ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5249

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

Lisa J. Stevenson
Deputy General Counsel — Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak
Acting Assistant General Counsel
echlopak@fec.gov

Greg J. Mueller
Attorney
gmueller@fec.gov

Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1650

May 8, 2015

APPELLEE FEDERAL ELECTION COMMISSION'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Order of October 22, 2014, and D.C. Circuit Rule 28(a)(1), appellee Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. Independence Institute was the plaintiff in the district court and is the appellant in this Court. The Commission was the defendant in the district court and is the appellee in this Court.

(B) ***Rulings Under Review***. Independence Institute appeals the October 6, 2014, order of the United States District Court for the District of Columbia (Kollar-Kotelly, J.) denying its application for a three-judge court, entering judgment for the Commission, and dismissing the action.

(C) ***Related Cases***. The Commission knows of no related cases.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

GLOSSARY

APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix

COUNTERSTATEMENT OF JURISDICTION

On October 6, 2014, the district court issued a final order denying Independence Institute's application for a three-judge court and entering judgment in favor of the Commission. (Joint Appendix ("J.A.") 36-38; *see* J.A. 34-35.) The district court had jurisdiction over this action under 28 U.S.C. § 1331 and to review for eligibility under 52 U.S.C. § 30110 note.[1] Independence Institute timely appealed on October 8, 2014. (J.A. 5.) This Court has jurisdiction from that final judgment under 28 U.S.C. §§ 1291, 1294(1). Independence Institute's challenge relating to a particular advertisement it wished to run in advance of the 2014 federal elections is now moot and the organization has failed to date to meet its burden of establishing that it satisfies the exception for matters that are capable of repetition yet evading review. *See infra* pp. 46-47.

COUNTERSTATEMENT OF THE ISSUES

Where the Supreme Court has facially upheld the "electioneering communication" disclosure provision in the Bipartisan Campaign Reform Act ("BCRA") and rejected an as-applied challenge which contended that the provision could not constitutionally extend beyond express candidate advocacy or its functional equivalent, did the district court properly reject another such as-applied

[1] Effective September 1, 2014, the federal campaign finance provisions formerly codified in Title 2 of the United States Code were recodified in a new Title 52.

challenge about an advertisement that Independence Institute wished to broadcast without the applicable donor disclosure and properly deny the organization's application for a three-judge court?

STATUTES AND RULES

The relevant provisions are included in the Addendum to Appellant Independence Institute's Opening Brief ("Appellant's Br.").

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA"), codified at 52 U.S.C. §§ 30101-30146, including the amendments added by BCRA. The Commission is empowered to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1), and "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 52 U.S.C. §§ 30107(a)(8), 30111(a)(8), (d).

A. The Origin of "Electioneering Communications"

FECA limits the amount individuals may contribute to candidates, their campaigns, and other political committees and parties. 52 U.S.C. § 30116(a). It also prohibits corporations and labor organizations from making contributions to federal candidates or their authorized committees, except through such entities'

separate segregated funds (also known as political action committees). *Id.* §§ 30118(a), (b)(2)(C).[2] And, before the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), FECA prohibited corporations and unions from making any "expenditures," defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i); *see id.* § 30118(a). FECA also requires periodic disclosure of contributions and certain expenditures and disbursements to the FEC, which, in turn, makes the information publicly available. *Id.* § 30104.

In 1976, the Supreme Court generally upheld FECA's contribution limits and disclosure requirements against a facial challenge, but the Court struck down FECA's limits on expenditures by individuals and candidates. *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). When the Court analyzed FECA's then-$1,000 limit and disclosure requirements for expenditures by any person "relative to" a federal candidate, the Court construed "expenditure" narrowly to avoid invalidating those provisions on vagueness grounds and applied them "only to expenditures for communications that in express terms advocate the election or

[2] FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i).

defeat of a clearly identified candidate for federal office." *Id.* at 44, 79 (footnote omitted).

Following *Buckley*, Congress amended FECA to define an "independent expenditure" as "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 52 U.S.C. § 30101(17)). FECA requires that all independent expenditures above $250 be timely reported to the Commission for disclosure to the public. 52 U.S.C. § 30104(c)(1).

Buckley did not consider the separate FECA provision prohibiting corporations and labor organizations generally from making independent expenditures using their general treasury funds, 52 U.S.C. § 30118. Following the Supreme Court's narrowing construction of independent "expenditure," corporations and unions generally could finance independent communications that discussed candidates with general treasury funds as long as they stopped short of express advocacy. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), however, the Supreme Court held that certain incorporated advocacy organizations — which were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from

for-profit corporations or unions — could not constitutionally be barred from using general treasury funds to make independent expenditures. *Id.* at 263-64.

By the end of the 1990s, groups were spending millions of dollars on ads that avoided words of express advocacy and ostensibly advocated for or against an issue, but in essence urged the election or defeat of federal candidates. *See McConnell v. FEC*, 540 U.S. 93, 126-128 (2003) *overruled in part by Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Congress determined that because the express advocacy standard was easy to evade, corporations and labor unions were able "to fund broadcast advertisements designed to influence federal elections . . . while concealing their identities from the public." *Id*. at 196-97.

To address this and other developments in federal campaign finance, Congress enacted BCRA in 2002, which, *inter alia*, imposed new financing restrictions and disclosure requirements for "electioneering communications." BCRA §§ 201-204, 116 Stat. 88-90, 52 U.S.C. §§ 30104(f)(1)-(2), 30118(a), (b)(2); *see also McConnell*, 540 U.S. at 126.

BCRA defines an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, is publicly distributed within 60 days before a general election or 30 days before a primary election, and is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A); 11 C.F.R. § 100.29(a)(2). BCRA prohibited the financing of

electioneering communications with corporate or union general treasury funds. 52 U.S.C. §§ 30104(f)(3)(A)(i), 30118(a), (b)(2).

Congress also required disclosure concerning the sources and financing of electioneering communications. Any "person" (defined to include any corporation, labor organization, or other group, 52 U.S.C. § 30101(11)) that spends over $10,000 to produce or air an electioneering communication must file a statement with the Commission. 52 U.S.C. § 30104(f)(1). The information required on the statement includes identification of the person making the electioneering-communication disbursement and the amount and date of certain disbursements. 52 U.S.C. § 30104(f)(1), (2)(A)-(C).

BCRA provides two options for disclosing information about the funds used to finance electioneering communications. If the disbursements were paid from a segregated bank account that contains only funds contributed directly to that account for electioneering communications (and solely by individual United States citizens, nationals, or lawful permanent residents), the statute requires disclosure only of the names and addresses of contributors that gave a total of $1,000 or more to the account between the beginning of the preceding calendar year and the disclosure date. 52 U.S.C. § 30104(f)(2)(E). Alternatively, if the disbursements were not paid with funds from such an account, the statute requires disclosure of the names and addresses of all contributors that gave a total of $1,000 or more to

the person making the disbursement between the beginning of the preceding calendar year and the disclosure date. *Id.* § 30104(f)(2)(F).

B. The Supreme Court's Resolution of Facial and As-Applied Constitutional Challenges to BCRA's Electioneering Communications Provisions

When BCRA's electioneering communication provisions were challenged as facially unconstitutional, the Supreme Court upheld the statutory definition of "electioneering communication" at 52 U.S.C. § 30104(f)(3)(A)(i), the related disclosure provision at 52 U.S.C. § 30104(f), and (initially) the related spending prohibitions at 52 U.S.C. §§ 30118 and 30120. *See McConnell*, 540 U.S. at 194, 201-02, 207-08. The Court rejected the contention that the statutory definition of "electioneering communication" was infirm because it was not limited to "communications expressly advocating the election or defeat of particular candidates." *Id.* at 189-90. *Buckley*, the Court found, had not established a "constitutionally mandated line" between express candidate advocacy and issue advocacy. *Id.* 189-90 (explaining that *Buckley*'s "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law"). The Court further observed that unlike FECA's definition of "expenditure," BCRA's definition of "electioneering communication" did not raise any vagueness concerns; on the contrary, its elements "are both easily understood and objectively determinable." *Id.* at 194.

As to BCRA's disclosure requirements, eight Justices agreed that such requirements serve the important governmental interests of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," and "do not prevent anyone from speaking." *Id*. at 196, 201 (brackets and internal quotation marks omitted). The Court thus held that "*Buckley* amply supports application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'" *Id.* at 196.

