No. 14-1463

In the

United States Court of Appeals for the Tenth Circuit

INDEPENDENCE INSTITUTE,
a Colorado nonprofit corporation,

Appellant,

v.

SCOTT GESSLER,
in his official capacity as Colorado Secretary of State,

Appellee.

On appeal from the United States District Court
for the District of Colorado, No. 1:14-cv-02426 (Jackson, J.)

Appellant's Opening Brief

Shayne M. Madsen
John Stuart Zakhem
JACKSON KELLY, PLLC-DENVER
1099 18th Street, Suite 2150
Denver, Colorado 80202
Telephone: 303.390.0012
Facsimile: 303.390.0177
smadsen@jacksonkelly.com
jszakhem@jacksonkelly.com

Allen Dickerson
Tyler Martinez
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org
Counsel for Appellant

Oral Argument Requested

January 7, 2015

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Independence Institute makes the following corporate disclosure:

The Independence Institute is a nonprofit corporation organized under the Internal Revenue Code and under Colorado law. The Independence Institute does not have any outstanding securities in the hands of the public. There are no parent companies, subsidiaries, or affiliates of the Independence Institute.

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Statement of Related Cases

Pursuant to 10th Circuit Rule 28.2(C)(1), Appellant Independence Institute states that there are no prior or related appeals in this Court.

Glossary

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

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).

FEC – Federal Election Commission

JA – Joint Appendix

Jurisdictional Statement

The district court had jurisdiction to hear federal questions arising under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. §§ 1983, 1988). 28 U.S.C. § 1331. On October 22, 2014, the district court issued its Order denying the Independence Institute's Motion for Preliminary Injunction/Summary Judgment and granting Secretary Gessler's Cross-Motion for Summary Judgment. Final judgment was entered the same day. JA 146. The Institute timely filed its notice of appeal to this Court on November 5, 2014. JA 164. This court has jurisdiction to hear the appeal from the Order and Final Judgment of the district court. 28 U.S.C. § 1291.

Statement of the Issues

When the Supreme Court upholds a federal statute, does it foreclose future as-applied challenges to similar state laws?

Do Sections 2(7) and 6(1) of Colorado Constitution Article XXVIII survive exacting scrutiny under the First and Fourteenth Amendments where they require reporting and donor disclosure for advertisements unrelated to any political campaign?

Statement of the Case

I. The Independence Institute and Its Television Advertisement

The Independence Institute is a Denver, Colorado-based nonprofit corporation organized under the Internal Revenue Code and Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status); COLO. REV. STAT. §§ 6-16-103(1) (defining "charitable organization"); 7-121-101 *et seq*. ("Colorado Revised Nonprofit Corporation Act") (2014). Established in 1985, the Independence Institute has a long conducted research and educated the public on various aspects of public policy, including taxation, education policy, health care, and environmental issues.

As a § 501(c)(3) organization, the Institute is barred from intervening in candidate campaigns for elective office. 26 U.S.C. § 501(c)(3) (prohibiting educational nonprofits from "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). As a result of its status, the Institute's donors may not be publicly revealed. 26 U.S.C. § 6104(d)(3)(A). In fact, ordinarily, a state official who publicly revealed the Institute's donors would face substantial criminal penalties. 26 U.S.C. § 7213(a)(2) ("felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the cost of prosecution").

To further this mission, the Institute wished to run a communication seeking an audit of Colorado's Health Benefit Exchange before the 2014 general election.[1] The communication is a 30 second television advertisement that would have run as follows:

Audio	Visual
Doctors recommend a regular check up to ensure good health.	*Video of doctor and mother with child.*
Yet thousands of Coloradoans lost their health insurance due to the new federal law.	*Headlines of lost insurance stories.*
Many had to use the state's government-run health exchange to find new insurance.	*Denver Post headline "Colorado health exchange staff propose $13M fee on all with insurance"*
Now there's talk of a new $13 million fee on your insurance.	
It's time for a check up for Colorado's health care exchange.	
Call Governor Hickenlooper and tell him to support legislation to audit the state's health care exchange.	*Call Gov. Hickenlooper at (303) 866-2471.* *Tell him to support an audit of the*

[1] While the 2014 general election has, plainly, come and gone, the Institute intends to run "materially similar future targeted broadcast ads mentioning a candidate within the blackout period." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) ("*WRTL II*") (quotation marks and citation omitted).Furthermore, the Institute "cannot predict what issues will be matters of public concern during a future blackout period", rendering it "entirely unreasonable to expect that [it] could…obtain[] complete judicial review of its claims in time for it to air its ads." *WRTL II*, 551 U.S. at 362 (citation omitted, punctuation altered). Accordingly, this "case fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Id.*

Audio	Visual
	health care exchange.
INDEPENDENCE INSTITUTE IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISING.	*Paid for by The Independence Institute, Jon Caldara, President. 303-279-6536. www.indepedenceinstitute.org*

Television ads are expensive, and so the Institute knew that it would spend over $1,000 on the proposed advertisement. As a nonprofit corporation, the Institute relies upon donors to pay for its work, and so had planned to seek donations to pay for the advertisement. The Institute intended to receive more than $250 from individual donors.

II. Colorado's Electioneering Communications Law and Disclosure

Much of Colorado's campaign finance regulation is codified in the state constitution at Article XXVIII. *See* COLO. CONST. art. XXVIII ("Article XXVIII"). The constitution defines an "electioneering communication" to include "any communication broadcasted by television… that (I) Unambiguously refers to any candidate; and (II) Is broadcasted… within… sixty days before a general election; and (III) Is broadcasted to… an audience that includes members of the electorate for such public office." COLO. CONST. art. XXVIII § 2(7)(a).[2]

[2] The Colorado Revised Statutes either adopt by reference or mirror the substantive portions of the constitution's regulation of "electioneering communications." See, e.g., COLO. REV. STAT. §§ 1-45-103(9) (incorporating by reference COLO. CONST. art. XXVIII § 2); 1-45-108(1)(a)(III) (mirroring COLO. CONST. art. XXVIII § 6 on electioneering communications disclosure).

Once an organization spends $1,000 on electioneering communications, it must report to the State.[3] COLO. CONST. art. XXVIII § 6(1). Those reports require "the name, and address, of any person that contributes more than two hundred and fifty dollars per year to" the organization running the communication. *Id*. The law requires the filing of these reports "[o]n the first Monday in September and on each Monday every two weeks thereafter before the major election," as well as an additional, final report "thirty days after the major election." COLO. REV. STAT. § 1-45-108(2)(a)(I)(D)-(E). If the donor is a natural person, the report must include his or her occupation and employer. *Id*. The Secretary has interpreted these requirements as applying only to donations earmarked for electioneering communications. 8 C.C.R. 1505-6, Rule 11.1.[4]

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[3] The constitution features a press exemption and a broadcast editorial endorsement exemption. Colo. Const. art. XXVIII § 2(7)(b)(I) and (II). Beyond media communications, the constitution exempts communications made "in the regular course and scope of… business" or made to an organization's members. Colo. Const. art. XXVIII § 2(7)(b)(III). Finally, the constitution provides an exemption where the "popular name of a bill or statute" includes a candidate's name. Colo. Const. art. XXVIII § 2(7)(b)(IV). None apply here.

[4] The Colorado courts have, however, overturned other rules promulgated by the Secretary. For example, 8 C.C.R. 1505-6, Rule 1.7 added, *inter alia*, a "functional equivalent of express advocacy" standard to the test for electioneering communications. That rule was struck down as beyond his authority. *Colo. Ethics Watch v. Gessler*, 2013 COA 172M ¶ 60 (Colo. App. 2013) ("although the Secretary's attempt to conform Article XXVIII, section 2(7)(a), to constitutional standards is understandable, it exceeds his authority to 'administer and enforce' the

III. Proceedings Below

The Independence Institute sought declaratory and injunctive relief to protect its ad from Colorado's electioneering communications definition and disclosure regime. JA 28 ¶98; JA 31 ¶112; *id*. ("Prayers for Relief"). The Verified Complaint and Motion for Preliminary Injunction were filed before the 60 day general election window. Joint App. ("JA") at 7. The parties agreed on a joint stipulation concerning the scope of the Institute's claims, and agreed to convert the Institute's Motion for Preliminary Injunction into a motion for summary judgment. JA 69. The Secretary then cross-moved for summary judgment. JA 72. The district court held a hearing on October 15, 2014. JA 165. Before the close of the electioneering communications window, the district court entered an order granting the Secretary's cross-motion for summary judgment. JA 146, JA 160 ("Plaintiff's Motion for Preliminary Injunction/Summary Judgment [ECF No. 13] is DENIED, and defendant's Cross-Motion for Summary Judgment [ECF No. 21] is GRANTED").

Plaintiff timely appealed on November 5, 2014, and its appeal was docketed in this Court the next day. JA 164.

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law") (internal citation omitted); *id*. at ¶ 62 (affirming trial court's invalidation of Rule 1.7)

Summary of the Argument

All parties, and the district court below, agree that the Independence Institute's proposed advertisement is a genuine discussion of an issue of public importance, the Colorado Health Benefit Exchange, and that it does not electioneer for or against any candidate for public office.

Nonetheless, the district court ruled that the Independence Institute's issue ad could be constitutionally regulated as an "electioneering communication." As a result of that decision, the Independence Institute must allow the Secretary to publicize the names and addresses of the Institute's donors as a condition of running its ad within 60 days of an election.

This is a puzzling result. As a Section 501(c)(3) organization, the Institute is prohibited from involving itself in campaigns for office. Moreoever, as a federally-recognized charity, the privacy of the Institute's donors is explicitly protected by federal law.

More fundamentally, the Institute's donors have a First Amendment right "to pursue their lawful private interests privately and to associate freely with others in doing so." *NAACP v. Alabama*, 357 U.S. 449, 466 (1958). Consequently, the Supreme Court has only permitted the states to compel donor disclosure following "exacting scrutiny," under which states must demonstrate a substantial relationship

between the information to be publicized and a sufficiently important governmental interest.

