ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5249

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

INDEPENDENCE INSTITUTE,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

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

Opening Brief for Plaintiff-Appellant

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellant Independence Institute hereby provides this certificate as to parties, rulings, and related cases.

A. Parties, Intervenors, and *Amici*

Plaintiff-Appellant is the Independence Institute. Defendant-Appellee is the Federal Election Commission ("FEC" or "Commission").

The following entities participated as *amici curiae* in the proceedings before the United States District Court for the District of Columbia: Campaign Legal Center, Democracy 21, and Public Citizen, Inc. No entities participated as intervenors below.

B. Rulings Under Review

The Independence Institute appeals a decision of the United States District Court for the District of Columbia (Colleen Kollar-Kotelly, J.) denying the Institute's application for a three-judge court pursuant to 52 U.S.C. § 30110 note, denying the Institute injunctive relief against the enforcement of 52 U.S.C. § 30104(f), and dismissing the Institute's case "in its entirety." JA 36.

C. Related Cases

This matter has not previously been before this Court or any other federal court of appeals. The underlying regulation implementing 52 U.S.C. § 30104(f), however, was invalidated pursuant to U.S. District Judge Amy Berman Jackson's

decision in *Van Hollen v. FEC*, No. 11-0766, 2014 U.S. Dist. LEXIS 164833 (D.D.C. Nov. 25, 2014). Judge Jackson's decision is currently on appeal before this Court. *Van Hollen v. FEC*, Nos. 15-5016 and 15-5017.

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TABLE OF AUTHORITIES[1]

Cases

[1] Authorities upon which the Institute principally relies are marked with an asterisk.

Statutes

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GLOSSARY

BCRA	Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)
FEC or Commission	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972) and the Federal Election Campaign Act of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974).
JA	Joint Appendix

INTRODUCTION

Americans enjoy a First Amendment right "to pursue their lawful private interests privately and to associate freely with others in doing so." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 466 (1958). Nevertheless, the Bipartisan Campaign Reform Act of 2002 ("BCRA") requires public disclosure of virtually all significant donors to any organization that airs an advertisement mentioning any candidate for public office in the 60 days before a general election. Such advertisements are known as "electioneering communications."

This case concerns an ad discussing a question of public policy and lacking any connection to a campaign for public office. Nevertheless, because that ad meets the "electioneering communication" definition, it will trigger comprehensive donor disclosure under the Federal Election Commission's ("FEC" or "Commission") current regime. Surprisingly, if that ad instead expressly advocated for or against a candidate—with a phrase like "vote for Jones," for example—only donors who had earmarked their contributions for that specific communication would be disclosed.

That result is mystifying, and has never been reviewed by the Supreme Court. In such cases, Congress has required constitutional challenges to BCRA—like this one—to be heard by a three-judge district court. Nonetheless, the district

court below reached the merits of Appellant's claim, denied injunctive relief, and dismissed the case. That decision was in error, and should be reversed.

JURISDICTIONAL STATEMENT

The Independence Institute appeals a final decision of the district court dismissing its application for a three-judge court, denying its motion for injunctive relief, and entering judgment for the FEC. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1391, and 52 U.S.C. § 30110 note. JA 8-9. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The Independence Institute has standing, because its case falls into the class of cases "capable of repetition, yet evading review," which the FEC has acknowledged. Mot. for Summ. Affirm. at 10 n.2.

STATUTES AND REGULATIONS

The relevant portions of the Bipartisan Campaign Reform Act of 2002 (codified at 52 §§ U.S.C. 30104(c), (f); 30110 note, and 11 C.F.R. §§ 100.29, 104.20, 109.10), as well as 28 U.S.C. § 2284 and 52 U.S.C. § 30110 are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

Whether the district court erred in declining to convene a three-judge district court to hear Plaintiff-Appellant's constitutional challenge to the Bipartisan

Campaign Reform Act of 2002, as applied to an advertisement unrelated to any campaign for public office.

STATEMENT OF THE CASE

I. The Bipartisan Campaign Reform Act's Electioneering Communications Definitions

In 2002, Congress passed the Bipartisan Campaign Reform Act which, in relevant part, imposed restrictions upon a previously unregulated form of speech: "electioneering communications." BCRA defines electioneering communications as

> [A]ny broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. § 30104(f)(3)(A)(i).

Any entity—including a nonprofit corporation—that spends over $10,000 on a qualifying communication must file a disclosure report with the FEC. 52 U.S.C. § 30104(f)(1). This report discloses the names and addresses of all donors who gave more than $1,000 to the nonprofit during the preceding calendar year. 52 U.S.C. § 30104(f)(2)(E); (F). Under BCRA and the FEC's regulations, *any*

mention of a candidate within 60 days of a general election triggers such disclosure, regardless of context. *See*, *e.g.*, 11 C.F.R. § 100.29(b)(2).

In enacting BCRA, both Congress and the President anticipated that the breadth of this new regulation would pose significant constitutional questions. Congress went so far as to include a "backup" definition for electioneering communications, which stated, in relevant part, that if the electioneering communications definition

> is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

52 U.S.C. § 30104(f)(3)(A)(ii).

Notably, under this "backup" definition, the Institute's communication would be entirely unregulated, since the proposed ad neither "promotes or supports…or attacks or opposes a candidate" for office. *Id*.

Despite signing BCRA into law, the President noted in his signing statement that "[c]ertain provisions present constitutional concerns," and expressed "reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issue of public import in the months closest to an election." GEORGE W. BUSH, STATEMENT ON SIGNING THE

BIPARTISAN CAMPAIGN REFORM ACT (March 27, 2002).[2] Perhaps with the backup definition in mind, the President observed that he "expect[ed that] the courts w[ould] resolve these legitimate legal questions as appropriate." The backup definition never took effect, because the electioneering communications definition was upheld facially in *McConnell v. FEC*, 540 U.S. 93 (2003).

The Supreme Court's 2007 ruling in *FEC v. Wisconsin Right to Life, Inc.*, ("*WRTL II*") permitted certain exceptions to BCRA's general prohibition on corporate electioneering communications. 551 U.S. 449 (2007). In response, the FEC promulgated 11 C.F.R. § 120(c)(9), which imposed an earmarking limitation on BCRA's electioneering communication disclosure requirements. FEC, Electioneering Communications, 72 Fed. Reg. 72899, 72900 (Dec. 26, 2007). This made those requirements consistent with the statutory standard for "independent expenditures" (advertisements that expressly advocate for or against a candidate for office). Thus, after 2007, corporations would not face generalized donor disclosure simply because they mentioned a candidate by name in the months before an election.

On November 25, 2014—after this appeal was docketed—that regulation was declared invalid under the Administrative Procedure Act and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Van Hollen*

[2] *Available at*: http://www.presidency.ucsb.edu/ws/?pid=64503.

v. FEC, No. 11-0766, 2014 U.S. Dist. LEXIS 164833, at *76 (D.D.C. 2014). Consequently, if the Institute were to air its advertisement during the electioneering communications window, it would be required to disclose all donors who contributed $1,000, regardless of whether they gave for the purpose of electioneering communications, or were even aware that the Institute might mention a candidate (let alone *which* candidate) in a communication.

While the Commission did not appeal the invalidation of its regulation, Intervenors in that case timely appealed. *Van Hollen v. FEC*, No. 15-5016, Appellee FEC's Unopposed Mot. to Amend Briefing Schedule at 2 (D.C. Cir. Mar. 11, 2015) ("The Commission did not appeal the district court's summary judgment decision that is now before this court…").[3] That case is presently before this Court.

II. The Independence Institute, its Proposed Issue Advertisement, and the Proceedings Below

The Independence Institute is a Denver, Colorado-based nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code and Colorado law. JA 10 ¶ 18. Established in 1985, the Institute has a long history of conducting research and educating the public on various aspects of public policy, including taxation, education, health care, and criminal justice. JA 7 ¶ 2.

[3] The FEC successfully moved "to file a brief…to defend the district court's decision denying" one of the intervenors' "motion to amend its pleading." *Id*. at 2.

To further this mission, the Institute wished to run a radio advertisement supporting the Justice Safety Valve Act. JA 12. The ad would urge viewers to contact both of Colorado's sitting senators and express support for the Act, which was pending before the U.S. Senate. One of Colorado's senators, Mark Udall, also happened to be a candidate for reelection.[4] JA 12, ¶ 31. The proposed ad did not discuss or refer to Udall's candidacy in any way. Nevertheless, the Institute's proposed ad would qualify as an electioneering communication under BCRA, because it mentioned Udall's name within 60 days of the general election.

The text of the proposed advertisement is as follows:

> Let the punishment fit the crime.
>
> But for many federal crimes, that's no longer true.
>
> Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.
>
> And for what purpose?
>
> Studies show that these laws don't cut crime.
>
> In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.
>
> Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619.

[4] The Institute brought the action just before the beginning of BCRA's electioneering communications window. The 2014 election passed. The Institute and the FEC agree that this case fits "within the exception to mootness for disputes capable of repetition, yet evading review." Mot. for Summ. Affirm. at 10 n.2. (citing *WRTL II*, 551 U.S. at 461-64).

> It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.
>
> Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act.
>
> Tell them it's time to let the punishment fit the crime.
>
> Paid for by Independence Institute, I2I dot org. Not authorized by any candidate or candidate's committee. Independence Institute is responsible for the content of this advertising.

JA 12, ¶ 35.

Because this radio communication would cost more than $10,000 and reach more than 50,000 natural persons in the Denver area, it would trigger BCRA's disclosure requirements for electioneering communications. JA 12 ¶¶ 33, 34.