Four years after *McConnell*, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Supreme Court considered an as-applied challenge to BCRA's prohibition on the *financing* of electioneering communications with corporate and union treasury funds and partially invalidated it. The controlling opinion held BCRA's ban unconstitutional as applied to a corporation's advertisements that did not constitute express advocacy or "the functional equivalent of express advocacy." 551 U.S. at 476, 478-79. A communication is the "functional equivalent of express advocacy," the controlling opinion explained, only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70. Before the Court's decision in *Wisconsin Right to Life*, only corporations that qualified under the criteria the Court had established in *Massachusetts Citizens for Life* could make

electioneering communications, *see supra* pp. 4-5, but in *Wisconsin Right to Life*, the Court recognized the constitutional right of all corporations and unions to finance electioneering communications that did not contain express advocacy or its functional equivalent. *See* 551 U.S. at 480-81. The Court in *Wisconsin Right to Life* did not address BCRA's *disclosure* provisions.

Following the Supreme Court's decision in *Wisconsin Right to Life*, the Commission promulgated regulations that, *inter alia*, addressed the new category of permissible electioneering communications financed with corporate or union treasury funds. Consistent with the statutory requirements for unincorporated entities, the Commission's regulations provide that when a corporation finances an electioneering communication with funds from a "segregated bank account established to pay for electioneering communications," the corporation paying for the communication need only identify those individuals who contributed $1,000 or more to the account itself. 11 C.F.R. § 104.20(c)(7). In the absence of a segregated account, the Commission's regulations require that a corporation must report "the name and address of each person who made a donation aggregating $1,000 or more to the corporation . . . *for the purpose of furthering electioneering communications*." 11 C.F.R. § 104.20(c)(9) (emphasis added).

A district court recently found section 104.20(c)(9), the regulation specific to corporations and unions that do not employ a segregated account to finance

electioneering communications, to be invalid and its decision is currently the subject of a separate appeal in this Court. *Van Hollen v. FEC*, No. 11-0766, __ F. Supp. 3d __, 2014 WL 6657240 (D.D.C. Nov. 25, 2014), *appeal docketed*, No. 15-5016 (D.C. Cir. Jan. 22, 2015). The court in *Van Hollen* held that the provision fails arbitrary and capricious review under the Administrative Procedure Act ("APA") and concluded, *inter alia*, that the rule could not be justified as "fairly balanc[ing] the need for disclosure against sensitive First Amendment and privacy concerns," because "those arguments have been foreclosed by the Supreme Court." *Id.* at *24. *Van Hollen* did not alter the portions of the statute and Commission regulations permitting corporations to finance electioneering communications and limit the extent of donor disclosure by paying for their electioneering communications from a segregated electioneering-communications account. *See* 52 U.S.C. § 30104(f)(2)(E); 11 C.F.R. 104.20(c)(7).

In 2010, the Supreme Court revisited the constitutionality of prohibitions on using corporate and union general treasury funds to finance independent expenditures and electioneering communications, as well as the statutory disclosure requirements for electioneering communications. Citizens United, a nonprofit corporation, sought to distribute a film about then-Senator Hillary Clinton, who at the time was a candidate in the Democratic Party's 2008

Presidential primary elections. 558 U.S. at 319-20. Citizens United also sought to distribute several ads promoting the film. *Id.* at 320.

The Court found that Citizens United's movie was essentially "a feature-length negative advertisement that urge[d] viewers to vote against Senator Clinton for President." *Id.* at 325. Applying the "objective" "functional-equivalent test" articulated in the controlling opinion in *Wisconsin Right to Life*, the Court concluded that "there [was] no reasonable interpretation of [the movie] other than as an appeal to vote against Senator Clinton," and it was accordingly subject to the challenged financing prohibitions. *Id.* at 326. The court then invalidated FECA's prohibition on the use of corporate and union general treasury funds to finance independent expenditures, as well as BCRA's similar prohibition on the use of such funds to finance electioneering communications. 558 U.S. at 365-66.

In a portion of the opinion that eight Justices joined, however, the Court reaffirmed the part of *McConnell* that upheld BCRA's electioneering communication disclosure requirements on their face, and further upheld those disclosure requirements specifically as applied to both Citizens United's movie and its proposed advertisements. 558 U.S. at 366-71. Citizens United had sought to "import . . . into BCRA's disclosure requirements" a distinction similar to *Wisconsin Right to Life*'s limit on permissible financing restrictions, contending that "the disclosure requirements . . . must be confined to speech that is the

functional equivalent of express advocacy." *Id.* at 368-69. Because "disclosure is a less restrictive alternative to more comprehensive regulations of speech," the Court "reject[ed]" that contention. *Id.* at 369 (citing *Massachusetts Citizens for Life*, 479 U.S. at 262).

II. INDEPENDENCE INSTITUTE'S CHALLENGE TO BCRA'S ELECTIONEERING COMMUNICATION PROVISIONS

Independence Institute is a nonprofit corporation that is organized and claiming exemption from income taxes under 26 U.S.C. §§ 501(c)(3), and that "'conducts research and educates the public on various aspects of public policy — including taxation, education policy, health care, and justice policy." (J.A. 38-39.)

On September 2, 2014, Independence Institute filed a complaint seeking declaratory and injunctive relief regarding the scope of BCRA's definition of "electioneering communication" and the disclosure requirements attendant to such communications. (J.A. 32.) The organization alleged an intent to finance and publicly distribute a radio advertisement that clearly mentioned former Colorado Senator Mark Udall, who sought reelection in the November 2014 general election, within 60 days of that election. (J.A. 38-39.) Its planned advertisement would have constituted an "electioneering communication" and triggered the statutory disclosure requirements for such communications if aired during those two months before the election. (J.A. 39.) Independence Institute wanted to solicit contributions of over $1,000 from individual donors specifically to finance this

advertisement, but preferred not to publicly disclose the identity of any of its donors. (J.A. 13, 29-30, 31 (Compl. ¶¶ 36-38, 118, 128).)

Independence Institute also applied for a special judicial-review provision that provides for a three-judge court to decide substantial constitutional challenges to BCRA, and for such decisions to be directly appealable to the Supreme Court. 52 U.S.C. § 30110 note; *Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1338-39 (D.C. Cir. 1975). And it also filed a motion for a preliminary injunction. (J.A. 2.) Independence Institute made these initial filings just a few days before the electioneering-communication period was to begin.

Within nine days after Independence Institute filed its complaint and other requests in the district court, the parties agreed to an expedited briefing schedule and, at the court's suggestion, to consolidate briefing on the preliminary-injunction motion with merits briefing. (J.A. 3-4, 34-35, 39-40.) The parties further stipulated, and the district court ordered, that "'this case presents an as-applied challenge to 52 U.S.C. § 30104(f)(1)-(2) based upon the content of the Independence Institute's intended communication, and not the possibility that its donors will be subject to threats, harassment, or reprisals.'" (J.A. 34, 40.)

Independence Institute argued that its proposed advertisement "is genuine issue speech" and that the statutory definition of "electioneering communication" is unconstitutionally overbroad because it is not limited to communications

containing "an appeal to vote for or against a specific candidate." (J.A. 29 (Compl. ¶¶ 113, 116).) It further argued that BCRA's disclosure requirements for electioneering communications could not constitutionally be applied to its proposed advertisement based on its contention that for groups that "do not have 'the major purpose of political activity, . . . only communications that 'expressly advocate the election or defeat of a clearly identified candidate' are subject to disclosure." (J.A. 30 (Compl. ¶ 122).)

The Commission opposed Independence Institute's application for a three-judge court and its claims on the merits. On October 6, 2015, when the election was still approximately one month away, the district court issued its order and 22-page opinion. The district court agreed with the Commission that this case is "squarely foreclosed" by "the Supreme Court's clear instructions in *Citizens United*" and rejected all of Independence Institute's attempts to limit or distinguish that decision. (J.A. 42, 44-52, 57.)

First, the court explained the Supreme Court's holding in *Citizens United* — that the statutory disclosure requirements for electioneering communications could constitutionally be applied to communications that lack express advocacy or "the functional equivalent thereof" — and rejected Independence Institute's attempt to dismiss that holding as non-binding "dicta." (J.A. 43-47.)

Second, the court rejected Independence Institute's attempt to limit *Citizens United*'s disclosure holding to nonprofit entities organized under section 501(c)(3) of the Internal Revenue Code. (J.A. 47-48.) Independence Institute's "effort to draw a line between different types of nonprofit organizations" lacked any support in *Citizens United* or any other "authority [holding] that such a distinction would be required by the First Amendment." (J.A. 48.)

Third, the court rejected as irrelevant Independence Institute's emphasis on the lack of express candidate advocacy (or the functional equivalent of such advocacy) in its proposed advertisement, as well as Independence Institute's emphasis on the commercial nature of the advertisements at issue in *Citizens United*. (J.A. 48-50.) Such characteristics do not render any less controlling "the Supreme Court's clear conclusion: whether speech is express advocacy or issue advocacy does not affect the lawful applicability of BCRA's disclosure requirements." (J.A. 50.)

