No. 16-743

In the Supreme Court of the United States

INDEPENDENCE INSTITUTE, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly held that this Court's decisions in *McConnell* v. *FEC*, 540 U.S. 93 (2003), and *Citizens United* v. *FEC*, 558 U.S. 310 (2010), foreclose appellant's as-applied constitutional challenge to federal disclosure requirements for "electioneering communications," 52 U.S.C. 30104(f) (Supp. II 2014); 11 C.F.R. 104.20(c).

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OPINION BELOW

The opinion of the district court granting the Federal Election Commission's motion for summary judgment (J.S. App. 3-36) is not published in the *Federal Supplement* but is available at 2016 WL 6560396.

JURISDICTION

The judgment of the three-judge district court was entered on November 3, 2016. A notice of appeal was filed on November 10, 2016 (J.S. App. 37-39), and the jurisdictional statement was filed on December 5, 2016. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114 (52 U.S.C. 30110 note).[1]

[1] All references to Title 52 of the United States Code are found in the 2014 Supplement.

STATEMENT

1. For more than a century, federal law has required organizations that influence federal elections to disclose, *inter alia*, information about the sources of their funding. *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam). Beginning in 1910, Congress required "organizations operating to influence congressional elections in two or more States" to "disclose names of all contributors of $100 or more." *Ibid.* (citing Act of June 25, 1910, ch. 392, §§ 1, 5-6, 36 Stat. 822-824). Those federal disclosure requirements were "broadened in the Federal Corrupt Practices Act of 1925," which required "organizations that accept[ed] contributions or ma[de] expenditures 'for the purpose of influencing or attempting to influence' the Presidential and Vice Presidential elections" in two or more States "to report * * * the names and addresses of contributors of $100 or more * * * in a calendar year." *Id.* at 61-62 (quoting Act of Feb. 28, 1925, ch. 368, Tit. III, § 302(c), 43 Stat. 1070, and citing § 305(a), 43 Stat. 1071-1072).

The Federal Election Campaign Act of 1971 (FECA) replaced those earlier requirements with a more comprehensive disclosure regime. See Pub. L. No. 96-187, 86 Stat. 3, as amended by the Federal Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; see *Buckley*, 424 U.S. at 62-64. In *Buckley* v. *Valeo*, *supra*, this Court recognized the facial constitutionality of that regime, including a provision that, as construed by the Court, required any entity spending more than $100 in a calendar year "for communications that expressly advocate the election or defeat of a clearly identified candidate" to disclose, *inter alia*, information about donors who had given the

entity more than $100. 424 U.S. at 80; see 2 U.S.C. 434(b)(2) and (e) (Supp. IV 1974). The Court concluded that FECA's disclosure requirements, as it construed them, were constitutional, see *Buckley*, 424 U.S. at 64-84, except in the limited circumstance in which an entity could show that compliance would result in a "reasonable probability" of "threats, harassment, or reprisals," *id.* at 74.

The Court held that, as a general matter, disclosure requirements serve "governmental interests sufficiently important to outweigh" the privacy interests of donors. *Buckley*, 424 U.S. at 66. The Court explained that recordkeeping and reporting can "provide[] the electorate with information" that could "aid the voters in evaluating those who seek federal office," *id.* at 66-67; can "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity," *id.* at 67; and can "gather[] the data necessary to detect violations of the contribution limitations" that are also part of federal law, *id.* at 68. With respect to the particular disclosure requirements imposed on entities whose spending is not coordinated with a candidate, the Court explained that "the informational interest" in that context "can be as strong as it is" for coordinated spending, because the "disclosure helps voters to define more of the candidates' constituencies." *Id.* at 81. The Court also observed that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

2. a. The current federal disclosure regime was adopted in the Bipartisan Campaign Reform Act of 2002

(BCRA), Pub. L. No. 107-155, § 201, 116 Stat. 88-90, following lengthy experience with "abuse of" the original FECA regime by entities "us[ing] * * * purported 'issue ads' to influence federal elections" while "concealing their identities from the public." *McConnell* v. *FEC*, 540 U.S. 93, 196 (2003) (citation and internal quotation marks omitted). The current law imposes certain reporting requirements on a "person"—defined to include individuals, corporations, organizations, and other groups, 52 U.S.C. 30101(11)—who spends more than $10,000 in a calendar year to produce or broadcast "electioneering communications." 52 U.S.C. 30104(f)(1).