The Institute filed suit on September 2, 2014. JA 2 (Dkt #1). The same day, it moved for a three-judge court, pursuant to 52 U.S.C. § 30110 note. JA 2 (Dkt # 3); JA 8 ¶ 9. On September 4, 2014, it moved for preliminary injunctive relief. JA 2 (Dkt # 5). On September 8th, the parties held a telephonic conference with the district court. JA 3. The parties agreed to consolidate the Institute's preliminary injunction motion with full briefing on the merits, and filed a joint stipulation to that effect. JA 4 (Dkt #13), JA 34-35. The parties also stipulated that "[t]he Independence Institute's challenge does not rely upon the probability that its donors will be subject to threats, harassment, or reprisals as a result of the Institute's filing of an Electioneering Communications statement." JA 34.

On October 6, 2014, Judge Collen Kollar-Kotelly denied the Institute's application for a three-judge court, believing that the Institute's case was foreclosed by *Citizens United*. JA 5 (Dkt. #23); JA 57 ("Plaintiff's claim is squarely foreclosed by *Citizens United*"). The district court also denied the Institute's motion for injunctive relief as moot. JA58. The Institute timely appealed to this Court on October 8, 2014. JA 5 (Dkt # 25).

On November 25, 2014, the FEC filed for summary affirmance. On December 8, 2014, the Institute cross-moved for summary dismissal, citing, *inter alia*, the change in BCRA's disclosure burdens after *Van Hollen*. On February 20, 2015, this Court denied both motions and set the case for merits consideration.

SUMMARY OF THE ARGUMENT

The Independence Institute, a well-established Colorado think tank, sought to air a radio advertisement in the weeks before the 2014 election. That advertisement dealt solely with a legislative issue—federal sentencing reform—and exhorted the listener to contact his or her United States senators and ask them to support a particular piece of legislation, the Justice Safety Valve Act.

One of the two senators mentioned in the ad, Mark Udall, was seeking re-election. Consequently, even though the ad would not, in any sense, "electioneer," it nevertheless fell within BCRA's "electioneering communication" definition. As

a result, if the Institute were to run its ad, federal law would require it to file a report with the FEC and publicly disclose its donors.

The Institute filed suit, seeking a declaration that BCRA's reporting and disclosure provisions were unconstitutional as applied to its specific ad. Although the Supreme Court has explicitly limited donor disclosure to situations where an organization's speech is "unambiguously campaign related—so as to protect discussions of public policy from government regulation—the district court denied the Institute's motion for a preliminary injunction and dismissed its case.

This appeal does not concern the merits of the Institute's arguments. Rather, it asks whether the district court erred in dismissing the Institute's constitutional claims rather than convening a three-judge district court as Congress required. 52 U.S.C. § 30110 note (constitutional challenges to BCRA "*shall* be filed in the United States District Court for the District of Columbia and *shall* be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code") (emphasis added). The district court believed that it need not convene such a court because, in its view, the Institute's claims "are foreclosed by clear United States Supreme Court precedent, principally by *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)." JA 38.

While the district court correctly stated the standard for convening a three-judge BCRA court, its ruling should nonetheless be reversed for two reasons.

First, while *Citizens United* did uphold donor disclosure for "electioneering communications" as applied to commercial advertisements for a film critical of then-Senator Hillary Clinton's 2008 presidential candidacy, it has never considered that disclosure regime as applied to the sort of genuine issue speech at issue here. Instead, the last time the government sought to regulate issue speakers in a similar manner, the Supreme Court narrowed the reach of the statute, permitting regulation only of speech that was "unambiguously campaign related." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (*per curiam*). Because the district court did not apply the "unambiguously campaign related" standard, and because the Supreme Court has never considered BCRA's disclosure provisions as applied to an advertisement like the Institute's, this case should be heard by a three-judge district court.

Second, when this case was filed, the FEC insisted that, pursuant to its regulations, only contributors who earmarked their contributions for electioneering communications would be publicly disclosed. But during the pendency of this appeal, a federal district court struck down that regulation. This significantly raises the stakes in this case, as the Institute explicitly noted when it filed its lawsuit. JA 17-18 ¶55 (*Van Hollen* case). If the ad at issue here were to air in sufficient proximity to an election, all donors who gave more than $1,000 to the Institute—a § 501(c)(3) charity whose donors are kept private by operation of federal tax law—would be publicly disclosed. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A) (a § 501(c)(3)

Form 990 "shall not require the disclosure of the name or address of any contributor of the organization"); 26 U.S.C. § 6104(b) (providing for disclosure of the organization's name and address, but "[n]othing in this subsection shall authorize the Secretary [of the Treasury] to disclose the name or address of any contributor to any organization or trust").

This, too, is a circumstance the Supreme Court has never addressed, for the simple reason that this was not the law when *Citizens United* was decided. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) ("requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation *for the purpose of furthering electioneering communications*") (emphasis added)).

This case is a novel challenge based upon distinct facts and legal questions that were not before the *Citizens United* Court. Consequently, the district court below erred in determining, without a hearing, that Supreme Court precedent necessarily forecloses the Institute's claims. That decision should be reversed, and the Institute's claims presented to a three-judge district court for full consideration of the merits, as Congress intended.

STANDARD OF REVIEW

"When the district judge denies a request for a three-judge court and dismisses the case for want of a substantial constitutional question, this court must reverse if it finds that the questions raised were substantial." *Feinberg v. Federal Deposit Ins. Corp.*, 522 F.2d 1335, 1339 (D.C. Cir. 1975).

ARGUMENT

I. Scope of this Appeal

This Court is not asked to decide the merits of the Independence Institute's claims. Rather, the sole question on appeal is whether the district court erred in deciding the merits rather than convening a three-judge district court pursuant to 52 U.S.C. § 30110 note. That provision creates a compulsory procedure for reviewing constitutional challenges to BCRA: "[i]f any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of th[e Bipartisan Campaign Reform] Act or any amendment made by this Act…[t]he action *shall* be filed in the United States District Court for the District of Columbia and *shall* be heard by a 3-judge court convened pursuant to [§] 2284 of title 28, United States Code." *Id.* (emphasis added); Mem. Op., JA 42 (citing same).

There is a limited, straightforward exception to the three-judge court requirement, which applies to cases that have been foreclosed by a decision of the Supreme Court. As the district court correctly stated, "Constitutional 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.'" Mem. Op., JA 42 (citing *Feinberg v. Federal Deposit Ins. Corp*., 522 F.2d 1335, 1338-39 (D.C. Cir. 1975) (citations omitted and alteration added in Mem. Op.).

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. For example, when Wisconsin Right to Life challenged BCRA § 203's application to advertisements it sought to run during an election, the district court declined to convene a three-judge court because § 203 had been upheld on its face in *McConnell v. FEC*. 540 U.S. 93. The Supreme Court unanimously reversed that decision. *WRTL II*, 551 U.S. at 460. ("On appeal, we vacated the District Court's judgment, holding that *McConnell* 'did not purport to resolve future as-applied challenges' to BCRA § 203.") (citation, quotation marks omitted).

Thus, the scope of this appeal is limited to whether the district court erred in finding that the Independence Institute's claims are foreclosed by Supreme Court precedent, specifically, a portion of *Citizens United v. FEC*. JA 56.

II. The statute requiring the Institute's claims to be heard by a three-judge court is mandatory and jurisdictional.

The district court correctly articulated the applicable standard:

> A single district judge need not request that a three-judge court be convened if a case raises no substantial claim or justiciable controversy…Constitutional 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."

JA 42 (citing *Feinberg*, 552 F.2d at 1338-39 (citations omitted in Mem. Op.); *Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011)).

A. *McCutcheon v. FEC* proceeded under the same three-judge review provision the Independence Institute invokes, and demonstrates the propriety of following that procedure here.

Just last Term, another campaign finance case, *McCutcheon v. FEC*, came before the Supreme Court under the same three-judge review provision the Independence Institute invokes here. 572 U.S. ___, 134 S. Ct. 1434 (2014). The *McCutcheon* plaintiffs challenged the aggregate limit on total political contributions an individual may make over a two-year period, which was first established by the 1974 amendments to the Federal Election Campaign Act ("FECA"). 52 U.S.C. § 30116(a)(3); *Buckley*, 424 U.S. at 189 (appendix listing elements of statute); Pub. L. 93-443 § 101, 88 Stat. 1263 (1974). BCRA § 307(a)-(b) subsequently split this aggregate limit into two sub-limits: one on contributions

to candidates, and another on contributions to parties and PACs.[5] Pub. L. 107-155, 116 Stat. 81, 102-03 (2002). The *McCutcheon* Plaintiffs invoked BCRA § 403 (codified at 52 U.S.C. 30110 note),[6] and sought consideration of their case by a three-judge court.[7]

While the FEC disputed the *merits* of the *McCutcheon* plaintiffs' challenge, their briefing in district court did not contest that the case should be considered by a three-judge court, as it ultimately was. *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court considering merits of claim); *cf. McCutcheon v. FEC*, No. 12-cv-1034, Def. FEC's Opp. to Pl. Mot. for Prelim. Inj. (D.D.C. July 9, 2012) (ECF No. 16); *McCutcheon v. FEC*, No. 12-cv-1034, Def. FEC's Mot. to Dismiss (D.D.C. Aug. 20, 2012) (ECF No. 21).[8] Nevertheless, the FEC has vociferously objected to the Plaintiff's request for a three-judge court here.