In the case of regulations concerning the financing of political campaigns, the Court has recognized only one such interest. States may compel disclosure to allow the public to know the funders of "unambiguously campaign related" speech. This standard, first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976), represents the outer edge of constitutionally appropriate disclosure. Nevertheless, the district court here—despite agreeing with the Institute that its speech was genuine issue speech, that is, unambiguously *not* campaign related—ruled that the Institute must disclose the funders of its speech if its ad runs in moderate proximity to an election. This was contrary to *Buckley* and its progeny, and ought to be reversed.

The district court reached its decision by concluding that two recent Supreme Court cases involving federal campaign finance law, one facial and one as-applied, govern in the place of *Buckley*. But, reading these cases together, they go no further than allowing disclosure for "unambiguously campaign related" advertisements. The district court's remaining authority is of similar merit, and does not disturb the Supreme Court's definitive protection of genuine issue speech, and its funders, from state regulation.

Finally, the district court wrongly feared that ruling for the Institute would trigger a judicial crisis in the realm of campaign finance law. That is not the case.

Limiting constructions, already enacted by other legislatures and approved by other circuit courts, provide narrower standards that comport entirely with *Buckley* and its progeny while allowing Colorado to demand disclosure in appropriate circumstances.

Accordingly, this Court ought to reverse the district court and find that Colorado's electioneering communication regime is unconstitutional as it applies to the Institute's proposed advertisement.

Argument

I. Standard of Review

Below, the Institute sought injunctive relief, as-applied to its ad, from Colorado's disclosure regime. JA 28 ¶98; JA 31 ¶112; *id.* ("Prayers for Relief"). The Parties agreed that the case merited summary judgment. JA 70. The district court denied summary judgment for the Institute, and entered it for the Secretary. JA 146, JA 160.

Summary judgment decisions are reviewed *de novo* "viewing the record in the light most favorable to the parties opposing the motion." *KT&G Corp. v Att'y General of Oklahoma*, 535 F.3d 1114, 1127 (10th Cir. 2008). Moreover, in this Court, First Amendment cases require *de novo* review based upon "an independent examination of the whole record." *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1116 (10th Cir. 2010) (collecting cases) (citation and internal quotation marks

omitted).; *see also Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1029 (10th Cir. 2008) ("We review *de novo* a district court's findings of constitutional fact and its ultimate conclusions regarding a First Amendment challenge"). This independent review must be "rigorous" in order "to ensure that the judgment protects the rights of free expression." *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027 (10th Cir. 2008) (quoting *Chandler v. City of Arvada*, 292 F.3d 1236, 1240 (10th Cir. 2002)); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1145-1146 (10th Cir. 2007) (quoting *Faustin v. City & County of Denver*, 423 F.3d 1192, 1195-96 (10th Cir. 2005)).

II. Compelled Disclosure Regimes Must Be Reviewed Under Exacting Scrutiny.

a. The Supreme Court requires governments to demonstrate that a disclosure regime's reach is closely drawn to a sufficiently important interest.

The Supreme Court has long held that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. Indeed, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Id*. at 462.

When government power is used to compel an organization to reveal its financial supporters, it is not an incidental violation of these freedoms. Rather, as seventy years of unbroken precedent holds, compelled disclosure imposes "a

significant encroachment upon personal liberty." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (collecting cases); *Buckley*, 424 U.S. at 66 ("compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights"). There is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462.

To protect against unconstitutional infringement of associational liberty, the Supreme Court requires that government efforts to compel disclosure survive "the strict test" of exacting scrutiny. *Buckley*, 424 U.S. at 66. This rigorous review "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. FEC*, 558 U.S. 310, 366-367 (2010) (citation and quotation marks omitted).

b. The ability to associate free of compelled state disclosure is a hard-won victory of the civil rights era.

Much of the Court's case law governing compelled donor disclosure comes from a series of cases decided in the 1950s and 1960s. During that period, at the height of the civil rights era, a number of states sought the membership lists of the NAACP and its chapter organizations. In each case, the Supreme Court determined that the First Amendment prevented the states from obtaining or publicizing this information. These cases laid the foundation for the modern understanding of associational liberty and the constitutional necessity that governments closely tailor disclosure statutes to a properly understood government interest.

Freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by [the] more subtle governmental interference" of compelled disclosure (and attendant sanctions for failure to comply with such laws). *Bates*, 361 U.S. at 523. Accordingly, the civil rights era Court prohibited states from obtaining personal information about donors to groups unless the state government first "demonstrate[d] the compelling and subordinating governmental interest essential to support direct inquiry" into such records. *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 557 (1962); *see also Bates*, 361 U.S. at 525 (finding "no relevant correlation between" the government interest asserted "and the compulsory disclosure and publication of the membership lists")

III. In the Campaign Finance Context, Only Regimes Which Trigger Disclosure Based Upon Unambiguously Campaign Related Speech Survive Exacting Scrutiny.

a. *In the foundational case of* Buckley v. Valeo*, the Supreme Court applied exacting scrutiny to protect organizations engaged in issue speech from the burdens of disclosure.*

Buckley v. Valeo is the starting point for all campaign finance jurisprudence in the modern era. *See McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1444 (2014) (applying *Buckley* and invalidating federal aggregate contribution limits). In *Buckley*, the Supreme Court examined the interplay between government efforts to compel the disclosure of campaign contributor information and the First Amendment's robust protections of speech and association. Specifically, *Buckley*

reviewed provisions of the Federal Election Campaign Act ("FECA") which required "political committees" to disclose contributor information to the federal government for subsequent publication. *Buckley*, 424 U.S. at 79. FECA defined a "political committee" merely as an association making contributions or expenditures above a threshold amount. *Id*. at n. 105.[5]

The *Buckley* Court began its disclosure analysis by observing that "[s]ince *NAACP v. Alabama* we have required that the subordinating interests of the State *must* survive exacting scrutiny." *Id*. at 64 (emphasis supplied). *Buckley* "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed." *Id*.

Applying this standard, the Court determined that the definition of "political committee" was unconstitutional because it "could be interpreted to reach groups engaged purely in issue discussion." *Id*. at 79. Accordingly, in order to ensure a proper fit between the statute as written and the governmental interests FECA implemented, the Court promulgated the "major purpose" test. *Id*. The test is straightforward: the government may compel contributor information from "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*.; *see also id.*

[5] This was $1,000 per election in 1976 dollars, which would now be worth over $4,400.

at 79-80 ("This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate").

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. 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 the campaign of a particular federal candidate." *Id*. at 80, 81.

This holding arose from the concern of both the *en banc* D.C. Circuit and the Supreme Court that FECA might compel disclosure from groups "whose only connection with the elective process arises from completely nonpartisan," or even partisan, "public discussion of issues of public importance." *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975); 424 U.S. at 80 (narrowly construing FECA to

prevent disclosure from "reach[ing] all partisan discussion"). Thus, the Supreme Court, mindful that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," construed FECA to prevent disclosure regulations from capturing the precise kind of issue speech that Plaintiff wishes to engage in here. *Buckley*, 424 U.S. at 42.

This standard—that disclosure is properly tailored only when it relates to spending that is unambiguously campaign related—remains good law.

b. McConnell v. FEC *did not diminish the First Amendment's robust protection for donors supporting genuine issue speakers.*

In 2002, Congress passed BCRA, the first major expansion of federal political speech regulation since the *Buckley* decision. Like FECA before it, BCRA immediately faced a substantial number of constitutional challenges. *McConnell v. FEC*, 540 U.S. 93, 132 (2003) (noting eleven separate such challenges to BCRA's enactment).

While BCRA was a lengthy law, its creation of "electioneering communications" is the only relevant portion here. BCRA defined such a communication as "any 'broadcast, cable, or satellite communication' that…'refers to a clearly identified candidate for Federal office'", that is made with 60 days of a general election or 30 days of a primary election, and that "'is targeted to the

relevant electorate.'" *McConnell*, 540 U.S. at 189-190 (quoting 52 U.S.C. § 30104(f)(3)(A)(i)).

This new statutory creation was a response to a form of unambiguously campaign related speech which had been unregulated after *Buckley*. Specifically, BCRA targeted "sham issue advocacy" or "candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (quotation marks and citations omitted). The *McConnell* Court was explicit in its belief that "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an unambiguous "electioneering purpose." *Id*. at 206. The *McConnell* Court came to this conclusion only after reviewing an "extensive record, which was over 100,000 pages long."[6] *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).

The Court described this new brand of advertisements as ones which, rather than "urg[ing] viewers to 'vote against Jane Doe,'" simply "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id*. at 127. Indeed, "the [Court's] conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."

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[6] It is worth noting that no such lengthy record exists demonstrating that a fear of genuine issue advocacy, such as the Institute's proposed communication, was a concern of the Colorado electorate when it adopted Amendment XXVIII in 2002.

Id. The Court, appropriately enough, referred to these ads as "so-called" or "sham issue advocacy," and noted these "issue" ads' true purpose was to advocate for the election of some candidates at the expense of others. *Id*. at 126, 127, 132, 193.

As the district court observed, BCRA's electioneering communication definition survived facial review. *Id*. at 194. But *McConnell* did not provide a blank check to would-be regulators to force public disclosure upon the financial supporters of *any* issue communication—to do would have been to overrule *Buckley*. Indeed, the *McConnell* Court took care to make certain that genuine issue speakers could still raise as-applied challenges to BCRA's electioneering communications regime. 540 U.S. at 206, n. 88 ("We assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"); *id*. at 207 (noting the "heavy burden" involved in bringing a successful facial challenge).

c. Citizens United v. FEC *did not do away with* Buckley*'s "unambiguously campaign related" standard.*

Seven years after *McConnell*, the Supreme Court upheld BCRA's electioneering communication disclosure requirements against a specific as-applied challenge. *Citizens United*, 558 U.S. at 372. The particular facts and analysis of that case, however, matter.

Citizens United, a § 501(c)(4) social-welfare corporation, produced a film, *Hillary: The Movie* ("*Hillary*"), and several promotional advertisements. *Id*. at

319-20. The film and ads focused on Hillary Clinton, then seeking the Democratic nomination for President of the United States, and Citizens United sought to air its ads during the electioneering communications window. The Supreme Court unanimously concluded that *Hillary* functioned as express advocacy; it was, "in essence…a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." *Id*. at 325. The Court also determined that three advertisements for the film fell "within BCRA's definition of an 'electioneering communication'" because "[t]hey referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy." *Id*. at 368. It is undisputed that every advertisement for *Hillary* was designed to get viewers to watch the film—which was found to have, objectively, advocated an election result. *Id*. at 325.