The term "electioneering communication" is defined, in the context of congressional elections, as a "broadcast, cable, or satellite communication" that (1) "refers to a clearly identified candidate"; (2) is made within 60 days before a general election, or within 30 days before a primary election or nominating convention; and (3) "is targeted to the relevant electorate." 52 U.S.C. 30104(f)(3)(A)(i). A corporation that spends more than the threshold amount on such communications must report those disbursements, along with "the name and address of each person who made a donation aggregating $1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c)(9); see 52 U.S.C. 30104(f)(2); 11 C.F.R. 104.20(c); see also *Van Hollen, Jr.* v. *FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (upholding regulation's purpose requirement). If the corporation's disbursements were made out of a "segregated bank account" established to pay for electioneering communications, the corporation is required to identify only those individuals who contrib-

uted $1000 or more to that segregated account. 52 U.S.C. 30104(f)(2)(E); 11 C.F.R. 104.20(c)(7).

b. In *McConnell* v. *FEC*, *supra*, this Court "reject[ed]" a "facial challenge to the requirement to disclose individual donors" when an organization substantially funds electioneering communications. 540 U.S. at 199. The Court held that "*Buckley* forecloses" such a challenge. *Id.* at 197. The Court explained that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA." *McConnell*, 540 U.S. at 196. The Court therefore concluded that "*Buckley* amply supports application of [the] disclosure requirements to the entire range of 'electioneering communications.'" *Ibid.* The Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," holding that Congress had permissibly defined the term "'electioneering communication'" to include advertisements that mention a candidate in the run-up to an election but "do not urge the viewer to vote for or against a candidate in so many words." *Id.* at 193, 194; see *id.* at 321 (opinion of Kennedy, J.) (agreeing that relevant disclosure requirements are facially constitutional).

In *Citizens United* v. *FEC*, 558 U.S. 310 (2010), the Court upheld BCRA's disclosure requirements as applied to an advocacy group's dissemination of a movie about a presidential candidate and ads promoting that movie. *Id.* at 366-371; see *id.* at 319-320. The

Court explained that "the public has an interest in knowing who is speaking about a candidate shortly before an election," and it found that "informational interest alone" to be "sufficient to justify application" of the disclosure requirements. *Id.* at 369; see *id.* at 371; see also *id.* at 370 (noting absence of evidence showing "a reasonable probability that the [plaintiff] group's members would face threats, harassment, or reprisals if their names were disclosed"). The Court reiterated its longstanding view that a disclosure requirement is valid so long as it bears "a 'substantial relation'" to "a 'sufficiently important' governmental interest." *Id.* at 366 (quoting *Buckley*, 424 U.S. at 64, 66). The Court explained that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *id.* at 369, because, although "disclosure requirements may burden the ability to speak," *id.* at 366, such requirements "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking," *ibid.* (citations and internal quotation marks omitted). And the Court specifically "reject[ed] th[e] contention" that BCRA's "disclosure requirements * * * must be confined to speech that is the functional equivalent of express advocacy" for or against the election of a particular candidate. *Id.* at 368-369.

3. Appellant is a nonprofit corporation with tax-exempt status under 26 U.S.C. 501(c)(3). J.S. App. 6-7. In 2014, appellant sought to air a radio advertisement in Colorado that would refer to Colorado's then-Senator Mark Udall within 60 days of the federal election in which he was a candidate to retain his seat. *Id.* at 7. The proposed advertisement would urge listeners to call Senator Udall and Colorado's other Senator

and "[t]ell them to support" a particular criminal-justice bill. *Id.* at 8 (citation omitted). Appellant alleged that it would spend at least $10,000 on the advertisement and that it would solicit contributions, including in amounts greater than $1000 per donor, for the purpose of disseminating it. *Id.* at 8, 60, 62.