The reason this objection is so puzzling—especially in light of the FEC's *lack* of objection to a three-judge court in *McCutcheon*—is because the aggregate

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[5] This second sub-limit capped the combined total of contributions to (1) non-candidate committees and (2) non-candidate, non-national party committees. *Id.*

[6] Formerly codified at 2 U.S.C. § 437h note, the statutory provision is at 116 Stat. at 113-14.

[7] Given that components of the statutory regime they challenged arose out of both FECA and BCRA, the *McCutcheon* plaintiffs argued in the alternative that their case should be certified to the *en banc* Court of Appeals for the D.C. Circuit under FECA's parallel provision for expedited consideration of constitutional challenges, 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h). *McCutcheon v. FEC*, No. 12-cv-1034 V. Compl. at 4-5 ¶¶ 8-9 (D.D.C. June 22, 2012) (ECF No. 1).

[8] Both available at FEC, *McCutcheon* et al. *v. FEC* District Court Related Documents, *available at*: http://www.fec.gov/law/litigation/McCutcheon.shtml#dc

limit challenged there had been facially upheld in *Buckley v. Valeo*. 424 U.S. 1 (1976). It is true that BCRA subsequently sub-divided that limit, but the essence of the challenge was the same as that which the *Buckley* Court had explicitly considered when, "in three sentences, the Court disposed of any constitutional objections to the aggregate limit that the challengers might have had." *McCutcheon*, 134 S. Ct. at 1445.

Most significantly, the *McCutcheon* Court found it appropriate to revisit whether the aggregate limit was constitutional on its face, despite the fact that it had previously been upheld facially. This was at least in part because, in *Buckley*, "the constitutionality of the aggregate limit 'ha[d] not been separately addressed at length by the parties.'" *McCutcheon*, 134 S. Ct. at 1446 (quoting *Buckley*, 424 U.S. at 38). The Court reiterated that it had "'no discretion to refuse adjudicating of the case on its merits,'" and proceeded to invalidate the limit under closely drawn scrutiny. *Id.* at 1444 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)).

Plaintiff submits that, particularly given *McCutcheon*'s analogous procedural history, declining to convene a three-judge court in this case was error. Moreover, the Commission has pointed to no case where the constitutionality of the registration and disclosure requirements challenged here has been "addressed at length" in the context of speech that is not unambiguously campaign related. If it was proper to convene a three-judge court to hear *McCutcheon*'s facial challenge

to the federal aggregate limits—which *had* been upheld on their face—it is certainly also appropriate to do so here, where Plaintiff's case presents a novel application of the law on a concise as-applied record.

B. The special constitutional review provisions of BCRA and FECA must be applied with strict fidelity to Congress's intent.

Both BCRA and its predecessor FECA contain special review provisions for constitutional challenges. While BCRA provides for a three-judge district court, FECA's parallel provision provides for certification to the *en banc* Court of Appeals. 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h). The Supreme Court and the Courts of Appeals have consistently required strict fidelity to these jurisdictional provisions.

1. Under the special review provisions of both BCRA and FECA, the relevant test is whether a question has been foreclosed by a Supreme Court ruling.

While the type of review that FECA and BCRA's special constitutional provisions provide is different, the showing required for each is analogous. In *Goland v. United States*, the Ninth Circuit compared FECA's standard for certifying questions to the *en banc* Court of Appeals to the three-judge court provision invoked here, describing the showing required under either as "closely resembl[ing] that applied under Rule 12(b)(6)." 903 F.2d 1247, 1257-58 (9th Cir. 1990). Other courts tasked with reviewing such challenges have concurred. *Cao v. FEC*, 688 F. Supp. 2d 498, 501 (E.D. La. 2010) *aff'd som. nom. Republican Nat'l*

Comm. v. FEC, 619 F.3d 410 (5th Cir. 2010) (In re *Anh Cao*) ("[T]he district court's role in certifying questions of FECA's constitutionality is "similar to that of a single judge presented with a motion to convene a three judge court to hear constitutional challenges") (citing *Goland*, 903 F.2d at 1257). Given the analogous nature of these standards, cases applying the three-judge court provision inform those applying the *en banc* certification provision, and vice versa.

The relevant test under both FECA and BCRA is straightforward: Constitutional challenges must proceed under these special review provisions unless the Supreme Court has already decided the questions presented. *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (collecting cases). In *California Medical Association. v. FEC*, Justice Marshall described this test as one of substantiality or settled law. 453 U.S. 182, 192 n.14 (1981) ("*Cal. Med.*"). ("the issues here are neither insubstantial nor settled. We therefore conclude that this case is properly before us pursuant to § [30110]"). The *en banc* Fifth Circuit stated that a "district court need not certify legal issues that have been resolved by the Supreme Court." *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*) (*per curiam*). And in the words of this Circuit, a constitutional question is "substantial" for purposes of certification to three-judge court unless the Supreme Court has "foreclose[d] the subject" and left "no room for the inference that the

question sought to be raised can be the subject of controversy." *Feinberg*, 522 F.2d at 1339 (quotation marks and internal citations omitted).

In the related context of special direct review by the *en banc* Court of Appeals, *Goland v. United States* emphasized that it is not the specific provision of law at issue that determines a question's substantiality, but the factual posture and legal theory undergirding the case itself. 903 F.2d at 1257 (9th Cir. 1990) (discussing 52 U.S.C. § 30110). There, the plaintiff funneled over $120,000 through 56 people to fund campaign ads without disclosing his identity. *Id.* at 1251. After being indicted for violating FECA, he challenged the statute's application to him and sought certification to a three-judge court under the procedure the Independence Institute invokes here. *Id.* at 1252. The Ninth Circuit dismissed as "sophistic" and "creative" Goland's suggestion that, because he contributed anonymously, the individual contribution limit upheld in *Buckley* was inapplicable to him. *Id.* at 1257, 1258.

But, as the *Goland* Court noted, *Buckley* had expressly considered a challenge to FECA's ban on anonymous contributions. *Id*. at 1260. Nevertheless, even in rejecting Goland's claim, the Court of Appeals reiterated that "[o]nce a core provision of FECA has been reviewed and approved by the courts, unanticipated variations also may deserve the full attention of the appellate court." *Id.* at 1257. In other words, while Goland had not mounted a proper as-applied

challenge, such challenges were certainly still subject to the jurisdictional requirements of FECA's special constitutional review provision. *See also, e.g.*, *Libertarian Nat'l Comm., Inc. v. FEC*, 950 F. Supp. 2d 58, 61 (D.D.C. 2013) (Wilkins, J.) (certifying as-applied constitutional question because "[t]he FEC's attempt to distinguish Supreme Court cases regarding other individualized as-applied challenges is not persuasive"); *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (opinion of Roberts, C.J.) (noting the Court's practice "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'") (citing *United States* v. *Raines*, 362 U.S. 17, 21 (1960)) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

In short, demonstrating that special courts lack jurisdiction to hear constitutional challenges to campaign finance laws—despite Congress's unambiguous command—has always been a heavy burden for the state to carry, akin to successfully raising a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Goland*, 903 F.2d at 1257-1258. Absent satisfaction of this high bar, convening a three-judge court is neither optional nor subject to the district court's discretion.

2. The special constitutional review provisions of FECA and BCRA may not be construed so as to alter Congress's jurisdictional choice.

The Supreme Court has insisted upon strict adherence to these provisions, which ensure meaningful review of constitutional challenges to campaign finance legislation. For example, in *Bread PAC v. FEC*, a PAC sought to invoke § 30110's "unique system of expedited review" even though, as a corporation, it was plainly not one of the "three carefully chosen classes of persons" named in the statute (the FEC itself, national party committees, and natural persons eligible to vote for the president). 455 U.S. 577, 581 (1982). The Court rejected the PAC's "expansive construction" in favor of the statute's "obvious meaning." *Id*. In doing so, *Bread PAC* noted the potential burden Congress placed upon the judiciary, and concluded that in such cases "close construction of statutory language takes on added importance" because "[j]urisdictional statutes are to be constructed with precision and with fidelity to the terms by which Congress has expressed its wishes." *Id.* at 580 (quotation marks and citation omitted).

Thus, even in refusing to construe FECA's special review provision more broadly than its plain text, the Court recognized the importance of heeding Congress's unambiguous wishes. In the context of special review for constitutional challenges, fidelity to the language that Congress enacted is paramount.

Similarly, in *Cal. Med.*, the FEC attempted (unsuccessfully) to narrow the

scope of § 30110 review. 453 U.S. 182. The FEC asked the Court to "preclude the use of [§ 30110] actions to litigate constitutional challenges to the Act that have been or might be raised as defenses to ongoing or contemplated Commission enforcement proceedings." *Id.* at 189. The Court declined to adopt this "cramped construction of the statute," noting the "all-encompassing language" of § 30110. *Id*. at 190, 191; *see also id*. at 190 ("[§ 30110] expressly requires a district court to 'immediately…certify *all* questions of the constitutionality of this Act' to the court of appeals." (emphasis and ellipses original)). It further stated that the FEC's interpretation would "undermine the very purpose" of the statute: "to provide a mechanism for the rapid resolution of constitutional challenges to the Act." *Id*. at 191.

Cal. Med. also contemplated the burden that a special review provision might impose upon the judiciary in this context. These burdens were not insubstantial: in the FECA context, that provision included a since-repealed requirement of direct Supreme Court review, and demanded that cases be "expedited to the greatest possible extent." Nonetheless, the *Cal. Med.* majority criticized the dissenters for "exaggerat[ing] the burden [§ 30110] actions have placed on the federal courts." 453 U.S. at 192 n.13. In particular, the Court noted that "only a handful" of such cases had been heard, including six cases from 1979-80. *Id*. (collecting cases).