The text of the *Hillary* advertisements follows:

"Wait"[7] [Image(s)] of Senator Clinton on screen] "If you thought you knew everything about Hillary Clinton…wait 'til you see the movie. [Film Title Card] [Visual Only] Hillary: The Movie. [Visual Only] www.hillarythemovie.com
"Pants"[8]

[7] *Citizens United v. FEC*, 530 F. Supp. 2d. 274, 276 n. 2 (D.D.C. 2008).

[Image(s) of Senator Clinton screen] "First, a kind word about Hillary Clinton" [Ann Coulter Speaking & Visual]: She looks good in a pant suit. "Now, a movie about the everything else" [Film Title Card] [Visual Only] Hillary: The Movie. [Visual Only] www.hillarythemovie.com
"Questions"[9] "Who is Hillary Clinton?" [Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ." [Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ." [Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ." "If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." [Film Title Card] [Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007. [Visual Only] www.hillarythemovie.com

The Court responded to two specific arguments claiming that the BCRA disclaimer regime did not apply to these ads. First, the Court determined that

[8] *Id*. at n.3 (punctuation altered for clarity).
[9] *Id.* at n. 4 (punctuation altered for clarity).

disclosure did not necessarily have to be restricted to speech that functioned as express advocacy.[10] *Id*. at 369. In doing so, the Supreme Court pointed out that the burden upon Citizens United under BCRA's disclosure regime was "a less restrictive alternative to more comprehensive regulations," such as the federal PAC status laws, which require onerous filing and reporting requirements. *Id*. at 369 (citing to *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) for proposition that PAC burdens are more "comprehensive").

Secondly, "Citizens United dispute[ed] that an informational interest justifie[d] the application" of BCRA disclosure requirements "to its ads, which only attempt to persuade viewers to see the film." *Id*. The Court rejected this argument, observing that the informational interest still applied regarding groups "speaking about a candidate shortly before an election." *Id*. While the district court considers this statement sufficient to also reach the Institute's proposed communication, that court missed the context of this ruling. JA 155. Namely, the informational interest in "speaking about a candidate before an election" can only

[10] The Seventh Circuit, however, does not believe that this determination was part of the holding of *Citizens United*. That court has observed that while "the Court declined to apply the express-advocacy limitation to the federal disclosure…requirements for electioneering communications…[t]his was *dicta*. The Court had already concluded that *Hillary* and the ads promoting it were the equivalent of express advocacy." *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014). If nothing else, the Seventh Circuit's caution in reading *Citizens United*'s discussion of speech functioning as express advocacy suggests that the Supreme Court did not further extend the government's informational interest beyond speech which is "unambiguously campaign related."

come from *Buckley*—the first case to apply the informational interest to government efforts to link disclosure to political speech. And that interest only extends to "increas[ing] the fund of information concerning those who support the candidates." *Buckley*, 424 U.S. at 81. Or, as the *Buckley* Court put it, "shed[ding] the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported." *Id*.

Accordingly, the *Citizens United* Court determined that there was "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest"—the informational interest from *Buckley*. *Citizens United*, 558 U.S. at 367 (citing *Buckley*, 424 U.S. at 66); *see also id*. at 369 ("the informational interest...is sufficient to justify application of [BCRA] to these ads").

In this context, the *Citizens United* Court's ruling makes sense. The *Hillary* ads, as reproduced *supra*, were clearly communications designed to encourage citizens to watch a full-length feature film that advocated against Hillary Clinton for President. Moreover, they are ads *about* Senator Clinton. They are not merely issue speech that referred to her in her official capacity as a small part of the overall message. The Institute's single communication, focused as it is on the Colorado Health Benefit Exchange, is simply not comparable.

To determine otherwise—to find that the informational interest covers speech which is unambiguously *not* campaign-related—assumes that the *Citizens United* Court overruled *Buckley*. Such an outcome is unlikely: the *Citizens United* Court was hardly shy about overruling prior precedent. 558 U.S. at 365 ("*Austin* is overruled…This part of *McConnell* is now overruled").

IV. Colorado's Electioneering Communications Statute Fails Exacting Scrutiny As-Applied to the Independence Institute's Proposed Speech.

a. The district court recognized that exacting scrutiny was the proper standard, yet misapplied it.

The district court correctly determined that the Institute's challenge to Colorado's electioneering communications disclosure regime necessitated exacting scrutiny. JA 151. To survive the "strict test" of this exacting constitutional review, the state must demonstrate "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Buckley*, 424 U.S. at 66; *Citizens United v. FEC*, 558 U.S. 310, 366-367 (2010) (citation and quotation marks omitted). While this level of review is "'possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp.'" *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) (quoting *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*)). "[T]he mere assertion of a connection between a vague interest and a disclosure

requirement is insufficient." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. 2014). Tailoring matters.

The need for heightened scrutiny is vital in cases involving compelled publicity of donors, for "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious[,] or cultural matters…state action which *may* have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id*. at 460-461 (emphasis supplied). Rather than apply this standard, under which "it is the *government*'s burden to show that its interests are substantial, [and]…furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes on political speech," the district court simply relied upon the government's invocation of the informational interest. *Chula Vista Citizens for Jobs & Fair Competition*, 755 F.3d at 684 (emphasis in original); JA 156 ("[T]he Supreme Court has held that a sufficient interest exists with respect to speech that references a candidate when made close in time to the election. *There is no need for this Court to go any further*…") (emphasis supplied). This was error. *Buckley*, 424 U.S. at 64 ("[S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes *cannot* be justified by a mere

showing of some legitimate governmental interest") (collecting cases) (emphasis supplied).

b. Colorado's disclosure regime, as-applied to the Institute's ad, does not serve a sufficiently important governmental interest.

The district court cited the *Buckley* Court as holding "that disclosure requirements serve important governmental interests in (1) providing voters with information useful in their evaluation of candidates; (2) deterring corruption and the appearance of corruption; and (3) gathering data necessary to detect violations of contribution limits." JA 152 (citing 424 U.S. at 66-67). But there is no anti-corruption interest served by the regulation of independent corporate electioneering communications, which, as a matter of law, cause no danger of *quid pro quo* corruption. *Citizens United*, 558 U.S. at 361 Nor would disclosure of the Institute's funders reveal data necessary to detect violations of contribution limits—there are no contribution limits to § 501(c)(3) organizations. This leaves us with the informational interest.

i. The state's legitimate informational interest is a narrow one, and disclosure statutes must be properly tailored to serve that interest.

The Independence Institute concedes that, given the context, disclosure may properly serve a sufficiently important governmental interest. *See supra* at 11-21 (discussing informational interest in *Buckley*, *McConnell*, and *Citizens United*). But the informational interest does not simply extend to whatever information the

state desires. This interest was defined—and cabined—by *Buckley*. As discussed *supra*, *Buckley* held that the relevant governmental interest sounded only in information which "increases the fund of information concerning those support the candidates" for office. 424 U.S. at 81. No other case has expanded the informational interest beyond this narrow scope.

This interest is served when information "helps voters to define more of the candidates' constituencies." *Id*. Disclosure provisions designed to elicit this information, such as those which reveal the true source of "independent groups…running *election-related advertisements* 'while hiding behind dubious and misleading names'" may be upheld "on the ground that they would help citizens 'make informed choices'" at the ballot box. *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 197) (emphasis supplied). The Supreme Court has *only* held that disclosure of the financiers of speech which is "unambiguously campaign related" can serve the state's interest in "increas[ing] the fund of information concerning those who support the candidates." *Buckley*, 424 U.S. at 81; *Citizens United*, 558 U.S. at 367 (quoting *Buckley*, 424 U.S. at 66 ("[D]isclosure c[an] be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending") (brackets in original)).

Not all disclosure related to political speech serves this narrow, finite, governmental interest. *Am. Fed. of Labor-Congress of Industrial Organizations v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation"); *Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") (emphasis supplied). And disclosure which is not keyed toward revealing the funding sources of such unambiguously campaign related speech is no longer tailored to a sufficiently important government interest. "In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456.

ii. Because Colorado's electioneering communication regime captures the Institute's genuine issue speech, it is not properly tailored.

In this case, the district court and both Parties have "stipulate[d] that the ad" which the Institute sought to run "can be classified as genuine issue advocacy." JA 146; JA 154 ("Counsel candidly acknowledges that its argument applies not just to the proposed ad but to any genuine issue ad that meets the statutory definition of an electioneering communication"). The ads are about an *issue*, namely, whether or not the Colorado Health Benefit Exchange ought to be audited by the state. The governor of Colorado merely merits mention

in the communication for the sole purpose of identifying a public official whose support for the audit is a necessary condition for it to be undertaken.

Unlike other communications that have been placed before the Supreme Court, such as a voter guide supportive of pro-life candidates or an advertisement promoting a film that functioned as express advocacy, the Institute's communication is unambiguously *not* campaign related. *Massachusetts Citizens for Life*, 479 U.S. at 243-244 (describing voter guide); *Citizens United*, 558 U.S. at 325. Accordingly, as it applies to the Institute's proposed communication, Colorado's electioneering communication regime is not tailored to the informational interest.

The district court upheld Colorado's law because it believed that "the Supreme Court has held that a sufficient interest exists with respect to speech that references a candidate when made close in time to the election." JA 156. But this theory of constitutional jurisprudence has no limiting principle—at best the district court could point to Colorado's 60 day window during which mentioning a candidate triggers disclosure. JA 151 ("Moreover, the Institute could have broadcast the ad without any reporting or disclosure requirements more than 60 days before the November 4, 2014 election. It can likewise broad the ad without any reporting or disclosure requirements after the election").

