express advocacy.

But even if the ads for *Hillary* were not the functional equivalent of express advocacy, *Citizens United* still does not resolve this case, for two reasons. First, the ads were merely commercial speech, and not the form of issue speech anticipated and protected by *Buckley.* And second, unlike the advertisement at issue here, they were unequivocally related to a campaign.

ii. The fact that the ads for *Hillary: The Movie* pertained to a commercial transaction bolsters rather than weakens Plaintiff's case.

In asserting that the ads for *Hillary* were not the functional equivalent of express advocacy, the FEC relies heavily upon the Court's statement that the ads proposed a commercial transaction. Op. at 19 (quoting *Citizens United*, 558 U.S. 369) ("'Even if the ads only pertain to a

commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election'"). Thus, the Commission suggests, speech by the Institute that is not the functional equivalent of express advocacy can be subject to greater regulation.

This is backward. Commercial speech is less protected than issue speech, and can therefore be more stringently regulated. *United States v. Williams*, 553 U.S. 285, 298 (2008) (noting that "the First Amendment status of commercial speech" is "less privileged" than other forms of speech); *see also Cent. Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) ("[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"). Accordingly, the government may regulate speech in the commercial context in ways that would never be accepted in the context of political speech. To use a recent example, while government could certainly require a commercial advertisement to hew to "truth in advertising" laws enforced by the Federal Trade Commission, it does not follow that "truth in politics" laws would pass First Amendment muster. *See, e.g., Alvarez v. United States*, 132 S. Ct. 2537 (2012); *Susan B. Anthony List v. Ohio Elections Comm'n*, No. 10-720, 2014 U.S. Dist. LEXIS 127382 (S.D. Ohio, Sept. 11, 2014).

In any event, it is undisputed that the broadcast communication that the Independence Institute wishes to disseminate is *not* commercial speech. Thus, it is not covered by the Commission's understanding of the *Citizens United* majority opinion, even if that understanding were correct. Speech about legislative issues, unlike commercial speech, enjoys the most robust First Amendment protection. *McConnell*, 504 U.S. at 206, n. 88 (recognizing that certain BCRA regulations could not apply to genuine issue speech).

iii. Although it is constitutional to impose disclosure upon lobbyists and those who speak about ballot measures, it does not follow that genuine issue speech may constitutionally trigger similar requirements.

The Commission suggests that mandatory disclosure for communications such as the Institute's is "consistent with the Supreme Court's earlier decisions finding that the government's informational interest is sufficient to justify mandatory disclosure relating to two different forms" of speech. Op. at 20. *Amici* mirror this argument. CLC Br. at 16-20. While communications about ballot initiative elections may constitutionally trigger disclosure, this is because such speech is *about an election*. Op. at 20-21. Plaintiff's speech is wholly divorced from any electoral outcome, and thus does not implicate the concerns that motivate ballot initiative disclosure. *See Citizens United*, 558 U.S. at 367 (tying informational interest in disclosure to 'election-related' speech).

Moreover, the Commission exaggerates the extent of the informational interest related to lobbying disclosure. The *Harriss* Court 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. *United States v. Harriss*, 347 U.S. 612, 625 (1954); *see Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 7-8 (D.C. Cir. 2009) (upholding successor statute). That is, the public may have an interest in knowing who is paid to meet with members of Congress behind closed doors, or who pays others to do so on their behalf. The Institute's donors, on the other hand, are funding an issue ad to the public—not paying a registered lobbyist to speak with Senators Udall and Bennet in private.

iv. The FEC's out-of-circuit authorities likewise deal with dissimilar communications.

At note 11 of its brief, the FEC argues that "[o]ther Courts of Appeals have similarly relied on the Supreme Court's constitutional analysis of EC disclosure requirements in *Citizens*

United to reject constitutional challenges to other federal and state disclosure requirements." Op. at 26, n. 11. But the Commission provides no context for this assertion. A quick review of the communications presented in those cases demonstrates why. *None* of them deals with communications which could fairly be called genuine issue speech.[5]

SpeechNow.org v. FEC explicitly addressed express advocacy. 599 F.3d 686. The PAC's proposed communications urged viewers to use "the right to vote" to "[s]ay no to Burton for Congress." Advisory Op. Request 2007-32, "SpeechNow.org", FEDERAL ELECTION COMMISSION, (Nov. 14, 2007).[6]

Free Speech v. FEC asked whether advertisements were express advocacy for the purpose of determining PAC status, and presented proposed communications quite distinct from the Institute's. 720 F.3d 788 (10th Cir. 2013). One such communication suggested that "Obama cannot be counted on to represent Wyoming values and voices as President." Advisory Op. 2012-11, "Free Speech", FEDERAL ELECTION COMMISSION at 7 (May 8, 2012).[7]

Ctr. for Individual Freedom v. Madigan did not discuss any particular scripts for electioneering communications, and in any event, was a facial challenge to a state disclosure regime. 694 F.3d 464, 470-71 (7th Cir. 2012). Like *McConnell*, it is inapplicable here.

Nat'l Organization for Marriage v. Sec'y of State of Fla. addressed, *inter alia*, proposed communications that expressly advocated for Rick Scott, the Republican nominee for governor, and against Alex Sink, his Democratic opponent. 477 Fed. Appx. 584 (11th Cir. 2010). A proposed ad focused upon Scott said "Rick Scott is running for governor. He and his ideas on

[5] The suggestion that Plaintiff "relies upon" *Real Truth About Abortion v. FEC*, 681 F.3d 551 (4th Cir. 2012), Op. at 26, is odd. That case involved a communication that was without doubt the functional equivalent of express advocacy, and thus bears no resemblance to the Institute's ad.

[6] http://saos.nictusa.com/aodocs/959641.pdf.