Fourth, the court rejected as "a distinction without a difference" the fact that the ads at issue in *Citizens United* "could be considered critical of then-candidate Hillary Clinton, while the advertisement in this action, *on its face*, says nothing positive or negative about a candidate for Federal office." (J.A. 50.) "[N]othing in *Citizens United* limit[ed] the disclosures holding to electioneering communications that are pejorative (or, alternatively, complimentary) on their face." (J.A. 52.)

The district court also rejected Independence Institute's attempt to relitigate a claim that BCRA's disclosure requirements are overbroad, noting that overbreadth "is fundamentally a facial claim" and that "*McConnell* resolved the overbreadth question . . . over ten years ago." (J.A. 55 & n.16.)

Finally, the Court explained why Independence Institute's purported alternative authorities "[i]n fact . . . do not indicate that" BCRA's "disclosure requirements may be applied constitutionally only to communications that contain express advocacy, or its functional equivalent." (J.A. 52.) The court found that "the other precedent [Independence Institute] seeks to enlist in its cause is either inapposite or, upon examination, actually supportive of the application of the disclosure requirements of BCRA in these circumstances." (J.A. 58.)

Because Independence Institute's claims "can be distilled to the application of the Supreme Court's clear instructions in *Citizens United*," and such claims seek "the same relief that has already been foreclosed by *Citizens United*," the district court denied the application for a three-judge court and entered judgment for the Commission. (J.A. 36, 42-43, 57-58.)

Independence Institute timely appealed that judgment. The November 2014 election has now passed, Udall is no longer a candidate, and Independence Institute's proposed advertisement would not qualify as an electioneering communication if aired at this time.

SUMMARY OF ARGUMENT

The decision below is correct and should be affirmed in its entirety. The Supreme Court has twice upheld BCRA's disclosure requirements for electioneering communications and explicitly rejected the argument, which Independence Institute seeks to relitigate here, that such disclosure requirements must be limited to communications that are express candidate advocacy or its equivalent. As the court below carefully and accurately explained, the Supreme Court's unambiguous *McConnell* and *Citizens United* decisions foreclose this constitutional challenge. Disclosure of the funders of preelection broadcasts referencing federal candidates furthers the important government interest in providing information to voters, enabling them to make informed choices in the political marketplace. Independence Institute's assorted attempts to limit, disregard, or distinguish the Supreme Court's decisions lack any merit, as the district court also thoroughly and correctly explained, and Independence Institute's proffered alternative authorities are inapposite or actually supportive of applying the challenged disclosure requirements here.

Independence Institute's appellate brief confirms the propriety of the decision below, while revealing additional flaws of its claims. It completely ignores the statutory right that it and other organizations have to limit the scope of disclosure for their electioneering communications by financing such

communications from a segregated bank account. And its erroneous assertion (Appellant's Br. 52) that the decision below somehow precludes future as-applied challenges to BCRA's disclosure requirements simply ignores the availability of as-applied challenges based on a reasonable probability of threats, harassment, or reprisals of an organization's members — claims that Independence Institute expressly waived in this case.

Independence Institute is currently free to air the only advertisement at issue here without triggering the temporally limited disclosure requirements it challenges. It nevertheless continues to hang this entire constitutional challenge on this specific ad, thereby failing to meet its burden of establishing that it qualifies for an exception to mootness because it will be subject to the same requirements again.

Independence Institute's latest effort to revive this stale constitutional challenge — by emphasizing the recent district court decision in *Van Hollen v. FEC* — is also unavailing. The court in *Van Hollen* invalidated section 104.20(c)(9) of the Commission's regulations, which provided that corporations and unions that do not employ a segregated account to finance electioneering communications need only disclose donors who donated at least $1,000 "for the purpose of furthering electioneering communications." That district court decision concerning an FEC regulation has no bearing on this *statutory* challenge, which is

foreclosed by Supreme Court precedent. Section 104.20(c)(9) did not even exist when the Supreme Court upheld the statutory disclosure requirements for electioneering communications on their face in *McConnell*. And the regulation was not mentioned by the eight Justices in *Citizens United* who similarly upheld the challenged statutory requirements and rejected a different party's attempt to limit disclosure to express candidate advocacy and its functional equivalent.

The parties and the district court all agree that a request for a three-judge court is properly denied (and summary judgment is properly granted) where the constitutional claims are obviously without merit or their unsoundness is clear from previous Supreme Court decisions. The district court correctly concluded that this is just such a case and its denial of the application for a three-judge court and judgment in favor of the Commission should be affirmed.

STANDARDS OF REVIEW

This Court reviews the district court's summary judgment ruling *de novo*. *Judicial Watch, Inc. v. United States Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013). And it reviews the denial of the request for a three-judge court by evaluating whether "the questions raised were substantial." *Feinberg*, 522 F.2d at 1339.

ARGUMENT

I. THE DISTRICT COURT FOLLOWED THE SUPREME COURT'S APPLICATION OF INTERMEDIATE SCRUTINY TO THE CHALLENGED DISCLOSURE PROVISIONS

The court below correctly recognized that the disclosure provisions at issue here are subject to "'exacting scrutiny,'" which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." (J.A. 55-56 (quoting *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66)).) Independence Institute concedes that the statutory provisions at issue here impose disclosure requirements, not financing restrictions, and that exacting scrutiny is the applicable standard. (Appellant's Br. 27.) Disclosure provisions "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201). As the court below correctly noted, the Supreme Court has thus consistently applied exacting scrutiny to disclosure requirements, including in *Buckley* and, in *McConnell* and *Citizens United*, to the exact same disclosure provisions at issue here. (J.A. 56-57.)

II. THE COURT BELOW PROPERLY ACCEPTED THE SUPREME COURT'S CONCLUSION THAT THE ELECTIONEERING-COMMUNICATIONS DISCLOSURE PROVISION FURTHERS THE IMPORTANT INTEREST IN PROVIDING THE ELECTORATE WITH INFORMATION

The district court properly reiterated the Supreme Court's repeated general conclusion that "'important state interests'" sufficient to uphold disclosure laws include "'providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.'" (J.A. 53 (quoting *McConnell*'s discussion of *Buckley*).)[3] The district court also correctly recognized the Supreme Court's conclusion in *Citizens United* that BCRA's disclosure requirements for electioneering communications continue to serve the important informational interest, even after the Court had struck down the electioneering communications financing provisions in the same decision. (J.A. 49 (discussing *Citizens United*, 558 U.S. at 369).) The Supreme Court in *Citizens United* declined to consider "'other asserted interests'" because "'the informational interest alone [wa]s sufficient to justify application'" of the disclosure provisions in that case. (J.A. 49 (quoting *Citizens United*, 558 U.S. at 369).)

[3] Independence Institute's heading contending generally that "[u]nder *Buckley*'s exacting scrutiny, the government's only legitimate interest is informational" is thus incorrect. (Appellant's Br. 30 (capitalization and bolding removed).)

III. THE DISTRICT COURT ACCURATELY DETERMINED THAT SUPREME COURT PRECEDENT DICTATES UPHOLDING BCRA'S DISCLOSURE REQUIREMENTS AS APPLIED TO ADVERTISEMENTS THAT ARE NOT FUNCTIONALLY EQUIVALENT TO EXPRESS CANDIDATE ADVOCACY

A. The Disclosure Requirements Are Substantially Related to the Informational Interest in This Context

As the district court here emphasized, *McConnell* held, in the specific context of the statutory disclosure requirements for electioneering communications, that the "important state interests" discussed in *Buckley* "apply in full to BCRA" and *Buckley* "'amply supports application of [those] disclosure requirements to the *entire range* of 'electioneering communications.'" (J.A. 53 (quoting *McConnell*, 540 U.S. at 196 (emphasis added by district court)).) In that portion of the decision, eight Justices agreed that requiring disclosure for *all* electioneering communications serves "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 196-97 (citation and internal quotation marks omitted).

