UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:14-CV-01500-CKK-PAM-APM

BRIEF *AMICI CURIAE* OF CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN, INC. IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center, Democracy 21 and Public Citizen, Inc. are nonprofit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have participated in many of the Supreme Court cases cited by the Independence Institute (the "Institute") as forming the basis of its First Amendment challenge, including *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010). *Amici* have participated in this case both before the U.S. District Court for the District of Columbia and in the D.C. Circuit Court of Appeals. *Amici* thus have substantial expertise in the legal issues raised in this case, and a demonstrated interest in the challenged "electioneering communications" disclosure provisions of the Bipartisan Campaign Reform Act ("BCRA"), 52 U.S.C. § 30104(f).

SUMMARY OF ARGUMENT

In 2014, the Institute asked the district court in this case to invalidate BCRA's disclosure provisions as applied to an "electioneering communication" ("EC") referencing U.S. Senators Mark Udall and Michael Bennet that it wished to broadcast on radio shortly before the 2014 general election. The Institute contended that applying these disclosure provisions to any communications that constituted "pure" or "genuine" issue advocacy was unconstitutional (*e.g.*, Br. Supp. Mot. Prelim. Inj. 6, 14 (Sept. 4, 2014) (Dkt. 5)), even though *Citizens United* had rejected this exact "contention." 558 U.S. at 369. Citing *Citizens United*, the single-judge district court found that the Institute's "claims are foreclosed by clear United States Supreme Court

[1] All parties have consented to *amici*'s participation in this case. Pursuant to LCvR 7(o)(5) and Federal Rule of Appellate Procedure 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

precedent," and accordingly denied its motion for a three-judge court under BCRA's special review provision, *see* 52 U.S.C. § 30110 note, and dismissed the action. *Indep. Inst. v. FEC*, 70 F. Supp. 3d 502, 503 (D.D.C. 2014), *rev'd and vacated*, 816 F.3d 113 (D.C. Cir. 2016).

Nothing that would bear on the substantive merits of this case has changed since Judge Kollar-Kotelly issued her ruling. Although that decision was vacated 2-1 by a panel of this circuit, the Court of Appeals ruled only with respect to the denial of plaintiff's motion to convene a three-judge court. The panel majority premised its decision upon the U.S. Supreme Court's intervening decision in *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015), which lowered the bar for the grant of a three-judge court under 28 U.S.C. § 2284. Applying this new precedent, the Court of Appeals held that the Institute was entitled to a three-judge court because one of its arguments was not "'essentially fictitious, wholly insubstantial, obviously frivolous, and obviously without merit.'" 816 F.3d at 117 (citing *Shapiro*, 136 S. Ct. at 456). Specifically, the opinion noted that although the Supreme Court had twice upheld the challenged law, it had not addressed the narrower argument that "a speaker's tax status or the nature of the nonprofit organization affects the constitutional analysis of BCRA's disclosure requirement." *Id.* at 116-17. The majority cautioned, however, that its ruling should not be understood "to suggest that Independence Institute's argument is a winner" or that it had reached the merits of the Institute's claims. *Id.* at 117.

Indeed, this case is not "a winner," and the Institute's merits claims have not improved with time. The crux of the Institute's argument throughout this litigation has been that its proposed ad does not constitute express advocacy or its functional equivalent, and disclosure laws must be limited to these two forms of communications. But as the single-judge district court already recognized, *McConnell* and *Citizens United* specifically considered—and unambiguously

rejected—this precise argument. 70 F. Supp. 3d at 506 ("[I]n no uncertain terms, the Supreme Court rejected the attempt to limit BCRA's disclosure requirements to express advocacy and its functional equivalent.").

In its latest submission, the Institute attempts to refresh this familiar and thoroughly discredited argument with "new" terminology, declaring that the test now for a disclosure law is whether it regulates only "unambiguously campaign-related" communications. Institute's Mot. for Summ. J. & Supp. Mem. 13-17 (June 17, 2015) (Dkt. 36) ("SJ Br."). Thus, instead of requesting an exception for its ad because it is not "the functional equivalent of express advocacy," the Institute now demands an exception because its ad is allegedly not "unambiguously campaign-related." This is a semantic distinction without a substantive difference. As the Institute conceded in its submission on appeal, these "tests" are virtually synonymous. Pl.-Appellant's Opening Br. 38 (D.C. Cir. Apr. 8, 2015) (No. 14-5249) (defining "unambiguously campaign-related" speech as a "category of speech which, while falling short of express advocacy, functions in the same way"). Relabeling its argument does not make the Institute's case any stronger, nor does it make *Citizens United* any less controlling.