The *Cal. Med.* Court further opined that any "concerns about the potential abuse of [§ 30110] are in large part answered by other restrictions on the use of that section." *Id.* at 192 n.14. Importantly, the restrictions the Court referred to are principally "the constitutional limitations on the jurisdiction of the federal courts," including standing.[9] *Id.* They also include the ability to avoid constitutional issues through "resolution of unsettled questions of statutory interpretation," and the ability to dismiss "frivolous" or "purely hypothetical" claims. *Id.*

The most recent pronouncement applying one of these special jurisdictional provisions—*Wagner v. FEC*—echoes this determination to give effect to special constitutional review provisions as Congress enacted them. 717 F.3d 1007. In *Wagner*, despite the fact that none of the parties challenged the court's jurisdiction, a panel of the D.C. Circuit concluded that "the plain text of [§ 30110] grants exclusive merits jurisdiction to the en banc court of appeals." 717 F.3d at 1011. The court continued, if

"there exists a special statutory review procedure, it is ordinarily

[9] That the Court found standing to be relevant in this context is particularly interesting given that in cases involving elections—even those brought under the rapid review provisions of FECA and BCRA—standing is often achieved only because the circumstances fall into the capable of repetition, yet evading review exception to mootness. *E.g. Citizens United v. FEC*, 558 U.S. at 334 ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed"). *See also, e.g.*, *Davis v. FEC*, 554 U.S. 724 (2008). The necessary implication is that, under BCRA's expedited review procedures, courts ought to error on the side of convening three-judge courts.

> supposed that Congress intended that procedure to be *the exclusive means* of obtaining judicial review in those cases to which it applies." Section [30110] is indeed a "special statutory review procedure." We therefore presume that the Congress intended to deprive both the district court and panels of the court of appeals of authority to hear the merits of constitutional challenges to the provisions of FECA."

Id. at 1011-12 (quoting *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979) (internal citation omitted, emphasis in *Wagner*).

The *Wagner* Court expressed doubts about the wisdom and effectiveness of § 30110, but recognized that it "'simply [was] not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." *Id.* at 1016 (quoting *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988)).

Thus, for a question to escape review by a three-judge court, it must be necessarily foreclosed by a Supreme Court holding. Constitutional 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." Mem. Op., JA 42 (citing *Feinberg*, 522 F.2d at 1338-39 (citations omitted in Mem. Op.); *Schonberg*, 792 F. Supp. 2d at 17). Neither 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. This is particularly so given *Van Hollen v. FEC*, which changed the disclosure

regime at issue, and was handed down a few months *after* Judge Kollar-Kotelly issued the opinion below. Thus, it was improper for the district court to refuse to convene a three-judge district court, which is the only body with jurisdiction to consider the merits of Plaintiffs' as-applied challenge.

III. Neither *Citizens United* nor any other case has found that compelled disclosure for communications that merely mention a candidate during the electioneering communications window—without more—furthers the informational interest.

The Supreme Court has never foreclosed a claim like the Independence Institute's, where a speaker wishes to air a genuine issue ad unrelated to any campaign for public office during the electioneering communications window. Protections for issue speech date back to *Buckley*, which established the foundational standards for judicial review of campaign finance laws, and continues to control resolution of such cases today. Nevertheless, the district court relied upon a single, distinguishable as-applied ruling in closing the courthouse door to the Independence Institute. Mem. Op., JA 42.

Buckley held that the government may only regulate speech that is "unambiguously campaign related," thereby strictly protecting genuine issue speech. *Id*. at 41. Later, a facial challenge—*McConnell v. FEC*—and an as-applied challenge—*Citizens United v. FEC*—explored BCRA's electioneering communications regime. In each instance, the Court upheld the statute. Nevertheless, neither holding forecloses the Institute's as-applied challenge here.

McConnell was a facial challenge that never overruled *Buckley*, while *Citizens United* was an-as-applied challenge contemplating ads that commented "pejoratively" upon a candidacy. Reading *Buckley*, *McConnell*, and *Citizens United* together—as we must—demonstrates that the Institute's claim is not foreclosed. The Supreme Court has never permitted a state to compel generalized organizational disclosure in connection with speech about an issue of public importance that lacks an unambiguous relationship to a particular campaign.

A. Compulsory disclosure regimes, including BCRA's regulation of electioneering communications, are subject to exacting scrutiny.

The Supreme Court has consistently subjected campaign finance disclosure regimes to exacting scrutiny. *Buckley*, 424 U.S. at 64; *Citizens United*, 558 U.S. at 366-67 (quoting and applying *Buckley* in reviewing BCRA disclaimer and disclosure requirements); *see also McConnell*, 540 U.S. at 201-202 (in context of major donor disclosure). In an unbroken, 60-year line of jurisprudence, the Court has repeatedly acknowledged that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958).[10]

[10] In the 1950's and 1960's, the Supreme Court rejected numerous states' efforts to compel disclosure on the grounds that privacy in association is a fundamental right of "all legitimate organizations". *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 556 (1962)); *see also NAACP v. Alabama*, 357 U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of

Americans enjoy a First Amendment right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466. Indeed, "[i]nvoilability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Id.* at 462. Thus, compulsory disclosure is "a significant encroachment upon personal liberty." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (collecting cases).

Buckley v. Valeo specifically applied this civil-rights-era jurisprudence to the modern campaign finance regime. 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460); *id.* at 64-66 (applying associational privacy principles from *NAACP v. Alabama*, 357 U.S. at 460-61; *Bates*, 361 U.S. at 522-523; and *NAACP v. Button*, 371 U.S. at 438). This Court in turn has recognized the precedential value of both these civil rights cases and *Buckley* in the compulsory disclosure context. *E.g.*, *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities cam impose just as substantial a burden on First Amendment rights as can direct regulation") (citing *Buckley*, 424 U.S. at 64-68;

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association…"); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (The freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference" such as disclosure and its attendant sanctions for failing to disclose); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (The freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").

NAACP, 357 U.S. at 462-63). Thus, like all compelled disclosure, BCRA's electioneering communications regime is subject to exacting scrutiny.

In the campaign finance context, it has "long [been]… recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64. *Buckley* therefore considered that

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

424 U.S. at 42 (emphasis added). Candidates who win public office are vested with public authority. A call for a candidate—especially an incumbent—to take official action is materially different from commentary upon that candidate's fitness for office. In other words, an incumbent can be (and often is) both a candidate and a government official. It is inevitable, then, that a call for action in the latter capacity is distinct from a statement of fitness concerning the former. Recognizing these truths, the *Buckley* Court "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed." *Id*. at 64. This standard is "exacting scrutiny."

Buckley called exacting scrutiny a "strict test." 424 U.S. at 66. In this very context, the Seventh Circuit noted that exacting scrutiny is "not a loose form of

judicial review." *Barland*, 751 F.3d at 840 (construing *Citizens United*). To apply exacting scrutiny, the Supreme Court demands careful review of both the asserted governmental interest *and* whether the law is tailored to that interest, because "[i]n the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456.

B. Under *Buckley*'s exacting scrutiny, the government's only legitimate interest is informational, and that interest extends only to speech that is "unambiguously campaign related."

The government has an informational interest in providing the public with knowledge about "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. Of course, such an informational interest only applies to speech that is, in fact, related to a campaign. *Buckley*, 424 U.S. at 66-67. *Buckley*'s entire discussion of disclosure was grounded in the need to protect issue speech from comprehensive disclosure, while still furthering the government's informational interest (where it was, in fact, legitimate).

FECA, as challenged in *Buckley*, required disclosure from "political committees"—a term defined only as organizations making "contributions" or "expenditures" over a certain threshold amount. *Id.* at 79 n.105. Both "contributions" and "expenditures" were defined in terms of "the use of money or other objects of value 'for the purpose of… influencing' the nomination or election of any person to federal office." *Id.* at 63 (quoting FECA §§ 431 (e)(1); 431 (f)(1)). Since such a vague definition "could be interpreted to reach groups engaged purely

in issue discussion," the Court limited FECA's reach to only that speech that is "unambiguously campaign related." *Id.* at 79, 80.

Moreover, *Buckley* limited compelled contributor disclosure to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* In this context, such an organization's expenditures "are, by definition, campaign related." *Id*. But in the context of an organization *without* "the major purpose" of supporting or opposing a candidate, the Court deemed disclosure constitutionally appropriate *only* "(1) when [organizations] make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when [organizations] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80 (upholding disclosure on narrow grounds).

The Court narrowly defined the term "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id*. at 80 n.108 (incorporating by reference *id*. at 44 n.52). Such communications have a "substantial connection with the governmental interests" in disclosure, because they involve "spending that is unambiguously related" to electoral outcomes. *Id*. at 80-81. Thus, *Buckley* held that comprehensive disclosure

can be required of groups only insofar as those groups exist to engage in unambiguously campaign related speech.

The FEC can point to no case where an ad even remotely like the Institute's proposed communication has been found to satisfy this standard. Thus, it has failed to meet its burden under exacting scrutiny. *Buckley*, 424 U.S. at 25 (burden is on "the State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms"). Moreover, the district court neither mentioned nor grappled with this standard in the decision below. Thus, a three-judge court should be convened to perform this inquiry, consistent with *Buckley*.