The Court acknowledged that whereas FECA had "limited the coverage of [its] disclosure requirement to communications expressly advocating the election or defeat of particular candidates," BCRA's definition of "'electioneering communication' is not so limited." 540 U.S. at 189. As the court below explained (J.A. at 53-54), *McConnell* clarified that *Buckley* did not establish a

"constitutionally mandated line" between express candidate advocacy and issue advocacy and *Buckley*'s "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 540 U.S. at 190. The Court found that BCRA's precise and objective definition of "electioneering communication" 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." *McConnell*, 540 U.S. at 194. Because the elements of the "electioneering communication" 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. *Id.* (citation omitted).[4]

More recently, in *Citizens United*, eight Justices again agreed that BCRA's electioneering-communication definition is constitutional in the disclosure context,

[4] To the extent Independence Institute attempts (Appellant's Br. at 56-57) to revisit whether the statutory definition of electioneering communication is "overbroad," "*McConnell* resolved the overbreadth question with regard to BCRA section 201 over ten years ago." (J.A. 55). Indeed, as the district court clarified, although Independence Institute has characterized its overbreadth claim as an "as-applied" challenge; in fact, overbreadth "is fundamentally a facial claim." (J.A. 55 & n.16.) The court below properly rejected Independence Institute's attempt to relitigate a facial constitutional challenge already decided by the Supreme Court in *McConnell*, and reaffirmed in *Citizens United*. *McConnell*, 540 U.S. at 190-94; *Citizens United*, 558 U.S. at 368 ("[W]e now adhere to [*McConnell*] as it pertains to [BCRA's] disclosure provisions.").

and held that "the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. The Court explicitly "reject[ed] th[e] contention" that the statutory disclosure requirements for electioneering communications "must be confined to speech that is the functional equivalent of express advocacy." *Id.* at 368-69.

The district court correctly held that the challenge here is "'clearly foreclosed by Supreme Court precedent,'" because Independence Institute seeks to impose the same limitation on BCRA's disclosure requirements that the Supreme Court has explicitly rejected. (J.A. 42.) Independence Institute has sometimes referred to the purported extent of communications it views as subject to disclosure as "express advocacy or the functional equivalent thereof," (*e.g.*, J.A. 39 (summarizing the organization's contentions)), and at other times repackaged that argument by referring to communications that are "unambiguously campaign related," (*e.g.*, Appellant's Br. 10, 11, 17). Whichever label Independence Institute chooses for the erroneous disclosure standard it urges, the Supreme Court has rejected the argument.[5]

[5] Independence Institute's amici similarly challenge the constitutionality of the scope of BCRA's disclosure provision on the basis of the identical arguments rejected in *Citizens United*. Amici surprisingly include Citizens United itself, for whom the claim would be precluded as a matter of res judicata if brought as a party. *Compare* Br. Amicus Curiae of Citizens United, *et al.* in Supp. of Appellant and Reversal 9-13 (arguing that BCRA's disclosure provision unconstitutionally

Citizens United considered the same statutory disclosure requirements in a context directly analogous to the circumstances here. Like the advertisement at issue here, the ads at issue in *Citizens United* mentioned the name of a federal candidate — then-Senator Hillary Clinton — but "did not advocate Senator Clinton's election or defeat." *Citizens United*, 530 F. Supp. 2d at 280; *see id.* at 276 nn. 2-4 (quoting scripts of Citizens United's proposed ads). Indeed, Citizens United itself emphasized the lack of any express or implicit candidate advocacy in its movie ads and thus argued in favor of a standard limiting disclosure requirements to ads containing such advocacy.[6]

In any event, the court below correctly rejected Independence Institutes's attempts to distinguish *Citizens United* by comparing the specific content of its proposed advertisement with the ads at issue in *Citizens United*. (J.A. 48-52.)

---

requires disclosure for ads that are not equivalent to express candidate advocacy), *with Citizens United*, 558 U.S. at 368-69 (rejecting same argument).

[6] *See, e.g.*, Reply Br. for Appellant 25, *Citizens United v. FEC*, No. 08-205 (S. Ct. Mar. 17, 2009), *available at* http://www.fec.gov/law/litigation/cu_sc08_cu_reply.pdf (describing Citizens United's advertisements, one of which "informs viewers that, '[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.' The other humorously presents a 'kind word about Hillary Clinton' from conservative commentator Ann Coulter — '[s]he looks good in a pant suit' — and then describes Hillary as 'a movie about everything else.'"; and observing that "[t]he advertisements do not mention an election, Senator Clinton's candidacy for office, her views on political issues — or anything else remotely related to the electoral process").

Independence Institute insists that its advertisement is "genuine issue speech" that "carries none of the *indicia* of speech which functions as express advocacy." (Appellant's Br. 11, 37 n.12.) But those characteristics are beside the point.

There is no dispute that the proposed ad — when it was intended to be broadcast — would have met the objective statutory definition of an electioneering communication, a definition the Supreme Court has upheld. *See Citizens United*, 558 U.S. at 321 (quoting definition of "electioneering communication"); *see also supra* pp. 22-24 & n.4. Whether the ad also "functions as express advocacy" is irrelevant for determining the constitutional applicability of BCRA's disclosure requirements, because, as the district court explained, the Supreme Court expressly "refused to draw a line between express advocacy and issue advocacy in the BCRA disclosure context." (J.A. 48.)

For the same reasons, the district court correctly rejected as irrelevant Independence Institute's arguments about the tone of its proposed advertisement. As the court explained, the language in *Citizens United* "does not suggest that the pejorative nature of [Citizens United's] advertisements in any way was important to the conclusion with respect to disclosures." (J.A. 50.) Indeed, "the text of the opinion does not even hint that" the Supreme Court's disclosure holding was limited to facially pejorative (or complimentary) advertisements. (J.A. 51-52.) Requiring a determination of whether a particular communication is pejorative

would add an entire additional level of inquiry to the simpler statutory definition of "electioneering communication" that the Supreme Court had embraced as "easily understood and objectively determinable." *McConnell*, 540 U.S. at 194.

B. *Citizens United*'s Holding Is Not Limited to Ads for Commercial Transactions

Independence Institute's arguments (Appellant's Br. 42-43) about the commercial nature of Citizens United's movie advertisements are just as misguided. The district court correctly rejected Independence Institute's mischaracterization of the Supreme Court's reference to the commercial nature of Citizens United's movie ads, which "excised [the reference] from its context." (J.A. 49.)

Contrary to Independence Institute's arguments, the Supreme Court neither "*relied upon* the commercial nature of the *Hillary* advertisements," nor otherwise implied that such communications could "be more heavily regulated than pure issue advocacy." (Appellant's Br. 42-43 (emphasis added).) Instead, the Court mentioned the commercial nature of Citizens United's ads to explain its rejection of an additional, separate argument that the government lacked any informational interest in requiring disclosure of the financing of such commercial advertisements. *Citizens United*, 558 U.S. at 369 (explaining — separate from the response to Citizen United's functional equivalent argument — that Citizens United "also"

disputes application to its ads "which only attempt to persuade viewers to see the film").

The Court concluded 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." *Id.* The district court correctly concluded that such language, "[i]n no sense" stated or even implied that Citizens United's movie advertisements "deserved only the lesser First Amendment protections of commercial speech." (J.A. 49-50.)

Despite the acknowledgment that Citizens United's ads may have "only attempt[ed] to persuade viewers to see the film" about Senator Clinton, the Court found that this was not a basis for invalidating BCRA's disclosure requirements as applied to that nonprofit organization. *Citizens United*, 558 U.S. at 369. The Court held that the government's "informational interest alone [wa]s sufficient" to uphold BCRA's disclosure requirements as applied to Citizens United's movie ads. *Id.*

C. There Is an Important Interest in Disclosure Related to Advertisements That Reference Both Candidates and Legislation

The government's interest in ensuring that the public can learn who is speaking about a candidate for United States Senate shortly before an election in an ad discussing a piece of proposed legislation, like the ad Independence Institute sought to broadcast last fall, is at least as "sufficiently important" as the government's interest in ensuring the public can know who is speaking about a

candidate in an ad that "only pertain[s] to a commercial transaction." *Citizens United*, 558 U.S. at 366, 369. Likewise, if disclosure of a commercial ad that "only attempt[ed] to persuade viewers to see [a] film" about a candidate was substantially related to the government's informational interest in *Citizens United*, *id.*at 369, then disclosure of Independence Institute's proposed ad must also be substantially related to the government's informational interest here. In contrast, Independence Institute's proposed broadcast, during the period shortly before a federal election, of an advertisement that referred to a federal candidate, "while concealing" the sources of financing of that advertisement from the public would not have "reinforce[d]" its First Amendment rights, but would have compromised "the competing First Amendment interests" of the electorate. *McConnell*, 540 U.S. at 196-97, 201 (internal quotation marks and citation omitted).[7]