Nor does the Institute's attempt to carve out an as-applied exception from the BCRA disclosure law for Section 501(c)(3) groups fare any better. *See* 26 U.S.C. § 501(c)(3). Although the Supreme Court may not have specifically addressed this particular as-applied argument, 816 F.3d at 116-17, it has never suggested that the constitutionality of a political disclosure law turns on the tax status of the entities subject to the law. On the contrary, the Supreme Court has criticized campaign finance laws that discriminate "based on the speaker's identity," *Citizens United*, 558 U.S. at 350, leading some circuits to question whether an exception to a campaign

finance law based on tax status is even constitutionally permissible, much less mandated. *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 289 (4th Cir. 2013).

Indeed, if anything has changed since the Institute filed this case, it is that yet more circuits have rejected the Institute's arguments in analogous cases. The Tenth Circuit, in fact, rejected virtually the same arguments from the same plaintiff, holding that *Citizens United* foreclosed the Institute's challenge to Colorado's EC disclosure law and affirming the lower court's rejection of the Institute's as-applied challenge on the basis of its Section 501(c)(3) tax status. *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016). Similarly, in *Delaware Strong Families (DSF) v. Attorney Gen. of Delaware*, 793 F.3d 304 (3d Cir. 2015), *cert. denied sub nom DSF v. Denn*, 136 S. Ct. 2376 (2016), the Third Circuit turned back a challenge to Delaware's EC disclosure law and also rejected an attempt by the plaintiff to challenge the state law's coverage of 501(c)(3) groups. *Id*. at 308 (finding no "compelling reason to defer to the § 501(c)(3) scheme in determining which communications require disclosure under the Act"). These two courts of appeals join the four other circuits that, as already discussed here (*see* 70 F. Supp. 3d at 507-509), each have rejected "the position that disclosure requirements cannot constitutionally reach issue advocacy." *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010); *see also Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015); *Ctr. for Individual Freedom, Inc. v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54–55 (1st Cir. 2011).

In short, the Institute's core contention is that all of these courts erred, because the eight members of the Supreme Court who upheld BCRA's disclosure provisions in *McConnell* and

Citizens United did not mean what they said. This Court should reject the Institute's attempt to relitigate controlling Supreme Court precedent.

ARGUMENT

I. The Institute's Attempt to Restrict Disclosure Laws to Express Advocacy Is Foreclosed by Supreme Court Precedent.

As already recognized repeatedly in this case, the Supreme Court has twice considered—and twice upheld—the federal EC disclosure provisions: facially in *McConnell*, 540 U.S. at 196, and as applied in *Citizens United*, 558 U.S. at 367. In both cases, the Court rejected attempts to limit the BCRA disclosure law to express advocacy or its functional equivalent. Judge Kollar-Kotelly correctly rejected the Institute's attempt to impose exactly this limit on the law, 70 F. Supp. 3d at 507-08, and the Court of Appeals did nothing to disturb her analysis, 816 F.3d at 117. This Court should follow suit.

A. *McConnell* Upheld the Electioneering Communications Disclosure Provisions on Their Face as to "the Entire Range of Electioneering Communications."

The "major premise" of the facial challenge in *McConnell* was that the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), "drew a constitutionally mandated line between express advocacy and so-called issue advocacy." 540 U.S. at 190. The plaintiffs there argued that disclosure requirements could not constitutionally extend to ECs "without making an exception for those 'communications' that do not meet *Buckley*'s definition of express advocacy." *Id.* The Supreme Court flatly rejected this argument, finding that neither its prior precedents nor the First Amendment "requires Congress to treat so-called issue advocacy differently from express advocacy" for purposes of disclosure requirements. *Id.* at 194.

The *McConnell* Court noted that in *Buckley*, it was construing a disclosure requirement in the Federal Election Campaign Act (FECA) that applied to ads "'for the purpose of . . . influencing' a federal election." *Id.* at 191. The *Buckley* Court found this language vague and

therefore construed the statute to reach only express advocacy, but *McConnell* explained that *Buckley*'s holding was "specific to the statutory language" of FECA. *Id.* at 192-93. Consequently, the Court refused to elevate *Buckley*'s express advocacy limitation—"an endpoint of statutory interpretation"—into "a first principle of constitutional law." *Id.* at 190. The vagueness concerns "that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy [were] simply inapposite" with respect to BCRA's "easily understood and objectively determinable" definition of "electioneering communication." *Id.* at 194. The Court thus upheld BCRA's disclosure provisions, finding that "the important state interests that prompted *Buckley* to uphold FECA's disclosure requirements"—providing the electorate with information, deterring corruption, and enabling enforcement of the law—"apply in full to BCRA." *Id.* at 196.