As discussed *supra*, the Institute acknowledges the informational interest in providing the voting public with some knowledge about "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. This interest is not boundless, but neatly cabined by *Buckley* and its progeny—including *Citizens United*—to speech which is unambiguously related to a candidate's *campaign*. The mere existence of the informational interest is not the question before this Court—and, indeed, the district court's misunderstanding of this point caused it to erroneously believe that the Institute brought a facial challenge to the law. JA 154 ("Though the plaintiff frames its challenge as 'as-applied', its argument rests on the same theory as the facial challenge rejected in *McConnell*"). Instead, the question is whether, *on these specific facts*, Colorado may constitutionally regulate the Institute's proposed communication because its law survives exacting scrutiny.

The *Buckley* Court explicitly anticipated that the present scenario would pose significant constitutional questions when it observed that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S. at 42. "Candidates, especially incumbents, are intimately tied to public issues involving…governmental actions," such as the audit proposal at issue here. *Id*. Thus, the *Buckley* Court drew the line—speech unambiguously related to a

candidate campaign could trigger disclosure, but not speech about incumbent officeholders in the broader context of general public debate.

As applied here, Colorado's disclosure regime does not "provid[e] voters with information [that is] useful in their evaluation of candidates." *Id.* The Independence Institute is was not a supporter nor was it an opponent of Governor Hickenlooper's campaign for re-election in 2014. Federal law forbids the Institute from engaging in electoral advocacy. 26 U.S.C. § 501(c)(3) (educational nonprofits may "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). Thus, public disclosure of the Institute's donors would not "increase[] the fund of information concerning those who support the candidates" in *any* matter—let alone in a manner "substantially related" to providing that information. *Buckley*, 424 U.S. at 81.

While the district court considered the reach of Colorado law to § 501(c)(3) organizations unremarkable because "the public's interest in knowing who is speaking is in no way related to an entity's organizational structure or its tax status," this misses the point. JA 159. The Institute is not "argu[ing] that because 501(c)(3) organizations may not engage in activity supporting or opposing a candidate, the law should exempt them from the disclosure requirements." JA 160. Perhaps some § 501(c)(3) organizations might risk losing their tax status and

engage in "unambiguously campaign related" speech.[11] Colorado law may constitutionally trigger disclosure in that case. But it is undisputed that the Institute, acting properly and pursuant to its elected tax status, did not engage in such speech. Therefore, disclosure of its donors could not be "substantially related" to increasing the fund of information about financial supporters of candidates for office.

Indeed, applying Colorado law to the Institute's advertisement might actually *harm* the informational interest by crowding out the disclosure of individuals whose donations actually do work toward unambiguously campaign related speech. Given that the purpose of the informational interest is to "help citizens 'make informed choices in the political marketplace,'" this Court should be wary of allowing states to vacuum up and publicize information concerning speakers whose speech has no discernible connection to the choices that voters are asked to make at the end of a political campaign. *Citizens United*, 558 U.S. at 367

[11] The fact that a number of states have exempted § 501(c)(3) organizations from their electioneering communications statutes, however, indicates that the fear of § 501(c)(3)'s running unambiguously campaign related communications is rather low. *See* CONN. GEN. STAT. § 9-601b(b)(13) (excluding "[a] lawful communication by any charitable organization which is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States"); IOWA CODE § 68A.401A (limiting reporting for communications merely mentioning a candidate to § 527 organizations); 10 ILL. COMP. STAT. ANN. 9/1.14(b)(4).

(quoting *McConnell*, 540 U.S. at 197). The informational interest cannot be served by voter confusion.

Thus, as applied to these circumstances, Colorado's electioneering communications disclosure regime is unconstitutionally untailored and fails exacting scrutiny.

c. *Faced with a similar disclosure statute, the D.C. Circuit struck it down as unconstitutional.*

Forty years ago, the *en banc* D.C. Circuit rejected the federal government's effort, in the name of campaign finance disclosure, to subsume practically all issue communications and communicators within its regulatory purview. *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (*en banc*). 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 Pub. L. 94-283, § 105 (May 11, 1976) (emphasis supplied)

"Dissecting the statutory language," it is clear that § 437 applied to any broadcast material which named a candidate and his official acts. *Buckley*, 519 F.2d at 870. The *en banc* D.C. Circuit invalidated this provision, observing—with considerable understatement—that its regulatory scope "is potentially expansive." *Id*. The Court of Appeals specifically observed that 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 are candidates for federal office." *Id*. at 871. Nonetheless, under FECA, the New York Civil Liberties Union's public discussions of civil liberties would suddenly trigger disclosure requirements, illustrating the provision's far-reaching effects. 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…" *Buckley*, 519 F.2d at 914 (Tamm, J., concurring in part, dissenting in part).

Thus, FECA § 437a explicitly sought the same scope of government power that the Secretary claims here: the right to regulate any speech, no matter how incidental to advocacy, which simply mentions a candidate in the context of the

public debate.[12] And while § 437a, unlike Colorado's electioneering communication regime, was not limited to a 60-day time period before an election, the *en banc* Court's opinion suggests that proximity to an election does not create a governmental interest in non-campaign speech. The 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 such issue speech and any cognizable governmental interest "may be far more tenuous." *Buckley*, 519 F.2d at 872.

Regardless of the proximity of time to an election, "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 Buckley* 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

[12] Indeed, § 437a hews quite similarly to Colorado in respect to the burden on filers. The plain language of § 437a required entities to file reports with the FEC which simply "set forth the source of funds used *in carrying out* any" activity which discussed a candidate for office. § 437a (emphasis supplied). This language is consistent with a construction limiting disclosure to persons earmarking funds for such communications—which is how Colorado regulates electioneering communications today.

issues….readily and often unavoidably draws in candidates and their positions, their voting records[,] and other official conduct." *Id*. at 875-876.

Put differently, as the *Buckley* Supreme Court did just a year later, the governmental interest in speech about candidates only extends to speech that is "unambiguously campaign related." 424 U.S. at 81. Accordingly, disclosure statutes may only survive exacting scrutiny to the extent they serve that limited interest.

V. None of the Others Cases Relied Upon By the District Court Overturn *Buckley* or Extend the Informational Interest to Encompass Genuine Issue Ads

If no other intervening case controls, than the law of the land must still be *Buckley v. Valeo*, which has not been overruled. *See McCutcheon v. FEC*, 893 F. Supp. 2d 133, 142 (D.D.C. 2012), *rev'd on other grounds*, *McCutcheon*, 134 S. Ct. at 1462 ("[W]hether [intervening case law] will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us"). And, if that is the case, than the district court does not have a substantive response to the fact that *Buckley*—as heard both in the Supreme Court and, *en banc*, by the D.C. Circuit—renders Colorado's statutory scheme unconstitutional. *Buckley v. Valeo*, 519 F.2d at 869-870, 878 (unconstitutional to require generalized donor disclosure when an organization "broadcast[] to the public any material referring to a candidate…setting forth the candidate's position on any public issue, his voting

record, or other official acts in the case of a candidate who holds or has held Federal office”).

The district court’s denial of the Institute’s claims largely rests with two cases—*McConnell v. FEC* and *Citizens United v. FEC*. It also supplemented these Supreme Court decisions with citations to a recent decision of this Court, *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), and a number of out-of-circuit cases.

But all of these cases are inapposite, and none overrule *Buckley*. None involved speakers engaged in genuine issue speech—or even speech bearing any resemblance to the ad at issue here. Rather, the speech in each of those cases is plainly “unambiguously campaign related”—and fits comfortably into the *Buckley* precedent permitting disclosure of such speech’s funders.

The district court’s remaining cases—an out-of-circuit district court opinion presently on appeal, and a 1954 decision related to the regulation of federal lobbying—are similarly inapplicable here.

a. McConnell *was a facial challenge that specifically provided for future as-applied challenges predicated on “genuine issue speech.”*

The district court determined that the Institute’s “argument rests on the same theory as the facial challenge rejected in *McConnell*.” JA 154. Indeed, the lower court found the Institute’s argument wholly subsumed by *McConnell*, and determined that this case was less “‘an as-applied challenge [than]…it is an

argument for overruling a precedent.'" JA 154 (quoting *Republican Nat'l. Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court), *aff'd*, 130 S. Ct. 3544 (2010)).

McConnell was a facial decision upholding, in relevant part, the *federal* electioneering communications regime enacted by the Bipartisan Campaign Reform Act ("BCRA"). While it is true that "[t]he *McConnell* Court held that this…[regime] was facially constitutional in spite of claims that it might capture non-campaign speech," this is unsurprising. JA 155. It would be remarkable if a facial ruling did *not* uphold the statute in a wide range of circumstances. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. at 466 (Roberts, C.J., controlling opinion) ("*WRTL II*") (noting the *McConnell* plaintiffs' "'heavy burden of proving' that [BCRA] was facially overbroad and could not be enforced in *any* circumstances") (quoting *McConnell*, 540 U.S. at 207) (emphasis in *WRTL II*). But the existence of a facial constitutional ruling does not foreclose as-applied challenges to the same statute. Indeed, a unanimous U.S. Supreme Court has already explicitly held that *McConnell* does *not* foreclose future as-applied challenges. *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-412 (2006) ("*WRTL I*").

Nevertheless, the district court suggested that the Institute "made no true distinction between the challenge in *McConnell*—that issue advocacy must be distinguished from express advocacy—and its argument before this Court." JA

155. This is difficult to square with the plain text of the *McConnell* decision. That Court facially upheld BCRA's disclosure regime predicated on a lengthy record which documented that "the vast majority of ads" which fell into BCRA's electioneering communication definition "clearly had" an electioneering purpose. *McConnell*, 540 U.S. at 206.

McConnell, which itself noted "that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," cannot be read to foreclose the distinction between genuine issue speech and speech which unambiguously electioneers. 540 U.S. at 206, n. 88. Rather, "*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 overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.'" *Am. Civil Liberties Union v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (quoting *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004)). The district court's decision to decide otherwise was error.