[7] BCRA's disclosure requirements would have enabled the public to evaluate Independence Institute's pre-election message. There has been public interest in Independence Institute's funding even outside the electioneering context, confirming that the public considers funding sources to evaluate the messages it receives. *See* Frank Smyth, *The Times Has Finally (Quietly) Outed an NRA-Funded "Independent" Scholar*, The Progressive, (Apr. 23, 2014), http://www.progressive.org/news/2014/04/187663/times-has-finally-quietly-outed-nra-funded-%E2%80%9Cindependent%E2%80%9D-scholar (last visited May 6, 2015) (questioning the independence of an Independence Institute scholar that has testified before Congress and written editorials on gun policy issues while "he and his Independence Institute have received over $1.42 million including about $175,000 a year over eight years from the NRA"); Eli Stokols, *NRA Money Behind Lawsuit Challenging New Colo. Gun Control Laws*, Fox31 Denver (May, 29, 2013, 9:56 p.m.), http://kdvr.com/2013/05/29/nra-money-behind-lawsuit-challenging-new-colo-gun-control-laws/ (last visited May 6, 2015) (describing an

As the district court observed, its application of "the Supreme Court's clear instructions in *Citizens United*" is consistent with the decisions of numerous federal courts of appeals, which have likewise "determined that *Citizens United*'s language forecloses the suggestion that disclosure requirements must be limited to express advocacy and its functional equivalent." J.A. 42; *see* J.A. 46 (collecting cases); *see also, e.g.*, *Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir. 2013) (explaining that in *Citizens United*, "the Supreme Court . . . found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy'" (citation omitted)); *Real Truth About Abortion v. FEC*, 681 F. 3d 544, 551-52 (4th Cir. 2012) (citing *Citizens United*'s holding that "mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy" (citing *Citizens United*, 558 U.S. at 369)); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) (explaining that post- *Citizens United*, "the distinction between issue discussion and express

---

Independence Institute lawsuit challenging Colorado's gun control laws that "is mostly being funded . . . by . . . [t]he National Rifle Association").

advocacy has no place in First Amendment review of . . . disclosure-oriented laws"); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) (concluding that after *Citizens United*, "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable").[8] As the district court noted, the FEC identified these cases in its district court brief and Independence Institute failed to "address the fact that these opinions treat the Supreme Court's clear conclusion with respect to disclosures as binding." (J.A. 47 n.11.)

The correctness of the decision below is further underscored by its consistency with earlier Supreme Court decisions holding that the government's informational interest is sufficient to justify mandatory disclosure relating to two different forms of "pure" issue advocacy. First, the informational interest has been recognized extensively in the context of issue advocacy regarding ballot initiatives. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186, 194-99 (2010) (upholding law compelling disclosure of signatory information on referendum petitions); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999) ("*Am. Constitutional Law Found.*") (upholding requirement to disclose donations made to organizations

[8] *See also, e.g.*, *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 429-32 (E.D. Va. 2012) (explaining that "*Citizens United* 'upheld BCRA's disclosure requirements for all electioneering communications — including those that are *not* the functional equivalent of express advocacy,'" and concluding that certain communications discussing energy policy and the Affordable Care Act are subject to federal disclosure requirements for electioneering communications).

to pay ballot-initiative petition circulators); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure . . . .").

The Supreme Court has upheld ballot-related disclosure requirements notwithstanding its conclusion that ballot-initiative activity is inherently issue-focused and does not have the same corruptive potential as spending to influence candidate elections. *Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (footnote and citations omitted)). These cases further undermine Independence Institute's suggestion (*e.g.*, Appellant's Br. 27) that disclosure requirements cannot extend to "speech about an issue of public importance that lacks an unambiguous relationship to a particular campaign." On the contrary, the government's legitimate disclosure interest necessarily extends to issue speech "so that the people will be able to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32.

Second, courts are nearly unanimous in upholding mandatory disclosure of lobbying expenditures on the basis of the government's interest in informing the public as to who is attempting to sway the resolution of public issues and how they are attempting to do so. The Court in *Citizens United* supported its disclosure holding in part by embracing its earlier approval, in *United States v. Harriss*, 347

U.S. 612, 625 (1954), of registration and disclosure requirements for lobbyists that "'provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.'" *Citizens United*, 588 U.S. at 369 (quoting *Harriss*, 347 U.S. at 625); *see also, e.g.*, *Harriss*, 347 U.S. at 625 ("[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures."); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009) (rejecting a "constitutional challenge to Congress' latest effort to ensure greater transparency . . . [b]ecause nothing has transpired [since *Harriss*] to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue").[9]

Lobbying typically does not involve candidate campaigns; it is issue-oriented political activity separately protected by the First Amendment. As the Supreme Court thus expressly recognized in *Citizens United*, decisions upholding disclosure requirements in the lobbying context further establish that the government's informational interest extends beyond speech about candidate

[9] *See also Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (upholding state lobbyist disclosure statutes, which help citizens "apprais[e] the integrity and performance of officeholders and candidates, in view of the pressures they face"); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 512 (8th Cir. 1985) (per curiam) (quoting *Harriss*).

elections and encompasses activity that attempts to sway legislators on issues, just as Independence Institute claims it wished to do here.

McConnell, *Citizens United*, and the other decisions cited above demonstrate that the district court correctly rejected this attempt to relitigate BCRA's disclosure requirements.

D. *Citizens United* Is Binding Precedent

The district court correctly held that *Citizens United*'s disclosure holding is "not dicta but a holding . . . that ultimately encompasses the facts in this case." (J.A. 46.) Although Independence Institute presses its "dicta" argument in this Court only in passing, it does criticize the district court for supposedly dismissing that argument "out of hand" (Appellant's Br. 41). The district court did no such thing. On the contrary, it explained in detail why the Supreme Court's "refusal [in *Citizens United*] to import the express advocacy limitation to the disclosure context was not dicta" (J.A. 46), even after observing that Independence Institute appeared to abandon its "dicta" argument in its merits reply brief (J.A. 44 n.8).

In particular, the court below correctly explained that even the single, out-of-circuit opinion, upon which Independence Institute relied for its "dicta" argument, "ultimately conclude[d]" that the Supreme Court's "discussion of disclosures in *Citizens United is binding with respect to BCRA section 201*." J.A. 44 (discussing *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014); emphasis

added); *see Barland*, 751 F.3d at 836 (acknowledging Seventh Circuit's earlier holding "on the strength of this part of *Citizens United* . . . that the 'distinction between express advocacy and issue discussion does not apply in the disclosure context'" (quoting *Madigan*, 697 F.3d at 484)).

As the district court also explained, the Seventh Circuit panel in *Barland* distinguished BCRA's constitutionally permissible disclosure requirements for federal electioneering communications from the state disclosure scheme challenged in that case and "agree[d] that the 'express-advocacy limitation' does not apply to the disclosure provisions challenged in this action." J.A. 45 n.9; *see Barland*, 751 F.3d at 836 (describing BCRA's "onetime, event-driven disclosure rule for federal electioneering communications" as "a far more modest disclosure requirement" than other campaign-finance reporting regimes and recognizing that in the "specific context" of BCRA's electioneering-communications disclosure requirements, "the [Supreme] Court declined to apply the express-advocacy limiting principle").

The district court's clarification of what *Barland* actually held was more than sufficient to support its rejection of Independence Institute's "dicta" argument and its corresponding determination that "the Supreme Court's conclusion in *Citizens United* with respect to disclosures under BCRA section 201 is binding precedent." (J.A. 47.) Indeed, as the district court emphasized, whereas

"numerous other Circuit courts" have held that *Citizens United*'s disclosure holding "forecloses the suggestion that disclosure requirements must be limited to express advocacy and its functional equivalent," Independence Institute has failed to identify a single "Court of Appeals decision that has reached a contrary conclusion." J.A. 46-47; *see supra* pp. 30-31.

The district court went even further, however, and identified the flawed factual premise underlying the *Barland* panel's characterization of *Citizens United*'s disclosure holding as "dicta." (J.A. 45-46.) The court explained (J.A. 45) that the *Barland* panel's "dicta" characterization was based on a mistaken assumption that the Supreme Court in *Citizens United* "had already concluded that *Hillary* [the movie] *and the ads promoting it* were the equivalent of express advocacy." *Barland*, 751 F.3d at 836 (emphasis added). "But," as the district court clarified, "this statement is not supported by the Supreme Court's own language as it relates to the *Hillary* advertisements." (J.A. 45.) In fact, as explained above, the Supreme Court described Citizens United's promotional ads as only related to the commercial transaction of movie promotion. 558 U.S. at 369. The district court's critique of Independence Institute's failure to "even attempt to indicate where in *Citizens United* the Supreme Court held that the advertisements were the functional equivalent of express advocacy" is equally applicable to its appellate brief. (J.A. 45-46.) Indeed, contrary to Independence

Institute's argument (Appellant's Br. 41), "the very wording of [Citizens United's] ads" *dis*proves its point. *See id.* at 43 (arguing that Independence Institute's proposed advertisement is not campaign-related speech because "[i]t never mentions any election," while ignoring that Citizens United's movie ads also did not mention any election); *supra* n.6.