The Institute attempts to downplay this holding by asserting that *McConnell* considered the BCRA disclosure law only in connection to ads that were "express advocacy or something very like it." SJ Br. 29. But the *McConnell* Court acknowledged that the EC definition potentially encompassed both express advocacy and "genuine issue ads," noting that the "precise percentage" of ECs that "had no electioneering purpose" was "a matter of dispute." 540 U.S. at 206. Nevertheless, it upheld BCRA's disclosure requirements as "to the *entire range* of 'electioneering communications.'" *Id.* at 196 (emphasis added). In so holding, the majority confirmed that the governmental interests that had led the *Buckley* Court to uphold FECA's disclosure provisions also supported disclosure for ECs, even though some percentage of "genuine issue ads" were covered by BCRA.

B. *Citizens United* Sustained Disclosure Provisions as Applied to Ads That Were *Not* the Functional Equivalent of Express Advocacy.

Citizens United considered a challenge to the EC disclosure provisions as applied to Citizens United's film, *Hillary: The Movie*, and three promotional ads for the movie. In making

this challenge, the plaintiff relied principally on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), although *WRTL* addressed BCRA's restrictions on corporate spending for ECs—not its disclosure requirements. *Id.* at 457. In *WRTL*, the Court had concluded that BCRA's prohibition on corporate funding of electioneering communications could constitutionally apply only to speech that was "express advocacy or its functional equivalent," and not to "'issue advocacy[]' that mentions a candidate for federal office." *Id*. at 456, 481. The plaintiff Citizens United, citing *WRTL*'s holding that BCRA's *expenditure* restrictions could only reach "express advocacy and its functional equivalent," sought "to import a similar distinction into BCRA's *disclosure* requirements." 558 U.S. at 368-69 (emphasis added). The Supreme Court "reject[ed] this contention," *id.* at 369, explaining that the constitutional limitations it had established with respect to expenditure limits did not apply to disclosure requirements:

> [D]isclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found [BCRA's ban on corporate funding of ECs] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, *we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy*.

Id. (emphasis added) (internal citations omitted). The Court could not have made its conclusion any clearer: disclosure requirements may extend beyond express advocacy and its functional equivalent.

In a futile attempt to escape *Citizens United*'s clear holding, the Institute implies that this entire section of the decision was dicta. SJ Br. 30-36. It contends that the Court had already concluded that the movie and its promotional ads "were pejorative and the functional equivalent of express advocacy." SJ Br. 34.

That contention is incorrect. As Judge Kollar-Kotelly noted, 70 F. Supp. 3d at 508, although the Court determined that Citizens United's *movie* was the functional equivalent of express advocacy, it made no similar finding with respect to *the advertisements* for the movie. Contrary to the Institute's claim that the ads were simply "carried along in the decision's slipstream" (SJ Br. 30), they were in fact the focus of the Court's disclosure analysis. 558 U.S. at 325, 367-71. The Institute's suggestion that the disclosure section of *Citizens United* is non-precedential—or somehow distinguishable from this case—is incorrect. The Court's holding on the scope of disclosure laws was necessary to its judgment and is controlling here.

Furthermore, the parties in *Citizens United* agreed that the advertisements were not express advocacy, and the three-judge district court likewise found that the ads "did not advocate Senator Clinton's election or defeat." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (per curiam). Express advocacy requires the use of certain "magic words." *McConnell*, 540 U.S. at 191. The "functional equivalent of express advocacy" requires that a communication be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70. The Institute's new category of "unambiguously campaign-related" speech appears to be coextensive with the "functional equivalent of express advocacy." SJ Br. 24. But even if these tests are distinct, none of them was conceivably satisfied by Citizens United's promotional ad that stated, in its entirety: "If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." *Citizens United*, 530 F. Supp. 2d at 276 n.2. Indeed, if that ad met the Institute's self-devised test for "unambiguously campaign related" speech, then *a fortiori* the Institute's proposed ad here would as well.

The Institute also makes too much of *Citizens United*'s passing reference to the advertisements as containing "pejorative" references to then-Senator Clinton. SJ Br. 31, 32, 33,

34, 36. The Court offered that characterization as part of its description of the promotional ads, not as an element of its constitutional analysis. 558 U.S. at 368. There is nothing in *Citizens United* to suggest that a communication must contain a "pejorative statement" to be permissibly subject to disclosure. *McConnell* upheld "application of [BCRA's] disclosure requirements to the *entire range*" of electioneering communications, without regard to their "pejorative" nature. 540 U.S. at 196 (emphasis added). Had the Court in *Citizens United* wished to overrule its *McConnell* holding and limit disclosure to ads containing "pejorative" references, it would have done so explicitly.[2] Moreover, the Court's reasoning—that the public has an interest in knowing who is speaking about a candidate right before an election—applies equally to all communications that refer to a candidate, whether they are "pejorative" or not.