It also bears repeating that *McConnell* only applied to the federal electioneering communications regime, a one-time, event-driven reporting regime. Colorado's electioneering communication regime requires the filing of *multiple* disclosure reports, a fact that the district court explicitly noted. JA 149 ("As of the

date of this order it appears that there will be two required reports…"); *Barland*, 751 F.3d at 836 ("The [*Citizens United*] Court was addressing the onetime, event-driven disclosure rule for federal electioneering communications"). While this difference may seem minute, other circuits have placed great emphasis on the increased burden of requiring groups that do not expressly advocate from having to file multiple disclosure reports with the state. *Minnesota Citizens Concerned for Life*, 692 F.3d at 877 ("Accordingly, we reverse the district court's denial of the appellants' motion for a preliminary injunction to the extent it requires ongoing reporting requirements from associations not otherwise qualifying as PACs under Minnesota law"). If nothing else, this distinction strongly indicates that the Institute's case is not foreclosed by *McConnell*.

Thus, *McConnell* simply applied the *Buckley* exacting scrutiny analysis. It upheld, against a *facial* challenge, a law that served to compel disclosure from groups engaging in unambiguously campaign related speech.

b. Every ad in Citizens United*—and their root communication of* Hillary: The Movie *itself—was unambiguously campaign related.*

The district court also incorrectly interpreted *Citizens United* as foreclosing the Institute's case because "the *Citizens United* Court rejected an as-applied challenge brought on the grounds that the type of speech should determine the duty of disclosure." JA 156. But this actually begs the question: is the "type of speech" which the Institute seeks to distribute the some type that Citizens United sought to

broadcast? The answer is no. *Citizens United* went no further than *McConnell.* Indeed, all of the communications at issue in Citizens United were unambiguously campaign related—a fact glossed over by both the district court and the Secretary.[13]

Citizens United funded a movie which was a full-length feature film making the case that Hillary Clinton should not be elected President. As such, it was unquestionably express advocacy—all nine justices of the Supreme Court agreed on this point. Obviously, the Institute's proposed advertisement is not the equivalent of a two-hour movie dedicated to declare that "[Colorado] would be a dangerous place in a [Governor Hickenlooper] world, and that viewers should vote against [him]." *Citizens United*, 530 F. Supp. 2d at 280.

Nor is the television ad similar to promotional advertisements for *Hillary*—which suggested, for example, that the only "kind word" that could be said about Senator Clinton was that "[s]he looks good in a pant suit," and were unambiguously related to her Presidential campaign. *Id*. at 276, n.3; *supra* at 18. Citizens United "intend[ed] to fund at least three television advertisements…to

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[13] In fact, just "[f]our days after Senator Barack Obama won the Iowa presidential caucuses, Plaintiff [Citizens United] announced its intent to produce and broadcast a 'documentary' film about Senator Obama, as well as television advertising for that film." FEC Mem. of Law in Supp. of its Mot. for Summary Judgment, *Citizens United v. FEC*, No. 07-2240 at 5 (D.D.C. June 6, 2008) ECF 56. It is unlikely that *Hillary: The Movie* and its ads would have existed if Hillary Clinton had decided against running for President in 2008.

promote *The Movie* and direct viewers to *The Movie*'s website for more information about the film and how to see or purchase it." *Citizens United*, 530 F. Supp. 2d at 275-276. These advertisements were "to coincide with the release of the movie," and thus would be broadcast shortly before the January and February Presidential primaries—within BCRA's time frame for an electioneering communication. *Id.* at 276. These advertisements, reflective of the film they promoted, spoke pejoratively about Senator Clinton.[14] *Citizens United*, 558 U.S. at 320, 368 ("Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton…"; "The ads…contained pejorative references to [Clinton's] candidacy"). For example, one ad suggested that if elected, Senator Clinton would govern as "the closest thing we have in America to a European socialist." *Citizens United*, 530 F. Supp. 2d at 276, n.4, *supra* at 18-19. Two proposed advertisements included the tagline that "[i]f you thought you knew everything about Hillary Clinton…wait 'til you see the movie." *Id.* at 276, nn.2, 4; *supra* at 18-19. Thus, all of Citizens United's ads centered on a candidate for President, for the purpose of

[14] The district court dismissed the Supreme Court's use of the word "pejorative." JA 159 ("[W]hether the ads comment pejoratively about a candidate is not relevant"). But that unusual word is used twice, including as one of the two reasons for stating that the ads could be regulated as electioneering communications. 558 U.S. at 368 ("The ads fall within BCRA's definition of an 'electioneering communication': They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy.").

encouraging viewers to watch a movie that functioned as express advocacy against that candidate.

Comparatively, the Institute supports a specific official act—auditing the Colorado Health Benefit Exchange—and merely seeks to encourage the governor to support an audit. The ad offers no view on Governor Hickenlooper—indeed, it ignores his candidacy entirely. It is consequently, on its face, markedly different from Citizens United's advertisements, upheld under *McConnell*'s understanding of the informational interest served by BCRA. *McConnell*, 540 U.S. at 193 (BCRA regulates "advertisements [which] do not urge the viewer to vote for or against a candidate in so many words, [but] they are no less clearly intended to influence the election").

The Supreme Court's decisions have demonstrated that speech exists on a spectrum. One narrow band of speech is express advocacy—speech which uses the so-called "magic words" of express advocacy set forth in *Buckley*'s footnote 52. *Buckley*, 424 U.S. at 42, n. 52 (express advocacy constitutes phrases such as "cast your ballot for" or "Smith for Congress"). The Court has also recognized an analogous category of speech which, while falling short of express advocacy, functions in the same way. *McConnell*, 540 U.S. 93, 126-127 (2003) ("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. *Buckley*, 424 U.S. at 81 (disclosure acceptable as a means of determining the financial "constituencies" of candidates for office).

But the Independence Institute seeks to engage in speech that does not fall into the narrow band of speech regulable under *Buckley*, *McConnell*, or *Citizens United*. All parties to this case agree that the Institute's proposed communication is not express advocacy or its functional equivalent. Nor is the Institute's ad similar to the unambiguously campaign related ads for *Hillary: The Movie*. Instead, the Institute's advertisement falls into a more highly protected class of speech: genuine issue advocacy—public policy communications that educate and persuade the public. *See WRTL II*, 551 U.S. 449, 470 (genuine issue speech "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"). This form of speech has been protected since *Buckley v. Valeo*, and as discussed *supra*, no intervening Supreme Court decision has overruled *Buckley*.

It is true that the *Citizens United* Court upheld electioneering communications disclosure may capture speech beyond the "functional equivalen[ce] of express advocacy." *Citizens United*, 558 U.S. at 368-369. 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. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent"). Even if the district court correctly foresaw the trend of the Supreme Court's jurisprudence, it remains the Supreme Court's province to expand its own rulings. *See*, *e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

c. None of the other cases cited by the district court control the circumstances of this case.

The district court also supported its decision on the grounds that "every circuit court to have analyzed this question since *Citizens United* has come to the same conclusion, that the distinction between issue speech and express advocacy has no place in the context of disclosure requirements." JA 156. But none of the cases that the district court cites for this position are cases involving genuine issue speech.

i. *Free Speech* dealt with a FEC regulation and does not provide support for regulating genuine issue speech.

The district court correctly observed that in *Free Speech v. FEC*, the "Tenth Circuit was not addressing the question presented in this case." JA 157. Indeed, the *Free Speech* case dealt with a question far removed from this one: namely, whether certain advertisements constituted express advocacy for the purpose of determining whether a particular group's major purpose was candidate advocacy. 720 F.3d 788, 791 (10th Cir. 2013). Indeed, the Tenth Circuit noted that the FEC's definition of express advocacy—which was the issue in the *Free Speech* case—was "likely *narrower*" than the test for functional equivalence. 720 F.3d at 795 (citation omitted, emphasis supplied).

Nevertheless, the district court cites *Free Speech* for its "conclusion that 'in addressing the permissible scope of disclosure requirements, the Supreme Court…found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address even ads that 'only pertain to a commercial transaction.'" JA 156-157 (quoting *Free Speech*, 720 F.3d at 795) (ellipses in original). But even assuming that the *Citizens United* Court explicitly ruled that disclosure may apply to speech which does not function as express advocacy—a position with which at least one of this Court's sister circuits

disagrees[15]—commercial speech is much less highly rated than issue speech. *United States v. Williams*, 553 U.S. 285, 298 (2008) (describing the "First Amendment status of commercial speech" as "less privileged"); *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"). It ought to be undisputed that, during the 2008 Democratic primaries, speech about how Hillary Clinton and Barack Obama voted on funding for the war in Iraq came with more constitutional protection than an appeal to buy a documentary DVD about Hillary Clinton or, for that matter, dishwasher detergent.

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

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[15] *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014) ("This was *dicta*").

ii. None of the circuit court cases cited by the district court deal with circumstances akin to the instant matter.

The district court also relied on a number of cases for the proposition "that the distinction between issue speech and express advocacy has no place in the context of disclosure requirements." JA 156. But none of these cases actually stand for that proposition, which, in any event, is irrelevant here. The Institute is not seeking a line drawn between express advocacy and issue advocacy, but between speech that is unambiguously campaign related and speech that is not. *See McConnell*, 540 U.S. at 193 ("[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad").

The Seventh Circuit's opinion in *Center for Individual Freedom v. Madigan* dealt with an electioneering communication statute which explicitly limited its reach to speech which was "unambiguously an 'appeal to vote' for or against a candidate, party, or ballot issue." 697 F.3d 464, 472 (7th Cir. 2012). Moreover that case was a challenge to 10 ILL. COMP. STAT. ANN. 9/1.14 (LexisNexis 2014), which specifically exempted § 501(c)(3) organizations from those as-limited regulations. 10 ILL. COMP. STAT. ANN. 9/1.14(b)(4). Indeed, if the Independence Institute were an Illinois nonprofit corporation, and its ad mentioned Governor Pat Quinn, it would not have had to file this suit.

Likewise *National Organization for Marriage v. McKee* is also inapposite. JA 157. There, the First Circuit actually narrowed the statute in question to only

regulate speech that could be "susceptible of no reasonable interpretation other than to promote or oppose the candidate." 649 F.3d at 67 (1st Cir. 2011).