Recognizing that the proposed advertisement constituted an "electioneering communication" under BCRA, and that its activities would trigger statutory reporting requirements, appellant brought a pre-enforcement suit against the Federal Election Commission, alleging that BCRA's disclosure requirements would be unconstitutional as applied to its proposed expenditures. J.S. App. 9, 18; see 52 U.S.C. 30106(b)(1), 30107(a)(7), 30108, 30109, 30111(a)(8) and (d) (delineating authority of the Commission to enforce federal campaign-finance laws). The case was ultimately assigned to a three-judge district court, in accordance with the procedures for constitutional claims set forth in Section 403(a)(3) of BCRA, 116 Stat. 113-114 (52 U.S.C. 30110 note). See J.S. App. 9-10.

The district court granted summary judgment to the Commission. J.S. App. 3-36. The court held as a threshold matter that the completion of the 2014 election cycle had not mooted the case because appellant had "made clear at oral argument that it still desire[d] to run this particular advertisement during the 2016 general election," in which the other Senator "referenced in the advertisement" was a candidate for reelection. *Id.* at 17-18; see *id.* at 11-17 (questioning whether case might otherwise be moot). On the merits, appellant argued that BCRA's requirement to disclose certain donor information cannot constitu-

tionally be applied to purported "genuine issue advocacy." *Id.* at 18-19. Appellant also argued that its status as a nonprofit subject to 26 U.S.C. 501(c)(3) entitled it to a constitutional exemption "from the large-donor disclosure requirement." J.S. App. 19. The court rejected those contentions, stating that they "founder on Supreme Court precedent." *Ibid.*

The district court observed that this Court, in *McConnell* and *Citizens United*, "has twice considered and twice upheld" the relevant disclosure requirements, "and in doing so has rejected the very type of issue-centered exception" that appellant advocated. J.S. App. 19-20. The court found it "hard to see any constitutional daylight between [appellant's] issue advertisement and the issue advocacy to which the Supreme Court has already held that [BCRA's] disclosure requirements can permissibly be applied." *Id.* at 24. "Under *McConnell* and *Citizens United*," the court explained, "it is the tying of an identified candidate to an issue or message that justifies [BCRA's] tailored disclosure requirements because that linkage gives rise to the voting public's informational interest in knowing 'who is speaking about a candidate shortly before an election.'" *Ibid.* (quoting *Citizens United*, 558 U.S. at 369). The court also found appellant's "proposed constitutional exception for 'genuine' issue advocacy" to be "entirely unworkable as a constitutional rule." *Ibid.* The court observed, *inter alia*, that appellant's own advertisement "could very well be understood by Coloradoans as criticizing [a] Senate candidate's position," because it "at least implies" that the candidate has not yet expressed support for the legislative initiative that the advertisement promotes. *Id.* at 25-26.

The district court further held that the requirement to disclose the identity of large contributors, as applied to appellant's proposed expenditures, would satisfy the requisite degree of scrutiny under the First Amendment. J.S. App. 29-33. The court explained that the requirement "advances substantial and important governmental interests," *id.* at 30, because, *inter alia*, "[p]roviding the electorate with information about the source of the advertisement will allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments," *id.* at 31. The court further held that the requirement "is tailored to substantially advance" that interest because it does not limit speech or other election-related activities, and because disclosure is mandated for "only those substantial donors who contribute $1000 or more, and do so for the specific purpose of supporting the advertisement." *Ibid.*

The district court also rejected appellant's contention that its status as a Section 501(c)(3) nonprofit "makes a constitutional difference." J.S. App. 33. The court explained that the First Amendment permits disclosure provisions that regulate communications based on their "reference to electoral candidates, and not on the speaker's identity or taxpaying status." *Ibid.* (citing *McConnell*, 540 U.S. at 194). The court also noted that speaker-based distinctions are themselves constitutionally questionable. *Id.* at 33-34.

ARGUMENT

The district court correctly recognized that this Court's decisions in *McConnell* v. *FEC*, 540 U.S. 93 (2003), and *Citizens United* v. *FEC*, 558 U.S. 310 (2010), foreclose appellant's constitutional claim.

Those decisions, which upheld BCRA's disclosure regime in circumstances materially indistinguishable from this case, make clear that a nonprofit organization's electioneering communication cannot be constitutionally exempted from BCRA's disclosure requirements by labeling it "issue advocacy." The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.[2]

1. This Court "has twice considered and twice upheld" the BCRA disclosure requirements that appellant challenges here, "and in doing so has rejected the very type of issue-centered exception" that appellant seeks. J.S. App. 19.