Furthermore, if the BCRA disclosure requirements were instead predicated upon a determination of whether a communication was or was not "unambiguously campaign related," as the Institute demands, it would implicate the same vagueness concerns raised in *Buckley*, and would ignore the Supreme Court's explicit approval of the EC definition's "easily understood and objectively determinable" criteria. *McConnell*, 540 U.S. at 194. The Institute does not even attempt to articulate a test for when a communication is "unambiguously campaign related"—although in prior submissions, it linked this new standard to *WRTL*'s test for the "functional equivalent of express advocacy." *See, e.g.*, Pl.-Appellant's Opening Br. 38 (D.C. Cir. Apr. 8,

[2] Plaintiff has tried this gambit before. In its parallel challenge to Colorado's EC disclosure law, the Institute unsuccessfully argued that in *Citizens United*, the Court found that both the movie and the ads were "the functional equivalent of express advocacy." The Tenth Circuit saw "little support" for this claim, noting that although the movie was deemed express advocacy, the Court "nowhere suggested the same about the ads." 812 F.3d 787, 795 n.8; *see also id.* ("[T]he discussion to which the Institute refers is limited to whether a provision of BCRA prohibiting the use of corporate and union general treasury funds to fund [ECs] could apply to the movie itself.").

2015). As was the case in its Tenth Circuit challenge, "the Institute has offered no principled mechanism for distinguishing between campaign-related issue speech and speech that is not campaign-related." 812 F.3d at 796 (noting the "difficulty of reliably distinguishing between campaign-related and non-campaign-related speech" and rebuffing the Institute's test as "little more than [a] restate[ment]" of the "categorical distinction" rejected in *Citizens United*).[3]

The Institute's argument has been rejected time and time again by the Supreme Court, and should be rejected here as well.

C. No Legal Authority Supports the Institute's Position.

In an attempt to escape the weight of controlling Supreme Court authority, the Institute invokes a handful of appellate decisions, but ignores that six circuits have interpreted *Citizens United* as precluding exactly the type of challenge to a disclosure law it advances here.

The Institute urges this Court to discount *McConnell* and *Citizens United* in favor of the "most directly relevant" precedent, *Buckley*—not the Supreme Court's opinion in that case, but rather an unappealed portion of the D.C. Circuit's 1975 opinion that invalidated a disclosure provision of the original FECA. SJ Br. 28 n.18 (citing *Buckley v. Valeo*, 519 F.2d 821, 878 (D.C. Cir. 1975)).

But the appellate *Buckley* decision obviously predated the Supreme Court's decisions in *McConnell* and *Citizens United*, and the latter two rulings would supersede anything in the former that might conflict with them. Unsurprisingly, given its vintage, the D.C. Circuit's

[3] However the Institute conceives of the distinction, it is far from clear its ad falls on the non-campaign-related side of the line. There is nothing beyond the Institute's own conclusory statements to suggest its particular ad is indeed "genuine issue advocacy," given that it will refer to a current candidate by name and be distributed to the relevant electorate shortly before Election Day. These kinds of content and targeting choices are not accidental—and regardless, there is no reason to replace a clear statutory test that promotes transparency during the run-up to elections with the unprincipled line-drawing the Institute seeks to compel. *Cf. Indep. Inst. v. Williams*, 812 F.3d at 796.

Buckley decision did not consider the question central to this case: whether express advocacy and its functional equivalent (terms the Supreme Court had yet to coin) mark the outer boundary of permissible disclosure requirements. Thus, even if the *Buckley* circuit court decision were the governing precedent today, it is plainly not "relevant" because it does not address this question.

Furthermore, the law reviewed in this *Buckley* decision, FECA § 308, was entirely different from the EC disclosure provisions at issue here. First, Section 308 required an organization to file reports . . . as if [it] were a political committee." 519 F.2d at 869-70. Then, as today, political committee status meant *ongoing* quarterly reporting, regardless of whether the organization engaged in any election-related activity, as well as an array of organizational and record-keeping requirements. *See, e.g.*, Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, 1276; 52 U.S.C. §§ 30104(a)-(b) (quarterly and other ongoing reports), 30102(h) (governing use of bank accounts), 30103 (statements of organization and termination requirements). The EC disclosure requirement here, by contrast, consists of an event-driven, one-time report that must be filed if and only if a group spends more than $10,000 on ECs in a covered period. 52 U.S.C. § 30104(f).