The decisions of other federal courts implementing this standard underscore this conclusion. For example, in *Barland*, the Seventh Circuit stated that "[t]o protect against an unconstitutional chill on issue advocacy by independent speakers, *Buckley* held that campaign-finance regulation must be precise, clear, and may only extend to speech that is 'unambiguously related to the campaign of a particular federal candidate.'" 751 F.3d at 811 (quoting *Buckley*, 424 U.S. at 80). The Fourth Circuit used *Buckley*'s unambiguously campaign related standard in finding North Carolina's "political committee" definition overbroad and vague. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008). And, in the words of the Tenth Circuit, "[i]n *Buckley*, the Court held that the reporting and

disclosure requirements...survived 'exacting scrutiny' so long as they were construed to reach only that speech which is 'unambiguously campaigned related.'" *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (citing 424 U.S. at 79-81).

Likewise, the district courts have applied the "unambiguously campaign related" standard in various contexts. In examining the federal disclosure regime, the Eastern District of Louisiana upheld federal campaign fund coordination regulation by noting that "it is the act of coordination that...arguably make a communication 'unambiguously campaign related.'" *Cao*, 688 F. Supp. 2d at 541 (E.D. La. 2010). Just two years before *Cao*, the District of Utah noted *Buckley*'s standard in examining a state disclosure regime: "Supreme Court precedent makes clear that campaign finance laws may constitutionally regulate only those activities that are unambiguously campaign related." *Nat'l Right to Work Legal Def. and Ed. Found. v. Herbert*, 581 F. Supp. 2d 1132, 1144 (D. Utah 2008) (citing *Buckley*, 424 U.S. at 80).

By contrast, the district court below did not apply *Buckley*'s "unambiguously campaign related" standard. Instead, it declined to convene a three-judge court, relying upon an as-applied challenge with materially different facts—*Citizens United v. FEC*. In doing so, it eliminated the possibility of *any* future as-applied challenge based upon the content of a particular communication.

C. Neither *Citizens United* nor *McConnell* modified *Buckley*'s "unambiguously campaign related" limitation.

1. As a facial ruling, *McConnell* does not resolve the Institute's as-applied challenge.

As a facial challenge, *McConnell* cannot possibly resolve the as-applied case at bar. 540 U.S. at 194 (discussing the facial overbreadth claims against the electioneering communications provisions of BCRA). The *McConnell* plaintiffs challenged nearly every aspect of BCRA, based upon a record "over 100,000 pages" long. *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (per curiam) *aff'd in part and rev'd in part* 540 U.S. 93. This record was replete with examples of "sham issue advocacy," or "candidate advertisements masquerading as issue ads." 540 U.S. at 132 (quotations and citations omitted).[11] *On that extensive record*, the Supreme Court found that the electioneering communication ads were unambiguously campaign related in a "vast majority" of instances. *McConnell*, 540 U.S. at 206 (discussing the rise of "sham issue ads" in the context of BCRA's ban on electioneering communications by corporations). When *McConnell* recognized that much "campaign related" speech was not being captured because it lacked *Buckley*'s express words of advocacy, the Court

[11] For example, the *McConnell* district court opinion—issued by a three-judge court— featured a side-by-side comparison chart, demonstrating that at least one of the "sham issue ads" paid for with funds from the National Rifle Association's general treasury was virtually *identical* to an express advocacy ad paid for by that same organization's PAC. The "issue ad" simply omitted the sentence containing express advocacy. *McConnell*, 251 F. Supp. 2d at 548.

extended the test to include "the functional equivalent of express advocacy." *WRTL II*, 551 U.S. at 456 ("The Court concluded that there was no overbreadth concern to the extent the speech in question was the "functional equivalent" of express campaign speech") (applying, in context of a speech ban, *McConnell*, 540 U.S. at 204-205).

Nevertheless, the *McConnell* plaintiffs did not "carry their 'heavy burden' of establishing that *all* enforcement of the law should…be prohibited." *WRTL II*, 551 U.S. at 455 (emphasis original) They failed to show that BCRA "§ 203 was facially overbroad and *could not be enforced in any circumstances*." *WRTL II*, 551 U.S. at 465 (quoting *McConnell*, 540 U.S. at 207)) (emphasis added). Had the *McConnell* record instead been filled with examples of issue speech (such as the Institute's proposed ad here), the case would likely have been decided differently. Only because "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an "electioneering purpose" did the Court find the statute sufficiently tailored to survive a facial constitutional challenge.

Thus, selective citations to certain passages in *McConnell*, shorn of their context in a facial challenge, do not resolve this case. Given the as-applied nature of the Institute's claim, *McConnell* is simply beside the point for purposes of the three-judge court that is the subject of this appeal. *Wis. Right to Life, Inc. v. FEC*,

546 U.S. 410, 412 (2006) ("*WRTL I*") (requiring three-judge district court to hear as-applied challenge to provision facially upheld in *McConnell*). *McConnell* relied upon a factual finding that, in the vast majority of instances in the record before that Court, electioneering communications *were* equivalent to express advocacy—and thus, unambiguously campaign related. It did not discuss those examples in which speech that qualifies as an electioneering communication is *not* unambiguously campaign related. This is precisely why this as-applied challenge involving genuine issue speech is not foreclosed.

As other Courts of Appeals have noted, *McConnell* did not alter *Buckley*'s distinction between campaign speech and issue speech. The Ninth Circuit—quoting the Sixth Circuit—explicitly held that "*McConnell* 'left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.'" *ACLU of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (quoting *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004)).

Likewise, the Supreme Court continues to draw the distinction between issue speech and "unambiguously campaign related speech"—even after *McConnell*. *WRTL II*, 551 U.S. at 456 ("We now confront such an as-applied challenge. Resolving it requires us first to determine whether the speech at issue is the

'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, *or instead* a 'genuine issue a[d]'" (quoting *McConnell*, 540 U.S. at 206) (brackets in *WRTL II*, emphasis added). "Unambiguously campaign related" is the overall category of speech which the government has a sufficient interest in regulating, while express advocacy and its functional equivalent are subsets of speech that is *already* clearly about an electoral outcome.[12]

2. *Citizens United v. FEC* did not do away with *Buckley*'s "unambiguously campaign related" standard, and thus, does not resolve the Institute's challenge.

In *Citizens United*, the Court faced an as-applied challenge dealing with speech that was unambiguously campaign related—both in the form of *Hillary: The Movie* and the ads used to promote the film. It is true that the *Citizens United* Court stated that the "functional equivalent of express advocacy" test was inapplicable to electioneering communications disclosure. *Citizens United*, 558 U.S. at 369. But the "functional equivalent of express advocacy" is a narrow test

[12] Plainly, the Institute's advertisement carries none of the *indicia* of speech which functions as express advocacy, as described by the Chief Justice in his controlling opinion in *WRTL II*. It is not "susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" as it "do[es] not mention an election, candidacy, political party, or challenger; and…do[es] not take a position on a candidate's character, qualifications, or fitness for office." 551 U.S. at 469-470. Rather, its "content is consistent with that of a genuine issue ad." *Id*. at 470. The ad "focus[es] on a legislative issue, take[s] a position on the issue, exhort[s] the public to adopt that position, and urge[s] the public to contact public officials with respect to the matter." *Id*.

for finding speech that is advocating for electoral outcomes. All express advocacy and its functional equivalents are unambiguously campaign related speech. Nevertheless, that still leaves much speech that is not about electoral outcomes—such as genuine issue ads like the Institute's proposed communication.

The Supreme Court's decisions have demonstrated that speech exists on a spectrum. One narrow band of speech is express advocacy—speech that uses the so-called "magic words" set forth in *Buckley*. 424 U.S. at 42, n.52. The Court has also recognized an analogous category of speech that, while falling short of express advocacy, functions in the same way. *McConnell*, 540 U.S. at 126-127 ("Little difference exist[s], for example, between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think'"). This speech, like the speech reviewed by the Supreme Court in *Citizens United*, is "unambiguously campaign related," and therefore may lawfully trigger donor disclosure.

Citizens United merely applied *McConnell*'s reasoning to a set of advertisements which—like the "vast majority" of electioneering communications—were unambiguously campaign related. But the Court said nothing about speech that is *not* "unambiguously campaign related." Protections for *that* category of speech date back to *Buckley* and remain in effect.

a. Citizens United's *Hillary: The Movie* was "unambiguously campaign related."

The *Citizens United* litigation involved two communications: the feature-length film *Hillary: The Movie*, and ads urging viewers to see the film. *Hillary: the Movie* was about a presidential candidate, and "focuse[d] on….her Senate record, her White House record [as first lady]…her presidential bid, and include[d] express opinions on whether she would make a good president." *Citizens United v. FEC*, 530 F. Supp 2d. 274, 275 (D.D.C. 2008) (internal citation and quotation marks omitted). All nine members of the Court concluded that *Hillary: the Movie* was "a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." *Citizens United*, 558 U.S. at 325. The film "d[id] not focus on legislative issues," but rather "reference[d] the [2008] election and Senator Clinton's candidacy, and [took] a position on her character, qualifications, and fitness for office." *Citizens United*, 530 F. Supp. 2d at 279 (citing 11 C.F.R. § 114.15(b)).