The Court held in *McConnell* that "*Buckley* forecloses a facial attack" on BCRA's requirements to "disclos[e] * * * the names of persons contributing $1,000 or more to segregated funds or individuals that spend more than $10,000 in a calendar year on electioneering communications." 540 U.S. at 197; see *id.* at 321 (opinion of Kennedy, J.). The Court explained that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements," including the interest in "providing the electorate with information," also "apply in full to BCRA." *Id.* at 196. The Court accordingly concluded that

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[2] Although the election cycles in which appellant proposed to run its original advertisement have now passed, this case fits within the exception to mootness for "disputes that are capable of repetition, yet evading review," *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007), because appellant has credibly stated that it "inten[ds] in future years to run substantively similar advertisements to the one at issue," J.S. App. 46. See *Wisconsin Right to Life, Inc.*, 551 U.S. at 462-463 (applying mootness exception in similar circumstances).

"*Buckley* amply supports application of [the relevant] disclosure requirements to the entire range of 'electioneering communications'" as defined in BCRA. *Ibid.* The Court specifically rejected the proposition that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy" that would require narrowing the range of communications to which the disclosure requirements apply. *Id.* at 193; see *id.* at 195. The Court also highlighted substantial "evidence concerning the use of purported 'issue ads' to influence federal elections." *Id.* at 196.

The Court in *Citizens United* reaffirmed that the First Amendment does not limit application of BCRA's disclosure requirements to communications that are express advocacy or its functional equivalent. That case presented, *inter alia*, an as-applied challenge to the disclosure requirements premised on the contention that those requirements "must be confined to speech that is the functional equivalent of express advocacy." 558 U.S. at 368; see *id.* at 366. The Court "reject[ed] [that] contention" and upheld the disclosure requirements' application to three advertisements that were not themselves subject to BCRA's ban on corporate financing. *Id.* at 369; see *id.* at 367. The Court emphasized that "the public has an interest in knowing who is speaking about a candidate shortly before an election," and it found that "informational interest alone [to be] sufficient to justify application" of the disclosure requirements in that case. *Id.* at 367.

The result reached by the district court in this case follows directly from this Court's decisions in *McConnell* and *Citizens United*. "There is no dispute that [appellant's] advertisement meets the statutory

definition of an electioneering communication." J.S. App. 18. And as the courts of appeals have consistently recognized, the Court in *Citizens United* "upheld federal disclaimer and disclosure requirements applicable to *all* 'electioneering communications.'" *Free Speech* v. *FEC*, 720 F.3d 788, 795-796 (10th Cir. 2013) (citation omitted), cert. denied, 134 S. Ct. 2288 (2014). See *Vermont Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 131 (2d Cir. 2014) (explaining that contention that disclosure requirements should be limited to express advocacy "cannot be squared with *Citizens United*"), cert. denied, 135 S. Ct. 949 (2015); *Center for Individual Freedom* v. *Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *National Org. for Marriage* v. *McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011) ("We find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."), cert. denied, 132 S. Ct. 1635 (2012); *Human Life of Wash. Inc.* v. *Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."), cert. denied, 562 U.S. 1217 (2011); see also *Independence Inst.* v. *Williams*, 812 F.3d 787, 795 (10th Cir. 2016) ("It follows from *Citizens United* that disclosure requirements can, if cabined within the bounds of exacting scrutiny, reach beyond express advocacy to at least some forms of issue speech.").

2. Appellant's arguments on appeal are foreclosed by *McConnell* and *Citizens United*.

a. Appellant's discussion of the degree of scrutiny applicable to disclosure requirements (J.S. 3, 24-28), largely elides the distinctions this Court has drawn between disclosure requirements and actual restrictions on speech. The Court has repeatedly emphasized that disclosure requirements like BCRA's "'impose no ceiling on campaign-related activities,' * * * and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *McConnell*, 540 U.S. at 201; *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) (per curiam)). The Court has therefore held that such requirements do not violate the First Amendment so long as the government identifies a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 366-367 (quoting *Buckley*, 424 U.S. at 64, 66); see *McConnell*, 540 U.S. at 231-232.