Far from dismissing Independence Institute's "dicta" argument "out of hand," the district court thoroughly and correctly explained why that argument is both legally baseless and factually flawed.

E. The Informational Interest Does Not Vary According to an Advertiser's Tax Status

The court below also thoroughly and correctly rejected Independence Institutes's attempt to distinguish *Citizens United* based on the different subsections of the tax code under which it and Citizens United, respectively, are organized. (J.A. 47-48.)

First, the court explained that Independence Institute's tax-status argument lacks any support in *Citizens United*'s disclosure analysis. As Independence Institute itself acknowledges (Appellant's Br. 44 n.13), the majority opinion did not even identify the particular section of the tax code under which Citizens United was organized; it simply described the group as "a nonprofit corporation," *Citizens United* 558 U.S. at 319, a broad category that includes Independence Institute as well. As the district court explained, "nothing in *Citizens United*'s discussion of

disclosures of contributions cabins the Supreme Court's holding to certain types of organizations" and Independence Institute has failed to cite any "authority that such a distinction would be required by the First Amendment." (J.A. 47-48.)

It is unsurprising that the Court did not exempt a whole category of nonprofits from BCRA's disclosure requirements; such a categorical exemption would be inconsistent with the Court's broad holding regarding the importance of the public obtaining information about who is funding pre-election advertising. *Citizens United*, 558 U.S. at 369. The public's need to know who financed and distributed an electioneering communication is not altered based on which subsection of the Internal Revenue Code that entity relies on for its tax exemption. As the Seventh Circuit Court of Appeals has observed, "the voting 'public has an interest in knowing who is speaking about a candidate shortly before an election,' whether that speaker is a political party, a nonprofit advocacy group, a for-profit corporation, a labor union, or an individual citizen." *Madigan*, 697 F.3d at 490 (quoting *Citizens United*, 558 U.S. at 369).[10]

[10] Indeed, tax status is generally not dispositive of an organization's compliance with other federal laws. *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) (holding nonprofit tax status does not exempt organization from antitrust laws); *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473, 478 (1st Cir. 2005) (explaining that the Federal Trade Commission "determines, without reference to a target organization's tax-exempt status, whether the organization *in fact* operates as a nonprofit and is therefore beyond its jurisdiction"); *In re Grand Jury Proceedings*, 633 F.2d 754, 757 (9th Cir.1980) (holding that "treatment for tax purposes is largely irrelevant to

Second, the district court explained that Independence Institute's attempt to distinguish the disclosure obligations of nonprofits organized under section 501(c)(3) of the Internal Revenue Code from nonprofits organized under section 501(c)(4) "has no basis," because "[n]either type of nonprofit organization is obligated by federal tax law to disclose donor information." (J.A. 47 (citing 26 U.S.C. § 6104(d)(3)(A)).) In any event, and as the Ninth Circuit recently explained, even if Congress limited the disclosures of such entities under the Internal Revenue Code, federal tax-law provisions "do not broadly prohibit other government entities from seeking that information directly from the organization. Nor do they create a pervasive scheme of privacy protections. Rather, [the Internal Revenue Code provisions] represent exceptions to a general rule of disclosure." *Ctr. for Competitive Politics v. Harris*, No. 14-15978, __ F.3d __, 2015 WL 1948168, at *8 (9th Cir. May 1, 2015) (declining to preliminarily enjoin enforcement of a state law imposing certain disclosure requirements on charitable organizations).

Independence Institute's alternative argument — that *Citizens United* is distinguishable because Citizens United's "*affiliated entities* regularly disclosed their donors" (Appellant's Br. 44 (emphasis added)) — similarly fails to demonstrate any constitutional basis for distinguishing between the disclosure

---

the determination of whether it is an organization separate and apart from its creator").

obligations under BCRA of different types of nonprofits. As the district court clarified, the Supreme Court mentioned such donor disclosure in *Citizens United* only to address the availability of an as-applied exemption related to harassment that Independence Institute has stipulated is not at issue here. (J.A. 47-48.)

Third, the district court highlighted the flaws of Independence Institute's argument that federal campaign finance rules must be interpreted in a manner that *assumes* organizations' compliance with their separate, tax-law obligations. (J.A. 48 n.12.) Indeed, as both the district court and Independence Institute observe, the Commission previously promulgated a regulation that did precisely what Independence Institute advocates here (Appellant's Br. 45) — exempting section 501(c)(3) organizations from BCRA's disclosure requirements — and the regulation was invalidated, *inter alia*, because of "potential problems that might emerge by effectively delegating the enforcement of election law to the IRS." (J.A. 48 n.12 (citing *Shays v. FEC*, 337 F. Supp. 2d 28, 128 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005)).)

In addition to renewing these flawed arguments, Independence Institute asks this Court to consider "the fact that what [it and Citizens United] actually do is vastly different." (Appellant's Br. 46.) This suggestion that courts should subjectively evaluate an organization's broader activities to determine whether BCRA's event-driven disclosure requirements may apply conflicts with

McConnell's embrace of BCRA's clear and objective definition of "electioneering communication." *See supra* p. 7.

IV. AUTHORITIES REGARDING VERY DIFFERENT PROVISIONS SUCH AS FINANCING RESTRICTIONS AND IN-PERSON LEAFLETTING ARE INAPPOSITE

As it did in the proceedings below, Independence Institute (and its amici) insist that court decisions concerning entirely different provisions, including laws that *prohibited* certain speech, are more instructive than either of the two Supreme Court decisions upholding the precise statute at issue here and rejecting the exact arguments Independence Institute advocates in this case. Such arguments are just as unsound now as they were in the proceedings below, and the district court was correct to reject them.

In particular, the district court correctly held that Independence Institute's reliance on *Buckley*'s distinction between express advocacy and issue advocacy "is unavailing." (J.A. 53.) Not only does Independence Institute continue to ignore that the *Buckley* Court distinguished between such forms of advocacy "to avoid problems of vagueness and overbreadth" (J.A. 53 (quoting *McConnell*, 540 U.S. at 191-92)), it discusses *Buckley* and lower court decisions citing it as if they exist in a vacuum (Appellant's Br. 29-33), without even acknowledging the Supreme Court's more recent decisions upholding the provisions actually challenged here.

The district court also correctly rejected Independence Institute's misleading reliance on *Wisconsin Right to Life*, in which the Court narrowed the permissible scope of BCRA's former *prohibition* on certain electioneering communications, but did not at all address BCRA's *disclosure* requirements. (*Compare* J.A. 57 ("Plaintiff's attempt to apply the reasoning of [*Wisconsin Right to Life*] to *disclosure requirements* fails."), *with* Appellant's Br. 35-37 & n.12 (invoking the constitutional analysis in *Wisconsin Right to Life*).) This argument that the court should apply *Wisconsin Right to Life*'s functional equivalent of express advocacy standard to BCRA's disclosure requirements "is precisely the argument rejected in *Citizens United*." (J.A. 57.)

The court also correctly declined Independence Institute's invitation to draw inferences about the constitutionality of BCRA's disclosure requirements from principles articulated in this Court's 27-year-old analysis of a dramatically different (and far broader) disclosure provision that has since been repealed. (J.A. 56 n.17.) This Court's 1975 *Buckley* decision upheld a range of disclosure requirements, while invalidating a broad, catch-all provision on overbreadth and vagueness grounds. *Buckley v. Valeo*, 519 F.2d 821, 874-78 (D.C. Cir. 1975) (en banc). The catch-all provision required any group that "commits any act directed to the public for the purpose of influencing the outcome of an election . . . [to] file reports with the Commission as if such [group] were a political committee."

Buckley, 519 F.2d at 869-70 (quoting former 2 U.S.C. § 437a). Indeed, the breadth of former section 437a was central to this Court's analysis, which "emphasize[d] that [its] holding on statutory vagueness and overbreadth rests on the peculiar context of § 437a." *Id.* at 878 n.142. The district court correctly concluded that section 437a "bears no resemblance to the disclosure requirements in BCRA section 201 and sheds no light on the Court's consideration of them." (J.A. at 56 n.17.)