The film suggested that as "a politician of the left," Clinton's election would not "[be] good for the security of the United States." *Id*. at 279, n.12 (internal citations omitted). At one point in the film, an interviewee declared that "the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." *Id*. It is undisputed that *Hillary* was a negative ad whose "thesis…is that [Hillary Clinton] is unfit for the Presidency," and generally "that Senator Clinton is

unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Citizens United*, 558 U.S. at 325, 322; *see also Citizens United*, 530 F. Supp. 2d at 279.

b. The ads promoting *Hillary: The Movie* contained pejorative references to a candidacy, and were thus also "unambiguously campaign related."

Citizens United's ads promoting *Hillary* also took a negative—or, in the Court's words, perjorative—position on Senator Clinton's *candidacy*. Thus, the ads were clearly campaign related. In fact, the *Citizens United* majority consistently described the ads as "pejorative" in the context of the then-Senator's political campaign. 558 U.S. at 320 ("Each ad includes a short (and, in our view, pejorative) statement *about Senator Clinton*…"); *id*. at 368 ("The ads…contained pejorative references *to [Clinton's] candidacy*") (emphasis added).

Obviously, pejorative statements about a presidential candidate's candidacy for that office are "unambiguously campaign related." In fact, at least one Court of Appeals has read the Supreme Court's opinion as finding that the *Citizens United* ads crossed the line into the functional equivalence of express advocacy. In *Wisconsin Right to Life, Inc. v. Barland*, the Seventh Circuit noted

> the [*Citizens United*] Court declined to apply the express-advocacy limitation to the federal disclosure and disclaimer requirements for electioneering communications. *This was dicta*. The Court had already concluded that Hillary and the ads promoting it were the equivalent of express advocacy.

751 F.3d at 836 (emphasis added). The district court dismissed the Seventh Circuit's notation of "dicta" out of hand. JA 43-46. Nevertheless, the Seventh Circuit's understanding of this language—along with Justice Kennedy's decision to twice refer to the ads as "pejorative" toward Mrs. Clinton's candidacy—are sufficient to demonstrate that *Citizens United* left room for the this challenge which is (1) as-applied, and (2) based on a genuine issue ad which (3) never mentions a candidacy.

In short, *Citizens United* centered on "unambiguously campaign related" speech. The proof is in the very wording of the ads promoting *Hillary: The Movie*, which were reproduced in the district court opinion. One ad, called "Wait," stated: "If you thought you knew everything about Hillary Clinton… wait 'til you see the movie." 530 F.Supp. 2d at 276 n.2. Another asserted that then-Senator Clinton "looks good in a pant suit" but *Hillary: The Movie* was about "the [*sic*] everything else." *Id*. n.3 ("Pants" ad). Finally, the ad "Questions" asks, "Who is Hillary Clinton?" followed by responses from the film's participants critical of Clinton's character and fitness for the Presidency. *Id*. n.4.

1. To the extent that they functioned as commercial speech, the *Citizens United* ads were subject to less protection than issue speech.

Moreover, to the extent they did not function as express advocacy, the *Citizen United* ads were commercial speech, entitled to a lower level of protection

than issue advocacy. *Citizens United*, 530 F. Supp. 2d at 280 (discussing commercial nature of the ads urging people to "buy the DVD of *The Movie*"). The Supreme Court has long held that commercial speech can be more heavily regulated than issue speech. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 298 (2008) (noting that "the First Amendment status of commercial speech" is "less privileged" than other forms of speech); *Cent. Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) ("[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"). In fact, the government may *compel* speech in the commercial context in a way it cannot for discussions of public policy. *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) ("The Government has long required commercial disclosures to prevent consumer deception or to ensure consumer health or safety") *see also R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211, (D.C. Cir. 2012) (noting that there was no dispute about Congress's authority to require health warnings on cigarette packages).

Thus, to the extent that the *Citizens United* Court relied upon the commercial nature of the *Hillary* advertisements—as opposed to finding that the ads were advocacy against a candidacy—this supports the Institute's point that *Citizens United* does not foreclose this case.

Nevertheless, the district court rejected this distinction, and the conclusion that commercial speech can be more heavily regulated than pure issue advocacy, despite recognizing that the communications urging viewers to see *Hillary: the Movie* were "commercial advertisements." *See* J.A. 50. Of course, the *Citizens United* ads were also unambiguously campaign related—and possibly the functional equivalent of express advocacy. *E.g.*, *Barland*, 751 F.3d at 823. It is not unreasonable to believe that the ads served both purposes: while they inveighed against then-Senator Clinton, they also urged viewers to buy a DVD of *Hillary: The Movie*—a film that was also unambiguously campaign related.

By contrast, the Institute's proposed ad is about a public policy issue—specifically, reform of the federal penal system. It says nothing about either Senator Udall's or Senator Bennet's character or fitness for office. It never mentions any election. Instead, it merely asks Coloradoans to urge their Senators to exercise the power inherent in their office—to vote for a specific bill that the Institute cares about. The Institute's ad is not campaign related speech, while Citizens United's ads were.

2. As a § 501(c)(4) organization, Citizens United was permitted to participate in politics, and regularly did so. The Independence Institute, as a § 501(c)(3) organization, cannot.

Not only is the speech at issue in *Citizens United* distinct from that proposed here, the speakers are also different. While Citizens United, due to its tax status,

could engage in speech that functioned as advocacy against Senator Clinton, the Independence Institute is barred, by federal law, from carrying out any candidate-centered electioneering. *Compare* 26 U.S.C. § 501(c)(3) *with* 26 U.S.C. § 501(c)(4). *Citizens United* concerned the speech of a § 501(c)(4) organization, whose affiliated entities regularly disclosed their donors. 558 U.S. at 370 ("To the contrary, Citizens United has been disclosing its donors for years").[13] By contrast, the Independence Institute is organized under § 501(c)(3) and, like all such charities, has the right to keep its donors private.

Nevertheless, the district court found tax status "immaterial" for purposes of this case. JA 47. But § 501(c)(3) organizations like the Institute enjoy greater donor protection, because they are *prohibited* from engaging in political activity. They may not engage in activity supporting or opposing a candidate, and they are forbidden from electioneering. 26 U.S.C. § 501(c)(3). Furthermore, § 501(c)(3) organizations are limited in the amount of grassroots lobbying activity they can perform, unlike § 501(c)(4) organizations.[14] *Id.*; 26 C.F.R. § 1.501(c)(3)-1(a)(3)(i).

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[13] The *Citizens United* Supreme Court decision does not mention the section of the tax code Citizens United was organized under, simply describing the group as "a nonprofit corporation." *Id.* at 370. The *Citizens United* district court described the filmmakers' nonprofit status. *Citizens United*, 530 F.Supp. 2d at 275.

[14] The § 501(c)(4) organization is specifically conceptualized as a group advocating for certain public policies as a means to promote "social welfare. INTERNAL REVENUE SERVICE, Social Welfare Organizations, http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations (last accessed April 7, 2015) ("Seeking legislation germane to the

Thus, unlike an IRC § 501(c)(4) organization like Citizens United, the Institute can engage in *no* political activity, and only limited lobbying.

Consistent with this difference in permitted activity, donors to § 501(c)(4) organizations are generally offered less protection than those to § 501(c)(3) groups. *See, e.g.*, 26 U.S.C. § 6104(c)(3) (differentiating between disclosure to state officials of donors to § 501(c)(3) organizations and other § 501(c) organization types). The tax code specifically protects § 501(c)(3) donor lists from public disclosure. 26 U.S.C. § 6104(d)(3)(A).

Initially, the Commission's own regulations recognized the difference between speakers, and categorically exempted § 501(c)(3) activity. *Shays v. FEC*, 337 F. Supp. 2d 28, 125 (D.D.C. 2004) *aff'd by* 414 F.3d 76, 96 (D.C. Cir. 2005) ("In implementing this provision of BCRA, the FEC promulgated a regulating provision that 'electioneering communication does not include any communication…paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986") (quoting 11 C.F.R. § 100.29(c)(6)) (ellipses in *Shays*, emphasis removed). Ultimately, that rule failed judicial review under the Administrative Procedures Act and *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). *Id*. at 129. The Institute is thus left without an administrative

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organization's programs is a permissible means of attaining social welfare purposes").

rule providing protection for its donors—all for simply asking Coloradoans to urge Colorado's Senators to vote for a bill.

Comparing the Institute with Citizens United highlights the fact that what the organizations actually do is vastly different. Citizens United actively uses its ability to advocate, and regularly creates films and advertisements about the Democratic Party's *candidates*. In fact, just "[f]our days after Senator Barack Obama won the Iowa presidential caucuses, [Citizens United] announced its intent to produce and broadcast a 'documentary' film about Senator Obama, as well as television advertising for that film." *Citizens United v. FEC*, No. 07-2240, FEC Mem. of L. in Supp. of Mot. for Summ. J. at 5 (D.D.C. June 6, 2008) (ECF 56).[15] Indeed, *Hillary*: *The Movie* and its ads may not have existed if Hillary Clinton had decided against running for President in 2008. This last election cycle, the organization again created content that was about candidates and campaigns. For example, Citizens United created *Rocky Mountain Heist*, a film that "unambiguously refer[ed] to elected Colorado officials running for office... and include footage of events where participants *advocate the election or defeat of Colorado candidates*." *Citizens United v. Gessler*, 773 F.3d 200, 202 (10th Cir. 2014) (emphasis added).

[15] *Available at* http://fec.gov/law/litigation/citizens_united_fec_motion_sj.pdf.

By contrast, the Institute's communication neither electioneers nor is unambiguously campaign related. It does not take a position on Senator Udall or Senator Bennet's character, qualifications, or fitness for office. Instead, the ad focuses solely on the merits of a legislative issue—encouraging the passage of the Justice Safety Valve Act. It is but a small portion of the Institute's overall activities, because even grassroots lobbying is limited under IRC § 501(h).