Second, Section 308 differs from the BCRA provisions here because it included the same vague language that resulted in the Supreme Court's creation of the express advocacy test in *Buckley*. Section 308 required disclosure in connection to "any act directed to the public for the purpose of influencing the outcome of an election," *id.* at 869, using terminology almost identical to the "for the purpose of . . . influencing" phrase that Supreme Court later found to raise constitutional vagueness concerns. *Buckley*, 424 U.S. at 79-80. The Supreme Court, however, has described the EC definition at issue here as "both easily understood and objectively

determinable." *McConnell*, 540 U.S. at 194 (citing 2 U.S.C. § 434(f), now codified at 52 U.S.C. § 30104(f)). The D.C. Circuit's 1975 *Buckley* opinion is simply inapplicable here.

In contrast to this 40-year-old case, every circuit to address the permissible scope of political disclosure in the recent past has recognized that *Citizens United* found that disclosure laws can extend beyond express advocacy. *See Madigan*, 697 F.3d at 484 ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny.").[4] *See also Vermont Right to Life*, 758 F.3d at 132 ("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"); *Nat'l Org. for Marriage*, 649 F.3d at 54-55 (holding that *Citizens United* made clear that "the distinction between issue discussion and express advocacy has no place in First Amendment review" of "disclosure-oriented laws"); *Human Life*, 624 F.3d at 1016.

The Third and Tenth Circuits recently joined this consensus. In *DSF*, the Third Circuit rejected a challenge to Delaware's EC law as applied to a "neutral" voter guide, noting that "[t]he Supreme Court has consistently held that disclosure requirements are not limited to 'express advocacy' and that there is not a 'rigid barrier between express advocacy and so-called issue advocacy.'" 793 F.3d at 308 (quoting *McConnell*, 540 U.S. at 193). The Tenth Circuit addressed a virtually identical challenge, brought by the Institute itself, to Colorado's EC disclosure law as applied to another ad it claimed was "genuine issue advocacy." 812 F.3d at

[4] *Cf. Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014) (distinguishing *Citizens United* in reviewing state law imposing "comprehensive, continuous reporting regime" on political committees).

792. There, as here, the Institute "contend[ed] that the First Amendment right to free association categorically shields proponents of speech that is 'unambiguously not campaign-related' from disclosure." *Id*. But the Tenth Circuit found that the "logic of *Citizens United* is that advertisements that mention a candidate shortly before an election are deemed sufficiently campaign-related to implicate the government's interests in disclosure." *Id*. at 796. It continued to note that "the Court in *Citizens United* was nearly unanimous in applying BCRA's disclosure requirements both to Citizens United's express advocacy and to ads that did not take a position on a candidacy." *Id*.

This Court should follow the consensus of the other circuits that *Citizens United* means what it says: the public's interest in knowing the identities of those "spending shortly before elections" does not stop short at "express advocacy" or its functional equivalent.

II. The Supreme Court Has Repeatedly Approved of Measures Requiring Disclosure in Connection with "Issue Advocacy."

The Supreme Court's decisions holding that BCRA's disclosure requirements are constitutional without regard to whether they apply to express advocacy or issue advocacy are not anomalies. *McConnell* and *Citizens United* are fully consistent with longstanding Supreme Court precedent recognizing that the broad public interest in knowing the identity of those financing political advocacy extends far beyond express advocacy or its functional equivalent.

A. Disclosure Laws Are Not Limited by an "Unambiguously Campaign Related" Test.

Central to the Institute's latest brief is the assertion that disclosure laws can extend only to communications that are "unambiguously campaign related." *See, e.g.*, SJ Br. 13-17. This claim appears to be nothing more than an attempt to repackage the Institute's earlier argument—i.e., that disclosure laws cannot reach "pure issue advocacy"—because it is clearly foreclosed by *McConnell* and *Citizens United*. *See Indep.* Institute, 70 F. Supp. 3d at 507. Regardless of

whether one draws the line between express advocacy and issue advocacy at communications that are the "functional equivalent of express advocacy" or "unambiguously campaign related," the Supreme Court has repeatedly affirmed that disclosure laws *can apply on both sides of this line*.

In any event, the Institute's "unambiguously campaign related" test for disclosure has no basis in the law. The language appeared in *Buckley*, but only as a descriptive phrase incidental to the Court's narrowing construction of the term "expenditure" to encompass only express advocacy. 424 U.S. at 80.[5] The phrase certainly was not adopted as an independent constitutional test, and has never been mentioned, much less applied, in any subsequent Supreme Court case. The Institute is simply attempting to replace the Supreme Court's actual jurisprudential approach to the review of disclosure requirements—i.e., an approach that analyzes whether there exists a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed"—with a test more to its liking. *Id*. at 64. This Court should reject the Institute's invented standard, and adhere to the established Supreme Court precedent on the scope of permissible disclosure.