Finally, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), on which amicus curiae Citizens United and others rely (Br. Amicus Curiae of Citizens United, *et al.* in Supp. of Appellant and Reversal 8-14), is equally inapposite. *McIntyre* concerned a state law requiring in-person identification of pamphlet distributors and was decided long before both Congress's enactment of BCRA and the Supreme Court's two decisions upholding its disclosure requirements. The Court's earlier invalidation of an entirely distinct state law plainly does not supersede its more recent holdings on the precise issue here. Indeed, the *McIntyre* Court distinguished the "anonymous campaign literature" at issue there from the financial disclosures required by FECA. *McIntyre*, 514 U.S. at 353. And the Court expressly limited its holding to "leaflets of the kind Mrs. McIntyre distributed," disclaiming any application to "communications uttered

over the broadcasting facilities of any radio or television station." *McIntyre*, 514 U.S. at 338 n.3.

Courts have distinguished the mandatory in-person identification at issue in *McIntyre* from other provisions requiring after-the-fact filings with a government agency and held that the latter are reviewed under a lower standard. *See*, *e.g.*, *Am. Constitutional Law Found.*, 525 U.S. at 198 (striking down statute requiring petition-circulators to wear name badges but upholding statute requiring them to file affidavits identifying themselves); *Majors v. Abell*, 361 F.3d 349, 353-54 (7th Cir. 2004) (distinguishing *McIntyre*). As the Supreme Court has explained, the in-person, "one-on-one" nature of the communication was crucial to its decision in *McIntyre*. *Am. Constitutional Law Found.*, 525 U.S. at 199. *McIntyre* has no bearing here.

V. BCRA'S DISCLOSURE REQUIREMENTS DO NOT UNCONSTITUTIONALLY BURDEN INDEPENDENCE INSTITUTE

A. This Case Involves No Concern of Threats, Harassment, or Reprisals

Independence Institute claims (Appellant's Br. 52) that affirming the decision below "would close the door to any future as-applied challenges to BCRA's electioneering communication disclosure requirements." This claim is nonsense. The Supreme Court has repeatedly explained that as-applied challenges to disclosure requirements, *including the provision challenged here*, remain

available when an organization can demonstrate that disclosure would cause a "'reasonable probability'" of "'threats, harassment, or reprisals'" of its members. *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74). Independence Institute's express waiver of any such claim here (J.A. 34, 40) is no basis for expanding the scope of permissible as-applied challenges to a statutory disclosure provision, the constitutionality of which is well settled. And its assertion that the "Supreme Court has repeatedly held . . . generalized donor disclosure to be unconstitutional" (Appellant's Br. 52) similarly ignores its own waiver of the sole basis the Supreme Court has recognized for exempting an organization from campaign-finance disclosure requirements.

The Court of Appeals for the Ninth Circuit recently rejected precisely the same arguments in a constitutional challenge to state-law disclosure requirements brought by the organization and counsel that represent Independence Institute here. *See Ctr. for Competitive Politics*, 2015 WL 1948168, at *4-*8. In that case, the court of appeals held that, under the *Buckley* framework, when an organization neither claimed nor produced evidence to suggest that its donors would experience threats, harassment, or other chilling conduct as a result of its compliance with the challenged disclosure requirement, it had "not demonstrated any 'actual burden,' . . . on its or its supporters' First Amendment rights." *Id.* at *6 (citation omitted). The court further held that "contrary to CCP's contentions, no case has ever held or

implied that a disclosure requirement in and of itself constitutes First Amendment injury." *Id.*

B. Electioneering Communications Disclosure Requirements Would Not Apply to Comparable Ads Independence Institute May Wish to Run Now and It Has Not Established That It Will Be Subject to the Requirements Again

Independence Institute alleged in its complaint that its educational endeavors "[o]ccasionally . . . include advertisements that mention the officeholders," who "[s]ometimes . . . are also candidates for office." (J.A. 7 (Compl. ¶ 2).) Independence Institute has not, however, to date identified any specific intention to broadcast any electioneering communications in the future that would indicate it will be subject to the statutory disclosure requirements again. As the party claiming subject matter jurisdiction, Independence Institute bears the burden of demonstrating that jurisdiction exists, *see Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008), and it has not satisfied its burden of demonstrating that the matter is capable of repetition and thus within an exception to mootness. *Compare Wisconsin Right to Life*, 551 U.S. at 463 (holding that moot challenge to BCRA's former ban on certain electioneering communications was capable of repetition where plaintiff alleged future plans to run materially similar ads mentioning a candidate during electioneering-communication period). Its continued reliance on the supposed burden it would face "if [it] runs the ad as proposed in this case" (Appellant's Br. 51) is insufficient because, as explained *supra* p. 16, that ad is no

longer subject to the disclosure requirements challenged here. The FEC previously stated that this clearly moot case *appeared to* fall within the exception to mootness based on the above-mentioned general allegations in the complaint (J.A. 7 (Compl. ¶ 2)), while clarifying that this case can no longer rest on the particular proposed advertisement Independence Institute has described in this case. (FEC Mot. for Summ. Affirmance, at 10 n. 2. The Commission made such observations in its summary-affirmance briefing, before Independence Institute had an opportunity to update its jurisdictional claim. It has now had several chances to do so and has failed to meet its burden.

C. *Van Hollen* Is Irrelevant to Independence Institute's Claims

In *Van Hollen*, a district court recently invalidated an FEC regulatory interpretation of the scope of BCRA's disclosure requirements for electioneering communications financed by corporations, and concluded that the regulation was arbitrary and capricious under the APA. 2014 WL 6657240, at *24. Even setting aside the question of whether *Van Hollen* could retroactively apply to proposed circumstances and claims that predated the decision, Independence Institute's hyperbolic assertions that "the BCRA disclosure regime has been undone" by *Van Hollen* and that now, "*all of* [its] donors are subject to disclosure" if it "runs the ad as proposed in this case" are wrong for several reasons.

First, it is not true that "[p]ost-*Van Hollen*, if an organization runs an electioneering communication, *all* donors who gave more than $1,000 to the organization will be publicly disclosed." (Appellant's Br. 51.) Independence Institute fails to mention that BCRA and FEC regulations continue to permit corporations and others that finance electioneering communications to limit the scope of their donor disclosure by financing such communications from a segregated account and identifying only those individuals who contributed $1,000 or more to the account itself. 52 U.S.C. § 30104(f)(2)(E); 11 C.F.R. § 104.20(c)(7)(ii). *See supra* p. 6. Independence Institute's own *choice* to eschew that option does not mean that it, or any other corporation, is *statutorily required* to disclose all of its donors. (Appellant's Br. 51.)

Second, Independence Institute ignores that the Supreme Court in *McConnell* considered and upheld the *statutory* disclosure requirements for electioneering communications before the regulation struck in *Van Hollen* was promulgated and that the regulation has never applied to entities that are neither unions nor incorporated. Independence Institute similarly disregards the fact that *Citizens United* upheld the statutory provisions without relying on, let alone considering or even mentioning in passing, the regulation. Notably, that part of *Citizens United*'s holding rested on Congress's goal of addressing through the electioneering communications provisions "a system without adequate disclosure"

and to create one with "effective disclosure" that is especially "informative" given today's technology. 558 U.S. at 370. *Citizens United* itself thus belies any suggestion that the Supreme Court in that case *sub silentio* relied on a particular limiting constructions of the statute it upheld.

Third, and relatedly, Independence Institute ignores the *reason* the *Van Hollen* court invalidated the Commission's interpretive regulation. Contrary to Independence Institute's arguments here, the *Van Hollen* court agreed with the court below that "[i]n *Citizens United*, the [Supreme] Court clearly found that the disclosure requirements in [BCRA] — even those that apply to ads that are not express advocacy or its functional equivalent — do not impinge upon constitutional rights." *Van Hollen*, 2014 WL 6657240, at *24 (relying on *Citizens United* and also citing the district court opinion Independence Institute is appealing here). Regardless of whether *Van Hollen*'s vacatur of the Commission's regulation will ultimately be upheld on appeal, the decision lends no support to the premise behind Independence Institute's constitutional challenge to BCRA's statutory disclosure requirements.

Fourth, Congress's decision to impose different disclosure requirements for independent expenditures does not demonstrate that the statutory disclosure requirements for electioneering communications are unconstitutional as applied to Independence Institute or in any other circumstance. The electioneering

communications provisions were part of Congress's effort to address gaps in the preexisting disclosure regime, including the ability of the public to learn, as candidates and officeholders could, which "corporations or individuals make donations to interest groups that run 'issue ads.'" *McConnell*, 540 U.S. at 128-29 (other internal quotation marks and citations omitted). It is thus unsurprising that the electioneering communications provisions are in some respects more comprehensive than the disclosure requirements for independent expenditures. Moreover, such differences existed when the Supreme Court upheld BCRA's disclosure requirements both on their face and as applied to ads that, like Independence Institute's proposed ad, lacked campaign advocacy. In any event, and as clarified above, *see supra* 16, 46-47, Independence Institute is wrong when it asserts that "if [it] runs the ad as proposed in this case — without any candidate advocacy, express or implied — then *all* of [its] donors are subject to disclosure." (Appellant's Br. 51.) That supposed outcome not only is neither "troubling" nor "peculiar" (*id.*); given the Act's carefully tailored temporal limits, it is no longer true.