The Court's citation of *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) is also inapposite. JA 157. *Human Life* involved a group seeking to run ads denouncing legal euthanasia shortly before a ballot measure that proposed to legalize euthanasia. 624 F.3d at 995-996. The Court noted that in "the ballot initiative context…express and issue advocacy are arguably one and the same." *Id*. at 1018 (quotation marks omitted). That plainly is not the case here, where no ballot measure is being discussed. Indeed, the *Human Life* Court explicitly noted that "the potential of the Disclosure Law to incidentally regulate issue advocacy, to which Human Life objects, would engender far more concern if the relevant election involved a candidate." *Id.*

Vermont Right to Life, Inc. v. Sorrell is also unrelated to the instant case. JA 156. There, Vermont's "'electioneering communications' definition, which triggers disclosure requirements, use[d] the words 'promotes', 'supports', 'attacks', and 'opposes'." 758 F.3d 118, 128 (2d Cir. 2014) (citing VT. STAT. ANN. tit. 17, § 2901(6)). But the Independence Institute's ad, without rendering those words devoid of practical meaning, neither "promotes", "supports", "attacks", or "opposes" any candidate for office—even Governor Hickenlooper.

Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013) involved a challenge to Iowa's disclosure regime as it applied to "independent expenditures." Iowa defined independent expenditures as communications which expressly advocated. *Tooker*, 717 F.3d at 583. Similarly, *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) concerned whether an organization's proposed advertisement constituted express advocacy under federal law. Accordingly, those cases offer precious little guidance for this Court's consideration of a genuine issue ad.

iii. *Independence Institute v. FEC* does not control this case.

The district court also cited a court opinion where "[t]he Independence Institute (represented by the same counsel who represents it here) objected to BCRA's requirement that it disclose its donors on grounds all but identical to those it argues here." JA 158, *Independence Institute v. FEC*, No. 14-1500 (CKK) (D.D.C. Oct. 6, 2014) (*available at*: JA 107-128). First, that case is presently on appeal, and it is elementary that an out-of-circuit district court ruling does not bind this Court. Secondly, as discussed *supra*, the BCRA disclosure regime is arguably less onerous than Colorado's. Colorado requires more burdensome disclosure by requiring multiple reports, and does so with a much lower monetary trigger. Under the federal rules, one must only disclose donors giving over $1,000 after spending $10,000 on electioneering communications. 52 U.S.C. § 30104(f)(2)(F). In

Colorado, the spending of $1,000, an order-of-magnitude lower amount, triggers disclosure. *See Randall v. Sorrell*, 548 U.S. 230 (2006) (finding state contribution limit for donations to candidate campaigns one-tenth that of the federal limit for the same to be unconstitutional).

iv. The constitutionality of certain lobbying regulations does not bear on the regulation of genuine issue speech conducted in public.

The district court rejected the Institute's argument that "disclosure…requirements *cannot* be applied to pure issue speech," in part because "[t]he Supreme Court did, for example, uphold disclosure requirements in the context of lobbying, perhaps the epitome of issue speech." JA 156 (emphasis in original). But the Supreme Court has acted with great care in ensuring that lobbying regulations do not compel disclosure outside of a narrow set of circumstances. The district court cites *United States v. Harriss*, but that Court narrowed the Regulation of Lobbying Act to apply only to lobbyists who were paid to directly communicate with members of Congress for the express purpose of encouraging those members to cast specific votes on pending legislation. *United States v. Harriss*, 347 U.S. 612, 625 (1954). That is, the public may have an interest in knowing who is paid to meet with members of Congress behind closed doors, or in who pays others to do so on their behalf. The Institute's donors, on the other hand, are funding an issue ad to the public—not paying a registered lobbyist to speak with Governor Hickenlooper in private.

In any event, *Harriss* is an odd citation for the simple reason that *Buckley* is obviously the better authority and controlling case. *Buckley cites Harriss* in the context of reviewing an overbroad disclosure regime—and limiting disclosure only to speech which is "by definition, campaign related." 424 U.S. at 78-79. *Harriss* likewise limited reporting to "all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress." *Harriss*, 347 U.S. at 623. "Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness" *Id.*at 624. *Buckley*'s "unambiguously campaign related" focus limited the reach of campaign disclosure laws to fit First Amendment protections of issue speech in a similar way.

VI. The Independence Institute's Challenge Will Not "Reopen the Floodgates to Subjective Review of All Arguably Political Speech Made Close in Time to an Election".

Part of the district court's rationale for both considering the Institute's case a facial challenge and rejecting the Institute's constitutional claims is that "the inability to effectively distinguish between campaign-related speech and issue advocacy" necessities the electioneering communication definition, which however overbroad, has the virtue of clarity. JA 154-155. The district court decided that, accordingly, *no* challenge predicated on the danger that Colorado's electioneering communications regime will "capture non-campaign related speech" may be brought. JA 154-155. Otherwise, such "a challenge w[ill] inevitably reopen the

floodgates to subjective review of all arguably political speech made close in time to an election." JA 155. This, however, is incorrect. The judiciary routinely countenances as-applied exceptions to otherwise vague or overbroad rules. And in the campaign finance context, the courts have generally had little difficulty in fashioning bright line rules which protect associational liberties.

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Supreme Court laid out a simple, objective test for determining whether or not an entity qualified for an as-applied exemption to the then-constitutional ban on corporate independent expenditures. Lower courts had little difficulty following this test. *Day v. Holahan*, 34 F.3d 1356, 1363, 1365 (8th Cir. 1994) ("[T]he analysis in *MCFL*…is an application, in three parts, of First Amendment jurisprudence to the facts…Should these facts change [as-applied here]…the state may wish to revisit [plaintiff Minnesota Citizens Concerned for Life]'s qualification for the exemption"). Similarly, the Supreme Court faced little difficulty in determining that *Hillary: The Movie* functioned as express advocacy—even though the test for determining whether speech was the "functional equivalent of express advocacy" derived from a previous test developed by the Court in *WRTL II*. 551 U.S. at 469-470.

Distinguishing speech which is "unambiguously campaign related"—that is, speech which is about a *candidacy* for office, would simply create "a construction

[which] is, we think, also consistent with the principal purpose of the Act." *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972); *see also McConnell*, 540 U.S at 132 (BCRA a response to "candidate advertisements masquerading as issue ads"). Such speech could simply be defined as speech that does not, under any reasonable interpretation, speak to the communication's recipients about an ongoing campaign for office. Such a definition would cover the ads for *Hillary: The Movie*, given that those ads explicitly urged the recipient to watch a feature-length film critical of Hillary Clinton's then-ongoing campaign for office, and were themselves unambiguously about Senator Clinton herself and not an issue of public policy.

Alternatively, this Court could hold that BCRA's definition of an electioneering communication may not apply to speech which "promotes," "supports," "attacks," or "opposes" a candidacy or campaign—the so-called "PASO standard". The Supreme Court has already reviewed this standard, and found the PASO standard acceptable in the context of BCRA's ban on contributions to state and local party committees for "Federal election activity." *McConnell*, 540 U.S. at 161-162. Federal election activity was defined, in part, as "any public communication that refers to a clearly identified candidate for Federal office and promotes, supports, attacks, or opposes a candidate for that office."

McConnell, 540 U.S. at 162. It was upheld against a vagueness challenge. *McConnell*, 540 U.S. at 170 n. 64.

This standard has also been reviewed by several courts of appeals. The Second Circuit recently upheld a Vermont statute which defined an "electioneering communication" as "any communication that refers to a clearly identified candidate for office and that 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." VT. STAT. ANN. tit. 17, § 2901(6). "This definition by its terms only reaches communications that take a position on an actual candidacy." *Vermont Right to Life v. Sorrell*, 758 F.3d 118, 133 (2d Cir. 2014); *also McKee*, 649 F.3d 34, 66 (finding words "promoting", "support" and "opposition" "to be sufficiently clear to evade due process concerns").

The states have not simply plucked the PASO standard out of thin air. In passing BCRA, Congress anticipated the significant constitutional concerns raised by the law, and provided a "backup definition" for electioneering communications. If the electioneering communication 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 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." 52 U.S.C. § 30104(f)(3)(A)(ii). This limitation may also be read to permit the regulation of speech such as the advertisements for *Hillary*, given the unusual circumstance of those ads—encouraging a viewer to watch a lengthy follow-up ad relentlessly critical of Hillary Clinton's Presidential campaign. *Citizens United*, 558 U.S. at 325 ("In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency…there is little doubt that the thesis of the film is that she is unfit for the Presidency").

Simply put, there are alternatives between the district court's fears of unlimited litigation clogging the federal judiciary and the present situation where Coloradoans must live under an unconstitutionally overbroad law. Either limiting principle would limit the overbreadth problem present in the Colorado Constitution, and provide a bright enough line to avoid "the shoals of vagueness." *Buckley*, 424 U.S. at 78. These standards also have the virtue of simply capturing ads that are indisputably and unambiguously about a candidacy for office, while shielding the mere discussion of public issues in the public square from

unnecessary government intervention. The First Amendment demands nothing less.

Conclusion

Given the substantial First Amendment liberties at stake in this case, this Court ought to reverse the decision of the district court. Decades of Supreme Court precedent—all of which remains good law—supports the conclusion that the state of Colorado may not publicize the Independence Institute's financial contributors' names and addresses on the basis of an advertisements that does not electioneer.

Request for Oral Argument

Pursuant to Federal Rule of Appellate Procedure 34 and 10th Circuit Rule 28.2(C)(4), Appellant Independence Institute request oral argument for this case. At issue in this appeal are complex questions of federal and state constitutional law as applied to the speech of a nonprofit organization. This Court will benefit from the opportunity to ask questions to counsel on the scope and applicability of multiple lengthy Supreme Court decisions, lower court opinions, and the interplay between constitutional, statutory, and regulatory law.

Respectfully submitted this 7th day of January, 2015.

/s/ Allen Dickerson

Allen Dickerson
Tyler Martinez
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org

Shayne M. Madsen
John Stuart Zakhem
JACKSON KELLY, PLLC-DENVER
1099 18th Street, Suite 2150
Denver, Colorado 80202
Telephone: 303.390.0012
Facsimile: 303.390.0177
smadsen@jacksonkelly.com
jszakhem@jacksonkelly.com

Counsel for Appellant

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Dated: January 7, 2015

/s/ Allen Dickerson
Allen Dickerson

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I hereby certify that on January 7, 2015, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Matthew D. Grove
matt.grove@state.co.us

Sueanna Park Johnson
Email: Sueanna.Johnson@state.co.us

Frederick Richard Yarger
fred.yarger@state.co.us

Office of the Attorney General for the State of Colorado
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203

Date: January 7, 2014

/s/ Allen Dickerson
Allen Dickerson
Center for Competitive Politics
124 S. West St., Suite 201
Alexandria, VA 22314
(703) 894-6800
adickerson@campaignfreedom.org

Attorney for Plaintiff-Appellant.