[5] Reviewing the context in which the phrase "unambiguously campaign related" appeared in *Buckley* confirms its inconsequentiality. To address "serious problems of vagueness," the Court construed the term "expenditure" in FECA to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. The Court then stated that "this reading is directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate." *Id*. (emphasis added). It is clear that the only "test" created by the *Buckley* Court was the express advocacy standard, and the Court's "unambiguously campaign related" language was not a separate test, but merely described the express advocacy standard in this context.

B. The Institute's Newly-Formulated "Unambiguously Campaign Related" Requirement Is Contradicted by Supreme Court Decisions Upholding Disclosure Laws in Non-Campaign Related Contexts.

Supreme Court decisions approving laws relating to lobbying and ballot measure advocacy confirm that the constitutionality of a disclosure requirement does not depend on whether the regulated speech is "unambiguously campaign related."

First, the Supreme Court has long approved of disclosure in the context of lobbying. *Citizens United*, 558 U.S. at 369 (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)). The Institute completely fails to acknowledge that *Citizens United* cited *Harriss* for the proposition that disclosure laws could extend beyond express advocacy, foreclosing its argument that advocacy that is not "unambiguously campaign related" is sacrosanct. *Id.*

In *Harriss*, the Supreme Court considered the Federal Regulation of Lobbying Act, which required all persons "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report information about their clients and their contributions and expenditures. 347 U.S. at 615 & n.1. After evaluating the Act's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests. The Court explained that "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected," and noted approvingly that the Act did not "prohibit these pressures" but "merely provided for a modicum of information" about them. *Id*. at 625. The fact that the Act was unrelated to candidate campaigns and instead pertained only to issue speech was not constitutionally significant: the disclosure it required served the state's informational interest and "maintain[ed] the integrity of a basic governmental process." *Id*.

The Court has likewise expressed approval of statutes requiring disclosure of expenditures relating to ballot measures, although such statutes also lack a connection to

candidates and thus do not constitute express advocacy or its functional equivalent. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on corporate expenditures to influence ballot measures, in part because the state's interests could be achieved constitutionally through the less restrictive means of disclosure: "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. Citing *Buckley* and *Harriss*, the Court emphasized "the prophylactic effect of requiring that the source of communication be disclosed." *Id*.

The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance limiting contributions to committees formed to support or oppose ballot measures. Again, the Court struck down the contribution limit, basing its holding in part on the disclosure that the law required from ballot measure committees. *See id.* at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

These precedents have led multiple circuits to conclude that requiring disclosure of donors financing ballot measure issue advocacy is constitutional, just as it is in the candidate advocacy context. *See, e.g.*, *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) ("The [Supreme] Court has repeatedly acknowledged the constitutionality of state laws requiring the disclosure of funds spent to pass or defeat ballot measures."). In a challenge to Florida's ballot measure disclosure law, for example, the Eleventh Circuit strongly rejected the

"[c]hallengers' proposed distinction between ballot issue elections and candidate elections," emphasizing that this distinction was "not supported by precedent" and could not "compel a departure from *Citizens United*." *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2013); *see also Madigan*, 697 F.3d at 480.

These courts recognize what the Institute does not: that the informational interest in disclosure recognized by *Buckley* applies equally to the disclosure of ballot measure advocacy even though this latter activity is not "unambiguously related" to candidate campaigns. Given the weight of the case law, "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Human Life*, 624 F.3d at 1016.

III. The Institute's As-Applied Challenge to the BCRA Disclosure Provisions Fails.

A. The Institute's "As-Applied" Argument with Respect to "Unambiguously Campaign Related" Communications Is Indistinguishable from the Claims Brought in *McConnell* and *Citizens United*.

Although the Institute bills its case as an "as-applied" challenge, its principal argument rests on the same theory as the facial challenge to BCRA that was rejected in *McConnell*. The Institute highlights little about its proposed ad that would serve as grounds for an as-applied exemption, other than the claim that its ad is not "the functional equivalent of express advocacy" or "unambiguously campaign related." SJ Br. 33-38. But the petitioners in *McConnell* likewise challenged the EC disclosure provisions because they extended beyond express advocacy, and their facial challenge was rejected. 540 U.S. at 190, 196. "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." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court), *aff'd*, 561 U.S. 1040 (2010).