Fifth, and finally, regarding the particular facts at issue here, Independence Institute would not have avoided disclosure even *pre-Van Hollen*. Under the regulation invalidated in that case, corporations were still required to disclose donations "made for the purpose of furthering electioneering communications."

11 C.F.R. § 104.20(c)(9). Independence Institute intended "to raise funds for [its] specific advertisement, including seeking donations in amounts greater than $1,000 from individual donors." (J.A. 13 (Compl. ¶ 37).) Such donations to finance a particular electioneering communication would have been subject to disclosure even under the regulation invalidated in *Van Hollen*.

VI. A THREE-JUDGE COURT WAS CLEARLY UNWARRANTED HERE

The analysis above demonstrates that the district court correctly determined that Independence Institute's case is "squarely foreclosed" by *Citizens United*, and thus so contrary to clear Supreme Court precedent that a three-judge court was unwarranted. (J.A. 42, 57-58.)[11]

[11] Independence Institute purports (*e.g.* Appellant's Br. 13-14) to limit the scope of this appeal to whether the district court erred in declining to convene a three-judge court. At the same time, however, it "asks whether the district court erred in dismissing the Institute's constitutional claims" (*id.* at 10) and argues that "[t]he judgment of the district court should be reversed" (*id.* at 57). Moreover, its appellate brief includes extensive arguments on the merits, including arguments unrelated to whether the district court properly denied its request for a three-judge court because its claims are foreclosed by Supreme Court precedent. (*E.g. id.* at 53-56 (arguing that this Court should extend purportedly analogous principles from its own 1975 *Buckley* decision to the distinct provision challenged here).) The Commission's statement of the issues presented for review, which included the district court's judgment for the FEC, thus presents a more accurate statement of issues and the Court is permitted to work from it. *A.J. McNulty & Co., Inc. v. Sec'y of Labor*, 283 F.3d 328, 331 (D.C. Cir. 2002) (following the organization of the appellee's brief).

When Congress passed BCRA in 2002, it included a special review procedure to ensure expedited appellate review of new constitutional questions likely to arise. BCRA § 403,116 Stat. 113-14. Section 403 of BCRA, in relevant part, permits special procedures for actions brought on constitutional grounds challenging "any provision" of BCRA. BCRA § 403(a), 116 Stat. 113-14. Section 403 required that all such actions initiated before December 31, 2006, were to be filed in the United States District Court for the District of Columbia and heard by a three-judge district court convened pursuant to 28 U.S.C. § 2284. It further provides that final decisions of such three-judge courts are reviewable only by direct appeal to the Supreme Court. BCRA § 403(a)(3), 116 Stat. 114. The special procedural rules do not apply to actions filed after December 31, 2006, however, "unless the person filing such action elects such provisions to apply to the action." *Id.* § 403(d)(2), 116 Stat. 114.

The Supreme Court has no discretion to refuse adjudication on the merits in direct appeal cases. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). The Court has thus instructed that courts should employ an "overriding policy . . . of minimizing the mandatory docket of [the Supreme] Court in the interests of sound judicial administration." *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 98 (1974); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (explaining that the Court has "more than once stated that its jurisdiction under the Three-Judge Court

Act is to be narrowly construed" because any loose construction would defeat Congress's purpose of keeping Court "within the narrow confines of its appellate docket"); *accord MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam).

Independence Institute correctly acknowledges (Appellant's Br. 13-15) that three judge-courts need not be convened "if a case raises no substantial claim or justiciable controversy," and that "[c]onstitutional claims may be regarded as insubstantial if they are 'obviously without merit,' or if their 'unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" *Feinberg*, 522 F.2d at 1338-39 (citations omitted); *see Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011) (per curiam) (applying *Feinberg* to BCRA § 403(a)). Independence Institute also acknowledges that "[t]he district court correctly articulated th[is] applicable standard." (Appellant's Br. 15; J.A. 42.)

The analysis above confirms that this case is obviously without merit and plainly unsound in light of previous Supreme Court decisions. None of Independence Institute's arguments regarding the applicability of BCRA § 403(a) demonstrates otherwise.

First, while the FEC agrees that the standard for certifying questions of FECA's constitutionality under 52 U.S.C. § 30110 "is analogous" to the standard

under BCRA § 403(a) (Appellant's Br. 18), the cases Independence Institute discusses (and others) demonstrate why the district court properly declined to convene a three-judge court here. In *Wagner v. FEC*, for example, this Court explained that section 30110 requires district courts to determine whether constitutional challenges to FECA are frivolous or involve settled legal questions and then to certify to the en banc court of appeals only those questions that are not frivolous or settled. 717 F.3d 1007, 1009 (D.C. Cir. 2013) (per curiam). Indeed, failure to "'complete the functions mandated by § 30110 and described in *Wagner*,'" may result in a remand to the district court. *Holmes v. FEC*, No. 14-1243 (RMC), __ F. Supp. 3d __, 2015 WL 1778778, at *12 (D.D.C. Apr. 20, 2015) (reconsidering certification question on remand from the Court of Appeals, denying motion to certify constitutional questions, and awarding summary judgment to the FEC because plaintiffs' claims challenged settled law), *appeal docketed*, No. 15-5120 (D.C. Cir. Apr. 29, 2015); *see also Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (remanding prematurely certified case and explaining that district court must "make the requisite threshold inquiry" including whether the claims presented "have been resolved by the Supreme Court"). Alternatively, where district courts have dismissed insubstantial claims that challenged settled legal questions, courts of appeals have affirmed those decisions. *See, e.g.*, *Libertarian Nat'l Comm. v. FEC*, 930 F.Supp.2d 154, 165-67 (D.D.C.

2013) (declining to certify proposed question as framed by plaintiffs, which was frivolous and insubstantial), *summ. aff'd*, No. 13–5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014) (per curiam; unpublished); *Cao v. FEC*, 688 F. Supp. 2d 498, 535-39, 43-45, 48 (E.D. La. 2010) (declining to certify various proposed constitutional questions because such questions failed to satisfy threshold substantiality inquiry), *aff'd*, *In re Cao*, 619 F.3d 410, 418-20 (5th Cir. 2010); *Goland v. United States*, 903 F.2d 1247, 1253 (9th Cir. 1990) (affirming denial of motion to certify questions that "d[id] not fall outside the principles" established by Supreme Court precedent). As the Ninth Circuit observed in *Goland*, "not every sophistic twist that arguably presents a 'new' question should be certified. Once the statute has been thoroughly reviewed by the Court, questions arising under 'blessed' provisions understandably should meet a higher threshold." *Id.* at 1257.

Independence Institute fails to provide any *actual* support for its proposition (Appellant's Br. 14) that the "Supreme Court has taken pains to emphasize that as-applied challenges are subject to the three-judge court procedure, even when the challenged provision has been upheld on its face." Its sole purported authority for that proposition is *Wisconsin Right to Life*, but it is not true that the Supreme Court in *Wisconsin Right to Life* reversed a denial of an application for a three-judge

court; a three-judge court had been convened when the case was first brought. *See Wisc. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 200 (D.D.C. 2006).

Second, Independence Institute attempts to transform into a legal argument the fact that the FEC elected not to challenge an application for a three-judge court during the expedited district court proceedings in *McCutcheon v. FEC*. (Appellant's Br. 16-17.) The Commission's choices of which arguments to pursue in any given case reflect a variety of considerations and waivers of particular arguments in particular cases certainly do not amount to precedent concerning the merits of such arguments in an entirely separate case. The Commission's non-objection to a three-judge court in *McCutcheon* does not prove that the district court erred in declining to convene such a court here.

Third and finally, Independence Institute's assertion (Appellant's Br. 25) that "[n]either the district court nor the FEC has identified a case where the Court has upheld disclosure for communications that merely mention a candidate — without more — during the electioneering communications window" is utterly baffling. That *Citizens United* is precisely such a case is why Independence Institute's claim "is squarely foreclosed" by that decision. (J.A. 42-52, 57.)

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision below in its entirety.

Respectfully submitted,

Lisa J. Stevenson
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Erin Chlopak
Acting Assistant General Counsel

/s/ Greg J. Mueller
Greg J. Mueller
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

May 8, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,395 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
Federal Election Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2015, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

Allen Dickerson
Tyler Martinez
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ Greg J. Mueller
Greg J. Mueller
Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1650
gmueller@fec.gov