In *McConnell* and *Citizens United*, the Court held that the BCRA disclosure requirements satisfy that standard. See *Citizens United*, 558 U.S. at 368-369; *McConnell*, 540 U.S. at 189-198. Contrary to appellant's contention (J.S. 23-24, 31-33), the district court in this case did not err in applying that same standard to reach that same result. Even apart from this Court's square holdings in *McConnell* and *Citizens United*, those decisions include subsidiary determinations that supported the district court's analysis. The district court's treatment of the government's informational interest as a substantial one (J.S. App. 30) is consistent with this Court's determination that the government has a substantial interest in ensuring that the public is informed about the source of electioneer-

ing communications and does not misattribute those communications to the candidate or a political party. See *Citizens United*, 558 U.S. at 368-369. And the district court's conclusion that "the large-donor disclosure requirement is tailored to substantially advance [the government's] interests" (J.S. App. 31) reflects this Court's determination that the government's interests "amply support[] application of [the relevant] disclosure requirements to the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 196; see *Citizens United*, 558 U.S. at 369 (finding that "the informational interest alone is sufficient to justify application of [the disclosure requirements] to [Citizens United's] ads").

Appellant characterizes (J.S. 19) the district court's approach in this case as endorsing "essentially unlimited compulsory disclosure of personal association so long as public affairs * * * [are] being discussed." In fact, the court's analysis was tied to the particular communication that appellant proposed to make (which would "link[] an electoral candidate to a political issue * * * in the run up to a federal election") and the particular disclosure requirement that appellant identified as objectionable (which "is limited to only those substantial donors who contribute $1000 or more, and do so for the specific purpose of supporting the advertisement"). J.S. App. 30-31; see *McConnell*, 540 U.S. at 196 n.81 (noting that BCRA's disclosure requirements "are actually somewhat less intrusive" than the FECA requirements they replaced).

b. *McConnell* and *Citizens United* directly refute appellant's contention that *Buckley* established an "issue speech" exception to disclosure requirements by "limit[ing] disclosure only to groups speaking un-

ambiguously about candidates." J.S. 3 (emphasis, citation, and internal quotation marks omitted). Appellant bases that contention on the *Buckley* Court's construction of the then-existing FECA disclosure provisions "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted); see J.S. 12-15. As the Court explained in *McConnell*, however, *Buckley*'s "express advocacy limitation * * * was the product of statutory interpretation rather than a constitutional command." 540 U.S. at 191-192. In both *McConnell* and *Citizens United*, the Court recognized that BCRA's disclosure requirements can constitutionally be applied to all advertisements that "fall within BCRA's definition of an 'electioneering communication,'" *Citizens United*, 558 U.S. at 368, regardless of whether those advertisements are characterized as "express" or "issue" advocacy, *McConnell*, 540 U.S. at 195. See *Citizens United*, 558 U.S. at 368-369; *McConnell*, 540 U.S. at 189-198.

Appellant suggests that a footnote in *McConnell* reserved the question whether BCRA's disclosure requirements can constitutionally be applied to "genuine issue ads." J.S. 15 (quoting *McConnell*, 540 U.S. at 206 n.88). But the footnote on which appellant relies did not appear in the section of *McConnell* that addressed BCRA's disclosure requirements. Instead, it appeared in a section addressing a different BCRA provision, which prohibited corporations and unions from using treasury funds for electioneering communications. See 540 U.S. at 202-209. Although that prohibition was ultimately held unconstitutional in *Citizens United*, see 558 U.S. at 319, the Court reaf-

firmed that the government "may regulate corporate political speech through disclaimer and disclosure requirements," *ibid.*, including by applying to electioneering communications the specific disclosure requirements that appellant challenges here, see *id.* at 366-371.

c. Appellant's reliance (J.S. 16-18, 31) on this Court's decision in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), is similarly misplaced. The controlling opinion in that case invalidated BCRA's ban on the financing of electioneering communications with corporate and union treasury funds to the extent that such communications did not constitute express advocacy or its "functional equivalent." *Id.* at 476, 478-479 (opinion of Roberts, C.J.). As appellant acknowledges, however, the plaintiff in that case "did not challenge the scope of BCRA's disclosure regime" (J.S. 16), and this Court in *WRTL* did not address BCRA's disclosure provisions.