Even if viewed as an as-applied challenge, the Institute's claim must fail given *Citizens United*'s dismissal of an as-applied challenge that rested on exactly the same theory: that an ad should be exempted from disclosure on an as-applied basis because it did not constitute express advocacy or its functional equivalent. The Supreme Court adamantly "reject[ed] that contention." *Citizens United*, 558 U.S. at 369.[6] It recognized only one constitutionally mandated as-applied exemption from a facially valid political disclosure law: where there is "a reasonable probability that [a] group's members would face threats, harassment, or reprisals if their names were disclosed." *Id*. at 370; *see also Buckley*, 424 U.S. at 74. Here, the Institute has expressly disclaimed any concerns about harassment. *See* 70 F. Supp. 3d at 504, 509. It has thus failed to claim the only as-applied exemption from a facially valid campaign finance disclosure law that has been recognized by the Supreme Court.

B. The Institute's Status as a Section 501(c)(3) Organization Is Immaterial to the Constitutionality of a Disclosure Requirement.

The Institute now focuses on its tax status, arguing that it is a group organized under Section 501(c)(3) of the Internal Revenue Code, *see* 26 U.S.C. § 501(c)(3), whereas the plaintiff in *Citizens United* was a Section 501(c)(4) organization, and that this distinction somehow affects the First Amendment analysis. SJ Br. 17-26. But the Supreme Court has never premised the constitutionality of a disclosure requirement on the tax status of the spender. On the contrary,

[6] Indeed, the Institute's reworked argument resurrects the very same terminology pressed by Citizens United itself. *See, e.g.*, Mem. Supp. Pl.'s Mot. for Summ. J. at 22-23, *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (No. 07-2240) ("The burden is on the government to justify the Disclosure Requirements by proving both that Congress has a compelling interest in regulating speech that is not unambiguously campaign related and that the Disclosure Requirements are narrowly tailored to such an interest—all as applied to the communications at issue here."); *see also* Reply Br. for Appellant at 23, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (asserting that EC "reporting requirements can only be applied to 'spending that is *unambiguously* related to the campaign of a particular federal candidate'" under *Buckley*") (emphasis in original).

the Court has questioned campaign finance laws that discriminate "based on the speaker's identity." *Citizens United*, 558 U.S. at 350.

No exemption from disclosure for Section 501(c)(3) organizations is constitutionally required. In *McConnell*, the Supreme Court sustained the EC disclosure provisions even though they contained no exemption for Section 501(c)(3) groups. 540 U.S. at 194-96. And after *McConnell*, when the FEC created an exemption for 501(c)(3) groups by regulation, the exemption was invalidated. *Shays v. FEC*, 337 F. Supp. 2d 28, 124-28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The *Shays* court found this exemption to be arbitrary and capricious because "the [FEC] did not fully address whether the tax code . . . preclude[s] Section 501(c)(3) organizations from making" the communications that BCRA "requires be regulated." *Id*. at 128. No court has imposed such an exemption as a matter of constitutional law.

The D.C. Circuit granted the Institute's request for a three-judge court with respect to this argument in part because it was aware of "no precedent from the Supreme Court (or any other court) rejecting the argument," but in fact, at least two circuits have rejected this theory. The Third Circuit rebuffed an argument that the Delaware EC law should be invalidated as applied to the plaintiff "by virtue of its status as a § 501(c)(3) organization." *DSF*, 793 F.3d at 308. It instead concluded that "it is the conduct of an organization, rather than an organization's status with the Internal Revenue Service, that determines whether it makes communications subject to the Act." *Id.*; *see also Indep. Inst. v. Gessler*, 71 F. Supp. 3d 1194, 1203 (D. Colo. 2014) ("[T]he public's interest in knowing who is speaking is in no way related to an entity's organizational structure or its tax status."), *aff'd*, 812 F.3d 787 (10th Cir. 2016).

Indeed, far from mandating an exemption for Section 501(c)(3) organizations from disclosure laws, lower courts have questioned whether such an exemption is even

constitutionally permissible. In *Tennant*, the Fourth Circuit struck down an exemption for Section 501(c)(3) groups from West Virginia's state EC law, finding that the exemption "does not bear a substantial relation to [the] governmental interest" in "providing the electorate with information about the source of campaign-related spending." 706 F.3d at 289. The court of appeals reasoned that it was "not necessarily the case" that the campaign finance law and Section 501(c)(3) were "coextensive" in terms of the electoral communications that they regulate, and consequently, "by exempting communications by § 501(c)(3) organizations from the definition of 'electioneering communication,' West Virginia likely deprived the electorate of information about these organizations' election-related activities." *Id.*; *see also Shays*, 337 F. Supp. at 124-28.