Nevertheless, the FEC maintains that it may constitutionally compel the disclosure of the Institute's donors for engaging in genuine issue speech, and that the Institute is not entitled to challenge that disclosure. But this cannot be the law: as the civil rights cases of the 1950s and 1960s, discussed *supra* at Section III. A., aptly demonstrate, disclosure of a nonpolitical, nonprofit organization's donors is particularly troublesome. The Institute's IRC § 501(c)(3) status demonstrates the excessive breadth of BCRA's disclosure regime as-applied, and is thus far from "immaterial."

c. The regulatory regime challenged today is materially different from the one in place when *Citizens United* was decided.

Even if *Citizens United* did foreclose the Institute's case, the present BCRA disclosure regime bears little resemblance to the one reviewed by that Court or by Judge Kollar-Kotelly below. As the Institute anticipated when it brought its suit, the BCRA disclosure regime has been undone by the recent decision in *Van Hollen*

v. FEC, which struck down 11 C.F.R. 104.20(c)(9). JA 17-18 ¶55 (noting pending *Van Hollen* case); *Van Hollen v. FEC*, 2014 U.S. Dist. LEXIS 164833 (D.D.C. Nov. 25, 2014). Under that regulation, corporations making electioneering communications needed only disclose the "name and address of each person who made a donation aggregating $1,000 or more to the corporation…aggregating since the first day of the preceding calendar year, which was made *for the purpose of furthering electioneering communications*." 11 C.F.R. § 104.20(c)(9) (emphasis added); *see also Citizens United*, 530 F. Supp. 2d at 280 (citing same). The FEC specifically promulgated this regulation to protect "corporations…[from being] required to report the sources of funds that made up their general treasury funds." 72 Fed. Reg. 72899, 72910 (Dec. 26, 2007).

Without the FEC's narrowing construction, *all* of the Institute's donors giving over $1,000 in aggregate since "the first day of the preceding calendar year"—not simply those who earmark funds for an electioneering communication, or even for electioneering communications generally—must be publicly disclosed. 52 U.S.C. § 30104(f)(2)(F). The *Van Hollen* ruling was issued after the Independence Institute's application for a three-judge court and its motions for declaratory and injunctive relief were denied. If nothing else, this intervening change in the law necessitates new, as-applied review by a three-judge court. After all, the Supreme Court cannot foreclose that which it has not reviewed.

This new disclosure regime is decidedly more burdensome than the pre-*Van Hollen* system, which—for all its manifold flaws—at least ensured that the information disclosed bore some relationship to the communication triggering the disclosure. Now, if the Institute chooses to run a similar communication to the one it sought to air in 2014, *all* significant donors to the Institute will be disclosed to the FEC and publicized. Nothing in the Supreme Court's terse discussion of disclosure under BCRA indicates that the Court would have approved of such a far-reaching scheme. *Barland*, 751 F.3d at 836 ("The [*Citizens United*] Court's language relaxing the express-advocacy limitation applies only to the *specifics* of the disclosure requirement at issue there") (emphasis added).

Indeed, and surprisingly, now that the FEC's earmarking regulation has been struck, the law mandates that the Institute produce more private information as a result of airing its proposed advertisement than if the Institute's specifically said "vote for Senator Udall."

Under federal campaign finance law, an independent expenditure is "an expenditure by a person…expressly advocating the election or defeat of a clearly identified candidate…" 52 U.S.C. § 30101(17). Independent expenditure are exempted from the definition of electioneering communications. 52 U.S.C. § 30104(f)(3)(B)(ii). Therefore, if an advertisement expressly advocates, it is not an electioneering communication.

"Expressly advocating" is a term of art dating back to *Buckley*, which limited the disclosure regime attached to independent expenditure regulation "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. The *Buckley* Court provided examples of express advocacy: words "such as 'vote for', 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'' *Buckley*, 424 U.S. at 80 n.108 (incorporating by reference *id*. at 44 n.52). *Buckley*'s "magic words" help identify when a communication contains express advocacy, and may be regulated as an independent expenditure. *See* 11 C.F.R. § 100.22(a); *FEC v. Furgatch*, 807 F.2d 857, 860 (9th Cir. 1987) (the express advocacy "standard is designed to limit the coverage of the [independent expenditure] disclosure provision 'precisely to that spending that is unambiguously related to the campaign of a particular federal candidate'") (quoting *Buckley*, 424 U.S. at 80).

Independent expenditures, like electioneering communications, are subject to reporting and disclosure requirements. 52 U.S.C. § 30104(c). Unlike electioneering communications, however, producers of independent expenditures need only report contributions were were earmarked for the independent expenditure. 52 U.S.C. § 30104(c)(2)(C). (requiring "identification of each person who made a contribution in excess of $200 to the person filing such statement

which was made for the purpose of furthering an independent expenditure"); 11 C.F.R. § 109.10(e)(vi) (implementing 52 U.S.C. § 30104(c)(2)(C).

Van Hollen vacated the Commission's regulation treating electioneering communications in a manner similar to independent expenditures. *See Van Hollen*, 2014 U.S. Dist. LEXIS 164833 at *75 ("[T]he Court finds that 11 C.F.R. § 104.20(c)(9) is unreasonable…arbitrary, capricious, and contrary to law"). If an ad is an electioneering communication, disclosure is no longer limited to donors who gave "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). Post-*Van Hollen*, if an organization runs an electioneering communication, *all* donors who gave more than $1,000 to the organization will be publicly disclosed.

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

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

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

Affirmance of the district court's denial of the Institute's application for a three-judge court is—after *Van Hollen*—inappropriate, as the Supreme Court has clearly never considered whether a single "electioneering communication" that does not "electioneer" may nonetheless serve as the trigger for disclosure of all substantive donors to a nonprofit educational charity. Moreover, such a ruling would close the door to any future as-applied challenges to BCRA's electioneering communication disclosure requirements. By contrast, reversal would simply require the merits of the Independence Institute's constitutional claims to be fully considered by a three-judge district court, as Congress intended.

D. *Van Hollen v. FEC* places this case squarely within *this* Court's 1975 decision in *Buckley v. Valeo*.

After the *Van Hollen* decision, BCRA's disclosure regime replicates the situation this Court, sitting *en banc*, declared unconstitutional in 1975. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (*en banc*). There, this Court rejected the federal government's effort, in the name of campaign finance disclosure, to regulate practically all issue communications and communicators, and compel disclosure of all of a group's significant donors. *Buckley*, 519 F.2d at 870. That case dealt with—and dispatched—the only portion of the *Buckley* plaintiffs' comprehensive challenge to FECA that never made its way to the Supreme Court. *Buckley*, 424 U.S. at 11 n. 7.

The offending provision was 2 U.S.C. § 437a, which provided that:

> Any person (other than an individual) who expends any funds…who publishes or broadcasts to the public *any material relating to a candidate* (by name, description, or other reference), advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, *or other official acts*…or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the [FEC] as if such person were a political committee.

Buckley, 519 F.2d at 869-870 (citing 2 U.S.C. § 437a (repealed by Federal Election Campaign Act amendments of 1976 Pub.L.94-283, § 105, 90 Stat. 475, 481 (1976) (emphasis added).

"Dissecting the statutory language," it was clear that § 437a applied to any broadcast material which named a candidate for office and her official acts. *Buckley*, 519 F.2d at 870. The *en banc* Court invalidated this provision, observing—with considerable understatement—that its regulatory scope was "potentially expansive." *Id*. This Court pointedly observed that one plaintiff, the New York Civil Liberties Union was, by charter, "forbidden…from endorsing or opposing any candidate for public office," but the "organization also publicize[d] the civil liberties…positions and actions of elected public officials, some of whom [we]re candidates for federal office." *Id*. at 871. Despite the New York Civil Liberties Union's commitment to avoid endorsing or opposing candidates, under § 437a its regular, public discussions of civil liberties would suddenly trigger far-reaching, invasive disclosure because § 437a "necessitate[d] reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." *Id*. at 870. And, like BCRA after *Van Hollen*, § 437a required a speaker who merely mentioned a candidate's official acts to disclose all significant donors "as if…[the speaker] were a political committee." *Id*. Judge Edward Tamm, writing separately, said he could "hardly imagine a more sweeping abridgment of [F]irst [A]mendment associational rights. Section 437a creates a situation whereby a group contributes to the political dialog in this country only at the severest cost to their associational

liberties. I can conceive of no governmental interest that requires such sweeping disclosure… It represents a greater intrusion than any found in the line of cases commencing with *NAACP v. Alabama*." *Buckley*, 519 F.2d at 914 (Tamm, J., concurring in part, dissenting in part).

While § 437a, unlike the federal electioneering communications regime, was not limited to a 60-day time period before a general election, the *en banc* Court's opinion suggests that proximity to an election does not create a governmental interest in knowing all funders to an organization conducting non-campaign related speech. Regardless of the time period, "issue discussions unwedded to the cause of a particular candidate…are vital and indispensable to a free society and an informed electorate. Thus, the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes." *Buckley*, 519 F.2d at 873. In fact, the *en banc* Court anticipated that much speech covered by § 437a would, in fact, occur close in time to an election, given that "[p]ublic discussion of public issues *which also are campaign issues* readily and often unavoidably draws in candidates and their positions, their voting records[,] and other official conduct." *Id.* at 876 (emphasis added).