EXHIBIT PURSUANT TO 10th Cir. R. 28.2(A)(1)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 14-cv-02426-RBJ

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Colorado Secretary of State,

Defendant.

ORDER

This case concerns a television advertisement that the Independence Institute wishes to broadcast before the upcoming gubernatorial election. The Institute stipulates that its ad is an "electioneering communication" under Colorado law and, as such, the Institute must comply with certain reporting and disclosure requirements. However, because the ad constitutes "genuine issue advocacy" as opposed to advocacy for or against any candidate, the Institute claims that application of these requirements would be unconstitutional. The Secretary of State, who administers and enforces Colorado's election laws, stipulates that the ad can be classified as genuine issue advocacy but maintains that application of the reporting and disclosure requirements is constitutional. I agree with the Secretary.

FACTS

The advertisement. The Independence Institute is a Colorado nonprofit corporation organized under Section 501(c)(3) of the Internal Revenue Code that conducts research and educates the public on various aspects of public policy, including taxation, education policy, healthcare, and environmental issues. It wishes to run a television advertisement prior to the November 4, 2014 general election that will urge viewers to call Governor John Hickenlooper and ask him to support an audit of Colorado's Health Benefit Exchange. The 30-second ad, which would be distributed over local broadcast television in Colorado, would read as follows:

Audio	Visual
Doctors recommend a regular check up to ensure good health.	*Video of doctor and mother with child.*
Yet thousands of Coloradoans lost their health insurance due to the new federal law.	*Headlines of lost insurance stories.*
Many had to use the state's government-run health exchange to find new insurance. Now there's talk of a new $13 million fee on your insurance. It's time for a check up for Colorado's health care exchange.	*Denver Post headline "Colorado health exchange staff propose $13M fee on all with insurance."*
Call Governor Hickenlooper and tell him to support legislation to audit the state's health care exchange.	*Call Gov. Hickenlooper at (303) 866-2471. Tell him to support an audit of the health care exchange.*
INDEPENDENCE INSTITUTE IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISING.	*Paid for by The Independence Institute, Jon Caldara, President.* *303-279-6536.* *www.independenceinstitute.org*

Colorado law. In 2002 Colorado's voters approved what has been incorporated as Article XXVIII of the Constitution of the State of Colorado. Section 1, entitled "Purposes and findings," states:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; that the rising costs of campaigning for political office prevent qualified citizens from running for political office; that because of the use of early voting in Colorado timely notice of independent expenditures is essential for informing the electorate; that in recent years the advent of significant spending on electioneering communications, as defined herein, has frustrated the purpose of existing campaign finance requirements; that independent research has demonstrated that the vast majority of televised electioneering communications goes beyond issue discussion to express electoral advocacy; that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas and can unfairly influence the outcome of Colorado elections; and that the interests of the public are best served by limiting campaign contributions, establishing campaign spending limits, providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

Among other things, Amendment XXVIII and Colorado's Fair Campaign Practices Act, C.R.S. § 1-45-101 *et seq.* place certain restrictions on "electioneering communications." An electioneering communication is

> any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:
>
> (I) Unambiguously refers to any candidate; and
>
> (II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and
>
> (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

Colo. Const. art. XXVIII, § 2(7)(a); C.R.S. § 1-45-103(9).

The term "electioneering communication" does not include:

> (I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;
> (II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;
> (III) Any communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families;
> (IV) Any communication that refers to any candidate only as part of the popular name of a bill or statute.

Colo. Const. art. XXVIII, § 2(7)(b); C.R.S. § 1-45-103(9).

Here, both parties agree that the Institute's proposed advertisement is an "electioneering communication." It unambiguously refers to a candidate, Gov. Hickenlooper, who is seeking re-election. It will be broadcasted within 60 days before the November 4, 2014 election. It will be broadcast to a wide television audience including members of the electorate who will decide who will be Colorado's next governor. None of the four exemptions applies.

Because the Independence Institute acknowledges that it will spend more than $1,000 on the ad, it must submit reports to the Colorado Secretary of State including its spending on the ad and the name, address, occupation, and employer of any person who contributed more than $250 to fund it. Article XXVIII, §6(1). The Fair Campaign Practices Act governs the timing and content of such reports. C.R.S. § 1-45-108. As of the date of this order it appears that there will be two required reports, the first on October 27, 2014 and the second, after the election, on December 4, 2014. *See* Secretary's Brief [ECF No. 22] at 8.

Filing the reports is itself something of a burden on the Institute's ability to broadcast the ad. However, the bigger burden and the main reason for this case is the requirement to identify donors. This would not be all donors to the Independence Institute. Rather, it would be donors

who contribute $250 or more and whose contributions are specifically earmarked to support this advertisement. Code of Colorado Regulations § 1505-6:11.1. The Institute contends that having to identify any donors violates those individuals' rights of association and privacy, and if that requirement is sustained in this case, the ad will not be broadcast.[1]

The Independence Institute filed this action for declaratory judgment and injunctive relief on September 2, 2014 and shortly thereafter filed a motion for a preliminary injunction. However, the parties have since jointly asked the Court to consider the motion as one for summary judgment, allowing the Secretary to file a cross-motion for summary judgment and allowing the parties to obtain a final judgment as to whether the Secretary will be permanently enjoined from enforcing the foregoing reporting and disclosure requirements of Colorado law.

LEGAL STANDARD

"Summary judgment is appropriate 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1050 (10th Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). The parties stipulate, and the Court agrees, that there is no fact dispute that would preclude the entry of summary judgment.

[1] Any person found to have violated the disclosure provisions of Section 6 of Amendment XXVIII is liable for fifty dollars per day for each day the required information fails to be filed. *Id.* § 10(2)(a); *see also* C.R.S. § 1-45-111.5(c). The fine is a moot point here, because the Institute has made it clear that it will not broadcast the ad unless the reporting and disclosure requirements are determined to be unconstitutional.

ANALYSIS

To begin, and just to be clear, this case is not about preventing the Independence Institute from speaking on the issues of the day. It is not about prohibiting the Institute from broadcasting its advertisement. The Institute is free to broadcast its advertisement so long as it complies with the reporting and disclosure requirements of Amendment XXVIII. Moreover, the Institute could have broadcast the ad without any reporting or disclosure requirements more than 60 days before the November 4, 2014 election. It can likewise broadcast the ad without any reporting or disclosure requirements after the election. In fact, it could broadcast the advertisement today without the reporting or disclosure requirements if it did not refer unambiguously to a candidate presently running for office.

Rather, in the words of the Supreme Court, while "[d]isclaimer and disclosure requirements may burden the ability to speak," they "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)).

Thus, it has long been held that reporting and disclosure requirements are subject to a different standard of scrutiny than restrictions on one's ability to speak. Because "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *Citizens United*, 558 U.S. at 369, the Supreme Court "has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," *id.* at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66).

Buckley upheld the disclosure and reporting requirements of the Federal Election Campaign Act of 1971 ("FECA") against a constitutional challenge. In doing so it recognized that disclosure requirements serve important governmental interests in (1) providing voters with information useful in their evaluation of candidates; (2) deterring corruption and the appearance of corruption; and (3) gathering data necessary to detect violations of contribution limitations. 424 U.S. at 66–67. Similar interests were reflected in the stated purposes of Amendment XXVIII. The Amendment provides transparency to the voters by requiring that the identity of the persons or organizations paying for the ad—i.e., those speaking—be disclosed.

In *McConnell* the Court upheld a facial challenge to the reporting and disclosure requirements created by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). These BCRA provisions are substantially similar to the Colorado law at issue here. Under BCRA, individuals and organizations are required to report the identities of those who engage in "electioneering communications," a term coined in the statute and defined to mean 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.

52 U.S.C. § 30104(f)(3)(A). A communication is considered "targeted to the relevant electorate" if it could be received by 50,000 or more individuals in the district or State the candidate seeks to represent. *Id.* § 30104(f)(3)(C).

The *McConnell* plaintiffs challenged the scope of the term "electioneering communication" on the grounds that it did not differentiate between express advocacy and issue advocacy, contending that they possessed "an inviolable First Amendment right to engage in the latter category of speech." 540 U.S. at 190. The plaintiffs maintained that "Congress cannot constitutionally require disclosure of . . . 'electioneering communications' without making an exception for those 'communications' that do not meet [the] definition of express advocacy" as established in *Buckley*. *Id.* The Supreme Court disagreed. It explained that "[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, [the Supreme Court] nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192.

The Court did, however, acknowledge that "compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." *Id.* at 198. In such cases, the would-be speaker may bring an as-applied challenge and need only show "a reasonable probability that the compelled disclosure of [an organization's] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* (quoting *Buckley*, 424 U.S. at 74). Notably, the Independence Institute has

stipulated that it does not contend in this case that its donors would be subject to threats, harassment, or reprisals if their identities were disclosed.[2]

Though the plaintiff frames its challenge as "as-applied," its argument rests on the same theory as the facial challenge rejected in *McConnell*. Counsel candidly acknowledges that its argument applies not just to the proposed ad but to any genuine issue ad that meets the statutory definition of an electioneering communication. But "[i]n general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent." *Republican Nat. Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court), *aff'd,* 130 S. Ct. 3544 (U.S. 2010).