The Institute offers no substantive reason why 501(c)(3) organizations are situated differently than 501(c)(4) organizations for purposes of disclosure. It states that donors to Section 501(c)(3) organizations are generally offered greater protection than donors to Section 501(c)(4) groups," citing 26 U.S.C. § 6104(c)(3) and § 6104(d)(3)(A) for this proposition. SJ Br. 19. But the first cited provision concerns IRS cooperation with state enforcement efforts concerning "the solicitation or administration of the charitable funds or charitable assets," 26 U.S.C. § 6104(c)(3), and has nothing to do with public disclosure. With respect to the latter provision, the Institute is simply wrong. Section 6104(d)(3)(A) provides that *all* tax-exempt groups organized under 501(c) (except private foundations) have no obligation under federal tax law to disclose their donor information to the public. 26 U.S.C. § 6104(d)(3)(A) ("In the case of an organization which is not a private foundation (within the meaning of section 509 (a)) or a political organization exempt from taxation under section 527, [the law] shall not require the disclosure of the name or address of any contributor to the organization . . . ."). This provision

encompasses both 501(c)(3) and 501(c)(4) organizations. Thus, the tax code provision upon which the Institute relies fails to make the distinction between 501(c)(3) and 501(c)(4) groups that the Institute advances.

The Institute also argues that 501(c)(3) organizations should be exempted from disclosure because they are "prohibited from engaging in any electioneering activity," whereas other tax exempt groups, such as 501(c)(4) groups, may engage in considerable campaign intervention. SJ Br. 19. To be sure, 501(c)(3) groups are prohibited from "intervening" in a "political campaign" under 26 U.S.C. § 501(c)(3). But the IRS's "facts and circumstances" test for campaign intervention, *see, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421, is used to determine whether a group meets the criteria for a tax status under Section 501(c)(3), not whether the group should be subject to disclosure under federal election law. The IRS' definition is not—and was not intended to be—coterminous with the activity regulated under FECA. *See*, *e.g.*, *Shays*, 337 F. Supp. 2d at 124-28 (criticizing FEC for deferring to the IRS standard because "the IRS in the past has not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are . . . considered [to be political activities]" under federal campaign finance law). Indeed, given the radically different purposes of tax law and campaign finance law it would be surprising if the definitions were "consistent," as the Institute wishes were the case. SJ Br. 20. Tax law *prohibits* Section 501(c)(3) groups from running certain campaign ads to prevent use of a tax subsidy for political ends; the challenged law here requires *disclosure* in connection with certain campaign ads to "provid[e] the electorate with information" and "deter[] actual corruption." 540 U.S. at 196.[7]

[7] It bears noting that the bar against "campaign intervention" under 26 U.S.C. § 501(c)(3) is hardly self-executing. Despite the near-talismanic significance the Institute accords to Section 501(c)(3) status, entities organized under this section may—and often do—disseminate

In short, although the Institute makes the conclusory assertion that its tax status "affects the required constitutional analysis, and further distinguishes this case from Citizens United," Br. 26, it offers no substantive reason why this should be the case.

CONCLUSION

For the foregoing reasons, this Court should deny the Institute's motion for summary judgment, and grant summary judgement in favor of the Defendant.

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statements that could easily be interpreted to qualify under the "facts and circumstances" test as prohibited political communications. *See, e.g.*, M. Alex Johnson, *Pulpit politics: Pastors endorse candidates, thumbing noses at the IRS*, NBC News (Nov. 4, 2012), http://usnews.nbcnews.com/_news/2012/11/04/14703656-pulpit-politics-pastors-endorse-candidates-thumbing-noses-at-the-irs (noting that 1,600 pastors across the country violated the 501(c)(3) rules restricting campaign endorsements by churches with no apparent IRS action); Claudia Vargas, *Turned down by the IRS, Philly's DNC host committee goes for Plan B*, The Philadelphia Inquirer (July 17, 2016), http://articles.philly.com/2016-07-17/news/74517432_1_tax-exemption-committee-irs (noting that IRS denied Democratic convention host committee application for 501(c)(3) status but granted "almost identical" application by Republican convention host committee). Certainly, the IRS has issued no ruling specifically endorsing the Institute's proposed ad, and on its face, the ad appears to trigger several factors in the IRS test, including that it "identifies one or more candidates for a given public office" and "is delivered close in time to the election." Rev. Rul. 2007-41. Indeed, a 501(c)(3) group's ad may contain considerable electoral content but still legitimately escape classification as prohibited campaign intervention if it implicates countervailing factors in the IRS's test, such as if it is timed to "a non-electoral event such as a scheduled vote" or is "part of an ongoing series of communications by the organization on the same issue." *Id*. Exempting 501(c)(3) groups from campaign finance disclosure laws simply by virtue of their tax status thus has the potential to greatly undermine the effectiveness of disclosure laws—and to deprive voters of information they need to cast meaningful votes.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Local Rule 7(o)(4) because it contains 25 pages or fewer, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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