Thus, FECA § 437a explicitly sought the same scope of government power that the Commission claims here: namely, the right to regulate any speech,

regardless of whether that speech advocates an election result or is related to a political campaign, or if it instead merely mentions a candidate in relation to "any public issue." *Id*. at 869. In response, this Court determined that imposing disclosure requirements upon communicators for "tak[ing] public stands on public issues" was impermissible under the First Amendment because, when compared to campaign-related speech, "the nexus" between issue speech and any cognizable governmental interest "may be far more tenuous." *Buckley*, 519 F.2d at 872; *see also NAACP*, 357 U.S. at 466 (fundamental right for Americans "to pursue their lawful private interests privately, and to associate freely with others in doing so").

IV. Because no Supreme Court decision resolves the Independence Institute's case, it should be heard by a three-judge court.

Because no Supreme Court case forecloses the Institute's challenge, a three judge court should be assembled pursuant to 52 U.S.C. § 30110 note and 28 U.S.C. § 2284. Ruling for the Independence Institute would merely ensure that Congress' intent for speedy judicial review be preserved for an as-applied challenge. *See Wagner v. FEC*, 717 F.3d 1007, 1013 (D.C. Cir. 2013) (discussing Congressional intent of the related FECA review procedure of 52 U.S.C. § 30110).

Allowing the Independence Institute to present its case to a three-judge court would not gut "electioneering communications" regulations for other, campaign-focused organizations and advertisements. In the event that the expansive definition of "electioneering communications" was found to be overbroad, Congress

specifically provided for narrowing the reach of BCRA: the backup definition discussed *supra*. 52 U.S.C. § 30104(f)(3)(A)(ii). Under the backup definition, any communication in the electioneering communications window that **P**romotes, **A**ttacks, **S**upports, or **O**pposes ("PASO") a candidate may be regulated. The PASO standard is narrower, and more constitutionally defensible, than regulating any speech that merely mentions a candidate within the electioneering communications window—the current law—but it still captures the "unambiguously campaign related" speech in which the government has an appropriate informational interest. And the PASO standard has already been reviewed and approved by the Supreme Court. *McConnell*, 540 U.S. at 170, *id*. n.64.

Thus a ruling in favor of the Independence Institute will not upset the ordinary enforcement of campaign finance law. But it will protect the Institute's genuine issue speech from the burdens of campaign finance disclosure. By contrast, the district court's ruling would explicitly foreclose any future as-applied challenges concerning the scope of compelled electioneering communications disclosure, an outcome contrary to both the letter and spirit of *Buckley*.

CONCLUSION

The judgment of the district court should be reversed, and the merits of the Independence Institute's constitutional claims heard by a three-judge district court pursuant to 52 U.S.C. § 30110 note.

Respectfully Submitted,

s/ Allen Dickerson

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and District of Columbia Circuit Rule 32(a)(1) because it contains 13,402 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

Dated: April 8, 2015

s/ Allen Dickerson
Allen Dickerson

ADDENDUM

Table of Contents

U.S. CONST., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

52 U.S.C. § 30110 note

Bipartisan Campaign Reform Act of 2002; constitutional challenges. Act March 27, 2002, P.L. 107-155, Title III, § 403, 116 Stat. 113 (effective on enactment, as provided by § 402 of such Act, which appears as 52 USCS § 30101 note), provides:

"(a) Special rules for actions brought on constitutional grounds. If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act [for full classification, consult USCS Tables volumes], the following rules shall apply:

"(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

"(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

"(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

"(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket

and to expedite to the greatest possible extent the disposition of the action and appeal.

"(b) Intervention by Members of Congress. In any action in which the constitutionality of any provision of this Act or any amendment made by this Act [for full classification, consult USCS Tables volumes] is raised (including but not limited to an action described in subsection (a)), any member of the House of Representatives (including a Delegate or Resident Commissioner to the Congress) or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment. To avoid duplication of efforts and reduce the burdens placed on the parties to the action, the court in any such action may make such orders as it considers necessary, including orders to require intervenors taking similar positions to file joint papers or to be represented by a single attorney at oral argument.

"(c) Challenge by Members of Congress. Any Member of Congress may bring an action, subject to the special rules described in subsection (a), for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act [for full classification, consult USCS Tables volumes].

"(d) Applicability.

"(1) Initial claims. With respect to any action initially filed on or before December 31, 2006, the provisions of subsection (a) shall apply with respect to each action described in such section.

"(2) Subsequent actions. With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action."

52 U.S.C. § 30110

§ 30110. Judicial review

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting enbanc.

28 U.S.C. § 2284

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

52 U.S.C. § 30104(f)

§ 30104. Reporting requirements

(f) Disclosure of electioneering communications.

(1) Statement required. Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement. Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the

names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication. For purposes of this subsection--

(A) In general.

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which--

(I) refers to a clearly identified candidate for Federal office;

(II) is made within--

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions. The term "electioneering communication" does not include--

(i) a communication appearing in a news story, commentary, or editorial

distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) [52 USCS § 30101(20)(A)(iii)].

(C) Targeting to relevant electorate. For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons--

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date. For purposes of this subsection, the term "disclosure date" means--

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse. For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements. Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code. Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on

behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986 [26 USCS §§ 1 et seq.].

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (52 U.S.C. 30104(f)(3)).

(a) Electioneering communication means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section -- (1) Broadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) Publicly distributed means aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States

within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons --

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to

that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means --

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the

protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour --

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is

50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that --

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) The following communications are exempt from the definition of electioneering communication. Any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or

Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(5) Is paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate. See 11 CFR 300.71 for communications paid for by a candidate for State or local office that promotes, supports, attacks or opposes a Federal candidate.

11 C.F.R. § 104.20

§ 104.20 Reporting electioneering communications (52 U.S.C. 30104(f)).

(a) Definitions.

(1) Disclosure date means:

(i) The first date on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

(ii) Any other date during the same calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

(2) Direct costs of producing or airing electioneering communications means the following:

(i) Costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; or

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime.

(3) Persons sharing or exercising direction or control means officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners, of the entity or person making the disbursement for the electioneering communication.

(4) Identification has the same meaning as in 11 CFR 100.12.

(5) Publicly distributed has the same meaning as in 11 CFR 100.29(b)(3).

(b) Who must report and when. Every person who has made an electioneering communication, as defined in 11 CFR 100.29, aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date. The

statement shall be filed under penalty of perjury, shall contain the information set forth in paragraph (c) of this section, and shall be filed on FEC Form 9. Political committees that make communications that are described in 11 CFR 100.29(a) must report such communications as expenditures or independent expenditures under 11 CFR 104.3 and104.4, and not under this section.

(c) Contents of statement. Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information:

(1) The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and, if the person is not an individual, the person's principal place of business;

(2) The identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement or who executed a contract to make a disbursement;

(3) The identification of the custodian of the books and accounts from which the disbursements were made;

(4) The amount of each disbursement, or amount obligated, of more than $200 during the period covered by the statement, the date the disbursement was made, or the contract was executed, and the identification of the person to whom that disbursement was made;

(5) All clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates;

(6) The disclosure date, as defined in paragraph (a) of this section;

(7) If the disbursements were paid exclusively from a segregated bank account consisting of funds provided solely by persons other than national banks, corporations organized by authority of any law of Congress, or foreign nationals as defined in 11 CFR 110.20(a)(3), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization, the name and address of each donor who donated an amount

aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization and were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

(d) Recordkeeping. All persons who make electioneering communications or who accept donations for the purpose of making electioneering communications must maintain records in accordance with 11 CFR 104.14.

(e) State waivers. Statements of electioneering communications that must be filed with the Commission must also be filed with the Secretary of State of the appropriate State if the State has not obtained a waiver under 11 CFR 108.1(b).

52 U.S.C. § 30104(c)

(c) Statements by other than political committees; filing; contents; indices of expenditures.

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include--

(A) the information required by subsection (b)(6)(B)(iii), indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

(3) The Commission shall be responsible for expeditiously preparing indices

which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii), made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

11 C.F.R. § 109.10

§ 109.10 How do political committees and other persons report independent expenditures?

(a) Political committees, including political party committees, must report independent expenditures under 11 CFR 104.4.

(b) Every person that is not a political committee and that makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement or report on FEC Form 5 in accordance with 11 CFR 104.4(e) containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so in accordance with the quarterly reporting schedule specified in 11 CFR 104.5(a)(1)(i) and (ii) and shall file a report or statement for any quarterly period during which any such independent expenditures that aggregate in excess of $250 are made and in any quarterly reporting period thereafter in which additional independent expenditures are made.

(c) Every person that is not a political committee and that makes independent

expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election, must report the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18. (See 11 CFR 104.4(f) for aggregation.) The person making the independent expenditures aggregating $10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. Each 48-hour report must contain the information required by paragraph (e)(1) of this section.

(d) Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which a

communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. (See 11 CFR 104.4(f) for aggregation.) Such report or statement shall contain the information required by paragraph (e) of this section.

(e) Content of verified reports and statements and verification of reports and statements.

(1) Contents of verified reports and statement. If a signed report or statement is submitted, the report or statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) Verification of independent expenditure statements and reports. Every person shall verify reports and statements of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (e)(2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (e.g., by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, I electronically filed the foregoing using the court's CM/ECF system which will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

I also caused 8 copies of the foregoing to be delivered to the Clerk of this Court, and 2 copies to be delivered to counsel for each represented party.

s/ Allen Dickerson
Allen Dickerson