The plaintiff attempts to distinguish this case by focusing on the ads at issue in *McConnell*, explaining that BCRA was addressing a problem that arose out of *Buckley*, that the use of "magic words" of express advocacy had not proven effective for identifying speech that is "unambiguously campaign related." According to the plaintiff, since its speech is unambiguously *not* campaign related, the problems that BCRA addressed need not be considered in this "as-applied" challenge. This reasoning undermines the plaintiff's position, for it was because of the inability to effectively distinguish between campaign-related speech and issue

[2] The plaintiff maintains that its donors' associational interests are at issue even if the donors are not subject to threats, harassment, or reprisals. However, the Supreme Court already addressed this argument in *Buckley*. The *Buckley* Court acknowledged the significant privacy interest in one's associations and, in doing so, bumped up the level of scrutiny under which to review disclosure requirements from rational basis to exacting scrutiny. *See* 424 U.S. at 64–68. In effect, the associational interests of the Independence Institute's donors have already been accounted for. While the Supreme Court left the door open to future as-applied challenges where donors face a probability of threats, harassment, or reprisal, the donors' more general interest in privacy is subsumed in the level of scrutiny upon which the Court conducts its analysis.

advocacy that BCRA enacted an objective definition of "electioneering communication." The *McConnell* Court held that this definition was facially constitutional in spite of claims that it might capture non-campaign related speech. To be able to bring a so-called "as-applied" challenge on this basis, a challenge that would inevitably reopen the floodgates to subjective review of all arguably political speech made close in time to an election, is exactly the type of problem that BCRA (and the *McConnell* Court) hoped to resolve. The plaintiff has made no true distinction between the challenge in *McConnell*—that issue advocacy must be distinguished from express advocacy—and its argument before this Court. As such, the plaintiff's challenge must fail for the same reasons the facial challenge failed in *McConnell*.

In any event, *Citizens United* did involve, among other things, an "as-applied" challenge to the disclosure requirements of BCRA. Citizens United contended that those requirements must be confined to speech that amounts to express advocacy for a political candidate or its functional equivalent. The Court disagreed:

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . [W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy. . . . Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.

558 U.S. at 369 (internal citations omitted). In so holding, the Court referenced its decisions in a number of cases, including *McConnell*, as well as *United States v. Harriss*, 347 U.S. 612 (1954), a case in which the Court upheld registration and disclosure requirements for lobbyists. *See id.*

The plaintiff attempts to distinguish its claim from the one addressed in *Citizens United*. It maintains that it is not arguing that disclosure requirements must be confined to speech that amounts to express advocacy or its functional equivalent, but instead that such requirements

cannot be applied to pure issue speech, a contention that it claims the Supreme Court has never explicitly addressed. That is not entirely true. The Supreme Court did, for example, uphold disclosure requirements in the context of lobbying, perhaps the epitome of issue speech. In approving the Federal Regulation of Lobbying Act, the Court noted that the Act did not "prohibit these pressures" but "merely provided for a modicum of information" from those who attempt to influence legislation through lobbying. 347 U.S. at 625. I have also noted that the *McConnell* Court held that the First Amendment does not "erect[] a rigid barrier between express and so-called issue advocacy," 540 U.S. at 193, and that the *Citizens United* Court rejected an as-applied challenge brought on the grounds that the type of speech should determine the duty of disclosure.

The plaintiff would like us to review its proposed advertisement and determine whether Colorado voters have a sufficient interest in knowing who is speaking about Governor Hickenlooper when the speech is said not to be "campaign-related." However, the Supreme Court has held that a sufficient interest exists with respect to speech that references a candidate when made close in time to the election. There is no need for this Court to go any further with respect to the government's interest.

Moreover, every circuit court to have analyzed this issue since *Citizens United* has come to the same conclusion, that the distinction between issue speech and express advocacy has no place in the context of disclosure requirements. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54–55 (1st Cir. 2011) ("We find it reasonably clear, in

light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in *Citizens United,* and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *see also Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) ("*Citizens United* removed any lingering uncertainty concerning the reach of constitutional limitations in this context. In *Citizens United*, the Supreme Court expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy,' because disclosure is a less restrictive strategy for deterring corruption and informing the electorate."); *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 n.1 (8th Cir. 2013) *cert. denied,* 134 S. Ct. 1787 (U.S. 2014); *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 551–52 (4th Cir. 2012) *cert. denied,* 133 S. Ct. 841 (U.S. 2013).

Closer to home, the Tenth Circuit has interpreted this portion of the *Citizens United* opinion as a signal that the Supreme Court "upheld federal disclaimer and disclosure requirements applicable to *all* 'electioneering communications.'" *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 795 (10th Cir. 2013), *cert. denied,* 134 S. Ct. 2288 (U.S. 2014) (emphasis in original) (citation omitted). The Tenth Circuit was not addressing the question presented in this case. Nevertheless, I note its conclusion that "in addressing the permissible scope of disclosure requirements, the Supreme Court . . . found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address

even ads that 'only pertain to a commercial transaction.'" *Id.* (quoting *Citizens United*, 558 U.S. at 369.

Earlier this month a district court in the District of Columbia addressed a suit like the present case, also brought by the Independence Institute. *Independence Institute v. Fed. Election Comm'n*, No. 14-1500 (CKK), 2014 WL 4959403 (D.D.C. Oct. 6, 2014). The Independence Institute wished to produce and broadcast a radio advertisement that would ask the current United States Senators from Colorado – one of whom, Senator Udall, is up for reelection in the November 4, 2014 general election – to support the Justice Safety Valve Act. The proposed ad was similar to the ad involved in the present case except that it focused on criminal sentencing instead of health care laws. The Independence Institute (represented by the same counsel who represents it here) objected to BCRA's requirement that it disclose its donors on grounds all but identical to those it argues here. The court held, "Plaintiff's claims are foreclosed by clear United States Supreme Court precedent, principally by *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)." 2014 WL 4959403 at *1.

The present case involves a challenge to the "electioneering communications" provisions of Amendment XXVIII of the Colorado Constitution, rather than those in BCRA, but the substance of the requirements is essentially the same. As it did in the D.C. case, the Independence Institute argues that the Supreme Court's comments in *Citizens United* on the application of disclosure requirements to speech other than express advocacy or its functional equivalent were "dicta." But even if they were dicta (a contention that I question), this Court is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly

when the dicta is recent and not enfeebled by later statements." *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013).

The Independence Institute also attempts to distinguish *Citizens United* on grounds that (1) the ads in *Citizen United* constituted express advocacy, not genuine issue speech; (2) the ads in *Citizens United* spoke of a candidate (Hilary Clinton) pejoratively, whereas the ads promoted by the Independence Institute say nothing pejorative about Governor Hickenlooper; and (3) it is a 501(c)(3) organization whereas Citizens United is a 501(c)(4) organization. These all are distinctions without a difference.

I do not agree that the Supreme Court viewed the *Hillary* ads as express advocacy or its functional equivalent. *See Independence Institute*, 2014 WL 4959403 at *4. But even if such a characterization of those ads were correct, the Court clearly indicated that disclosure requirements are not limited to speech that is the functional equivalent of express advocacy.

Similarly, whether the ads comment pejoratively about a candidate is not relevant. Although the Court remarked about the pejorative nature of the *Hillary* ads, the Court's ruling did not depend on this characterization. Rather, the Court focused on whether BCRA's requirements were met, i.e., whether the speech referenced a candidate by name close in time to an election. If the requirements were met, the speaker's identity had to be disclosed.

Finally, the public's interest in knowing who is speaking is in no way related to an entity's organizational structure or its tax status. *See Madigan*, 697 F.3d at 490 ("[T]he voting 'public has an interest in knowing who is speaking about a candidate shortly before an election' whether that speaker is a political party, a nonprofit advocacy group, a for-profit corporation, a labor union, or an individual citizen.") (quoting *Citizens United*, 558 U.S. at 369). The

Independence Institute argues that because 501(c)(3) organizations may not engage in activity supporting or opposing a candidate, the law should exempt them from the disclosure requirements. This begs the question. The Secretary stipulates that the subject ad does not support or oppose a candidate; if it did, then presumably the Independence Institute would not promote it.

CONCLUSION

The First Amended does not "erect[] a rigid barrier between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 193. In 2003 the *McConnell* Court rejected a facial challenge to the breadth of the term "electioneering communication," and seven years later the *Citizens United* Court rejected an as-applied challenge to the same term. Both Courts explicitly held that an electioneering communication need not constitute express advocacy or its functional equivalent in order to trigger the disclosure requirements. The Independence Institute seeks to change the distinction, to require an exception for "pure issue advocacy" as compared to "campaign related advocacy." Yet the plaintiff presents no authority that would require, let alone allow, this Court to find a constitutionally-mandated exception for its advertisement on the grounds that it constitutes "pure issue advocacy." Accordingly, because the plaintiff has not succeeded on the merits of its claim, the application of the electioneering communications requirements of Amendment XXVIII of the Colorado Constitution will not be enjoined by this Court.

ORDER

Plaintiff's Motion for Preliminary Injunction/Summary Judgment [ECF No. 13] is DENIED, and defendant's Cross-Motion for Summary Judgment [ECF No. 21] is GRANTED.

Final judgment dismissing this case with prejudice is entered in favor of the defendant, Scott Gessler in his official capacity as the Colorado Secretary of State. As the prevailing party the defendant is awarded his reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 22nd day of October, 2014.

BY THE COURT:

R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02426-RBJ

INDEPENDENCE INSTITUTE,

Plaintiff,

v.

SCOTT GESSLER in his official capacity as the Colorado Secretary of State,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the ORDER of Judge R. Brooke Jackson entered on October 22, 2014 [ECF No. 32], it is

ORDERED that Plaintiff's, INDEPENDENCE INSTITUTE, Motion for Preliminary Injunction/Summary Judgment [ECF No. 13] is DENIED. It is

FURTHER ORDERED that Defendant's, SCOTT GESSLER in his official capacity as the Colorado Secretary of State, Cross-Motion for Summary Judgment [ECF No. 21] is GRANTED. It is

FURTHER ORDERED that judgment is entered in favor of the defendant, SCOTT GESSLER in his official capacity as the Colorado Secretary of State, and against the plaintiff, INDEPENDENCE INSTITUTE. It is

FURTHER ORDERED that this civil action and all claims therein are dismissed

with prejudice. It is

FURTHER ORDERED that the defendant, SCOTT GESSLER in his official capacity as the Colorado Secretary of State, as the prevailing party, is awarded his reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 22nd day of October, 2014.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ J. Dynes

J. Dynes
Deputy Clerk