[7] http://saos.fec.gov/aodocs/AO%202012-11.pdf.

marriage are what Floridians want." Ex. 2, *Nat'l Organization for Marriage*, No. 10-192 (N. D. Fla. 2010) (ECF No. 1). Another ad dealing with Sink said "Alex Sink is running for governor. She and her ideas on civil unions are bad for Floridians." *Id.*, Ex. 3.

Nat'l Organization for Marriage v. McKee contemplated similar ads, one of which "raised fears that legalizing same-sex marriage would lead to schools teaching children about same-sex relationships," and criticized by name candidates who supported gay marriage. 649 F.3d 34, 49 (1st Cir. 2011).

Human Life of Washington, Inc. v. Brumsickle dealt with a ballot measure regarding legalized euthanasia, not a candidate election. 624 F.3d 990 (9th Cir. 2010). But the proposed communications, *inter alia*, suggested that legalizing assisted suicide "turns doctors into killers" and compared advocates of legalization with "Nazi docs." *Id.* at 996.

Plainly, none of these communications are equivalent to the speech the Institute wishes to engage in. Thus, the FEC's attempt to corral out-of-circuit precedent to support its expansive reading of *Citizens United* is unconvincing.

v. The Commission's remaining efforts to apply *Citizens United* to this case are unavailing.

The FEC concludes its argument by attempting to refute two other characteristics which distinguish the Institute's case from *Citizens United*. First, the Commission suggests that Justice Kennedy's use of the word "pejorative" in every instance in which the Court discusses the ads for *Hillary: The Movie* is irrelevant. Op. at 28. Specifically, the FEC suggests that the "[t]he Court…at no point purported to limit the scope of th[e electioneering communication] definition, or the disclosure requirements attendant to it, to communications that" are "pejorative." Op. at 28. Yet, the *Citizens United* Court described the *Hillary* ads as "fall[ing] within BCRA's definition of an 'electioneering communication': They referred to then-Senator Clinton by name

shortly before a primary and contained pejorative references to her candidacy." 558 U.S. at 368. Plaintiff is at a loss what the second part of that sentence is doing, if the word "pejorative" is irrelevant. At a bare minimum, Justice Kennedy's description of the ads as "pejorative" toward Hillary Clinton's "candidacy" limits his reasoning; it cannot be fairly said to apply to every ad that happens to refer to a legislator. Again, the *Citizens United* advertisements made pejorative statements about a candidacy; they were consequently election-related in a way the Institute's communication is not.

Second, the FEC suggests that the Institute's § 501(c)(3) status is irrelevant. Yet, § 501(c)(3) organizations are prohibited from engaging in electoral advocacy, and the harm donor disclosure works against a § 501(c)(3) is greater than other exempt entities (a point that the FEC has at least once explicitly recognized). 26 U.S.C. § 501(c)(3); *Shays v. FEC*, 337 F. Supp. 2d 28, 125 (D.D.C. 2004) ("[i]n implementing this provision of BCRA, the FEC promulgated a regulating provision that '[e]lectioneering communication does not include any communication…paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986").[8] Because § 501(c)(3) organizations, by definition, are barred from activity that "electioneers," these organizations should not have to worry that an incidental mention of a candidate in compliance with their educational mission will subject their donors to disclosure.

In short, the Commission would answer vagueness with overbreadth; an as-applied challenge with facial precedent; and exacting scrutiny with a government interest shorn of tailoring. In all of these instances, the Commission meets only half its burden. In none is the

[8] The FEC correctly notes that this regulation was rejected under a *Chevron* analysis, but only because the Commission did not provide a "reasoned analysis" why it was issuing the regulation. *Shays*, 337 F. Supp. 2d at 127. This does not mean that such a "reasoned analysis" does not exist.

result constitutional. The only thing that would control the outcome of this case is an on-point, as-applied challenge based upon a similar issue ad. There is no such case.

III. Plaintiff must prevail under *Buckley*, regardless of whether the Institute's donors face a reasonable fear of threats, harassments, or reprisals, because the Commission cannot satisfy its burden under exacting scrutiny.

Since *McConnell* and *Citizens United* do not apply, we are left with the two *Buckley* cases. Both demand a ruling in favor of the Independence Institute. This is so despite the fact that the Institute does not assert that "disclosure would result in a reasonable probability of threats, harassments, or reprisals." Op. at 31 (quotation marks and citations omitted).

Buckley placed genuine issue speakers' contributor information beyond the government's reach. As a result, the Independence Institute need not invoke this exception to mandatory disclosure, which was designed for PACs and political parties which are generally already required to disclose under FECA. *Buckley*, 424 U.S. at 71 (discussing threats, harassment, or reprisals as an exception to FECA's disclosure requirements as narrowed by the Court). That is, the "threats, harassment, or reprisals" standard that Plaintiff has foresworn reliance upon only applies to those entities *who must disclose* under *Buckley*. The Institute is not such a group, and may avail itself of *Buckley*'s protection of anonymous non-electoral association.

CONCLUSION

At bottom, the Commission argues for a wooden, overly formalistic view of the constitutional liberties that compelled disclosure implicates. This is emphasized by their failure to demonstrate that disclosure of Plaintiff's contributors is tailored, on the facts presented here, to its informational interest. But there is no shortcut past *Buckley*'s exacting scrutiny, which the Supreme Court imposed to protect precisely the type of speech at issue here. This standard requires courts to carefully consider whether the government has limited the disclosure it seeks to speech that advocates an electoral outcome or, at the barest minimum, is election-related. As the FEC has failed to meet its burden, judgment should be entered for Plaintiff.

Dated this 26th day of September, 2014.

Respectfully submitted,

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**Admission* pro hac vice *pending*