Relying on the controlling opinion in *WRTL*, the plaintiff in *Citizens United* argued that BCRA's disclosure requirements "must be confined to speech that is the functional equivalent of express advocacy." 558 U.S. at 368. The Court "reject[ed] th[at] contention." *Id.* at 369; see *ibid.* ("[W]e reject [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."). And, contrary to appellant's characterization, the Court did not do so by "*ipse dixit*" and "without explanation," J.S. 19, but instead provided "reasons" why disclosure requirements should be viewed differently from spending restrictions in this respect, *Citizens United*, 558 U.S. at 369. The Court explained that "disclosure is a less restrictive alternative to

more comprehensive regulations of speech"; that *Buckley* had "upheld a disclosure requirement for independent expenditures [*i.e.*, expenditures not coordinated with a candidate] even though it invalidated a provision that imposed a ceiling on those expenditures"; that in *McConnell*, "three Justices who would have found [a direct funding ban] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements"; and that in *United States* v. *Harriss*, 347 U.S. 612 (1954), the Court had "upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself." *Citizens United*, 558 U.S. at 369.

d. Appellant's efforts to distinguish this case from *McConnell* and *Citizens United* are misconceived.

Focusing on the specific content of the communications at issue in *Citizens United*, appellant contends (J.S. 20) that the Court's decision in that case is "best understood" as limited to circumstances in which BCRA's disclosure requirements are applied to electioneering communications that are "part of a clear electoral effort." But if the Court in *Citizens United* had intended to confine its holding in that manner, it would not have explicitly "reject[ed] [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369. Nor would the Court have clarified that "[e]ven 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." *Ibid.*[3]

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[3] Appellant does not explain or substantiate its supposition (J.S. 31) that disclosure of the financing of its proposed advertisement could "confuse voters" by "lead[ing] voters to believe that [appel-

Appellant's attempt (J.S. 33-34) to distinguish this case from *Citizens United* based on appellant's status as a Section 501(c)(3) corporation is also unavailing. The Court's decision in *Citizens United* did not turn on the tax status of the plaintiff, which the Court described simply as "a nonprofit corporation," 558 U.S. at 319, a phrase that equally describes appellant. Rather, the Court focused on the plaintiff's dissemination of electioneering communications, see *id.* at 366-371, an activity in which appellant similarly proposes to engage.

Appellant emphasizes that, as a corporation organized under 26 U.S.C. 501(c)(3), it "is prohibited by [federal tax] law from engaging in political campaign intervention." J.S. 33. But appellant clearly (and reasonably) does not view that restriction to prohibit it from disseminating its proposed electioneering communication. See Erika K. Lunder & L. Paige Whitaker, Cong. Research Serv., R40141, *501(c)(3)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws* 7-8 (2013) ("[A]n issue advocacy communication, depending on its timing and content, might be an electioneering communication under FECA, but might not be treated as campaign intervention under the [Internal Revenue Code]."). And appellant offers no sound reason why the First Amendment would apply differently to it than to another organization that runs the same advertisement. Cf. *Simon & Schuster, Inc.* v. *Members of the N.Y.*

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lant] and its donors support or oppose Colorado's Senators, where it in fact does not." Some voters might infer from the content of the advertisement itself that appellant did not support the Senators referenced in it. But there is no evident reason that a voter who did not draw such an inference from the advertisement would be led to do so by disclosure of appellant's funding sources.

State Crime Victims Bd., 502 U.S. 105, 117 (1991) ("The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.").

Appellant asserts (J.S. 34) that Section 501(c)(3) organizations that run such advertisements face the "risk of ideologically opposed organizations filing complaints against them." But even assuming that were so, appellant fails to connect the filing of such complaints against the *organization* with the particular requirement that it challenges here, which involves the disclosure of *contributors*. In any event, appellant's argument would provide no basis for disturbing the decision below, as appellant has previously stipulated that it is not challenging BCRA's disclosure requirement based on anticipated "threats, harassment, or reprisals," *Citizens United*, 558 U.S. at 367 (citation omitted). See J.S. App. 21 n.5.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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