No. 14-1463

In the

United States Court of Appeals for the Tenth Circuit

INDEPENDENCE INSTITUTE,
a Colorado nonprofit corporation,

Appellant,

v.

WAYNE WILLIAMS,
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 Reply Brief

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Oral Argument Requested

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Table of Contents

Table of Authorities iii

Glossary.. vii

Argument...1

I. Common sense and Supreme Court precedent hold that, in regulating "electioneering communications," states may only reach communications that unambiguously relate to a campaign for public office. 1

II. The State's informational interest is limited to unambiguously campaign related speech. 5

a. *Buckley* defined the state's informational interest as limited to unambiguously campaign related speech and disclosure concerning the "candidate's constituencies." 6

b. *McConnell*, *Wisconsin Right to Life*, and *Citizens United* adopted *Buckley*'s understanding of the need for a nexus between an election and regulated speech. In each case, the speech considered was unambiguously campaign related. 9

c. The Secretary has pointed to no case, because there is none, where the state's informational interest was permitted to reach speech that was not unambiguously campaign related. 13

III. Even if the state had an adequate informational interest, Colorado law is not properly tailored to that interest. 20

IV. The right of private association is a fundamental right, not a privilege extending only to those that can prove—objectively and in advance—that they will suffer threats, harassment, and reprisals. 22

V. The Institute's Ad is unrelated to any campaign. 25

Conclusion 26

Certificate of Length and Typeface Compliance 27

Certificate on Privacy Redaction 27

Certificate of Digital Submission 28

Certificate of Anti-Virus Scan 28

Certificate of Service 29

Table of Authorities

Cases

Agostini v. Felton,
521 U.S. 203 (1997)..12

ACLU of Nev. v. Heller,
378 F.3d 979 (9th Cir. 2004) 11

Anderson v. Spear,
356 F.3d 651 (6th Cir. 2004) 11

Bates v. City of Little Rock,
361 U.S. 516 (1960)..23

Buckely v. Valeo,
424 U.S. 1 (1976).. 1, 2, 3, 5, 6, 7, 8, 13, 24, 25

Ctr. for Individual Freedom v. Madigan,
697 F.3d 464 (7th Cir. 2012) 17

Citizens United v. FEC,
558 U.S. 310 (2010)..6, 11, 12, 24, 25

Citizens United v. FEC,
530 F.Supp. 2d 274 (D.D.C. 2008)..12

Citizens United v. Gessler,
773 F.3d 200 (10th Cir. 2014) 13

Colo. Ethics Watch v. Gessler,
2013 COA 172M (Colo. Ct. App. 2013) 18

Entm't Software Ass'n v. Blagojevich,
469 F.3d 641 (7th Cir. 2006) 1

FEC v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986)..24

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007)..10, 11

Free Speech v. FEC,
720 F.3d 788 (10th Cir. 2013) 13, 14

Grayned v. City of Rockford,
408 U.S. 104 (1972)..1

Human Life of Washington, Inc. v. Brumsickle,
624 F.3d 990 (9th Cir. 2010) 17

Iowa Right to Life Comm., Inc. v. Tooker,
717 F.3d 576 (8th Cir. 2013) 19

McConnell v. FEC,
540 U.S. 93 (2003)...2, 5, 9, 10, 11

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003)...10

McCutcheon v. FEC,
572 U.S. ____, 134 S. Ct. 1434 (2014) 7

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958)..23, 25

Nat'l Right to Work Legal Def. and Ed. Found. v. Herbert,
581 F. Supp. 2d 1132 (D. Utah 2008) 7

Nat'l Org. for Marriage v. McKee,
649 F.3d 34 (1st Cir. 2011)...16, 21

N.M. Youth Organized v. Herrera,
611 F.3d 669 (10th Cir. 2010) 3

Real Truth About Abortion v. FEC,
681 F.3d 544 (4th Cir. 2012) 15, 16

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 12

Sampson v. Buescher,
625 F.3d 1247 (10th Cir. 2010) 8, 9

Talley v. California,
362 U.S. 60 (1960) 23

Taylor v. Roswell Indep. Sch. Dist.,
713 F.3d 25 (10th Cir. 2013) 3

United States v. Harriss,
347 U.S. 612 (1954) 13

Vt. Right to Life v. Sorrell,
758 F.3d 118 (2d Cir. 2014) 19

Wis. Right to Life, Inc. v. Barland,
751 F.3d 804 (7th Cir. 2014) 7, 18

Constitutional Provisions

U.S. CONST. art. II, § 2 15
COLO. CONST. art. XXVIII § 2(7)(a) 20
COLO. CONST. art. XXVIII § 2(7)(a)(III) 21
COLO. CONST. art. XXVIII § 6(1) 20, 21

Statutes

52 U.S.C. § 30104(f)(1) 20
52 U.S.C. § 30104(f)(3)(A)(i) 20
52 U.S.C. § 30104(f)(3)(C) 20
COLO. REV. STAT. § 1-45-108(1)(a)(I) 21
COLO. REV. STAT. § 1-45-108(2)(a)(I) 21
COLO. REV. STAT. § 1-45-108(2)(a)(I)(D)–(E) 21

Rules

Rule 1.7, 8 COLO. CODE REGS. § 1505-6 18

Other Authorities

AO 2012-11 (Free Speech) 14, 15

ASSOCIATED PRESS, "Obama officially announces run for the White House" CHICAGO BUSINESS NEWS Feb. 7, 2007 *available at* http://web.archive.org/web/20090220201332/http://www.chicagobusiness.com/cgi-bin/news.pl?id=23835 16

Healthcare for All Colorado, Initiative #12 *available at* http://www.healthcareforallcolorado.org/initiative_12_parent.......................9

Legislative Council of the Colorado General Assembly, Res. Pub. No. 639, 2014 Ballot Information Booklet and Recommendation on Retention of Judges (2014)..9

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.

AO – Advisory Opinion issued by the Federal Election Commission.

Argument

I. Common sense and Supreme Court precedent hold that, in regulating "electioneering communications," states may only reach communications that unambiguously relate to a campaign for public office.

The Independence Institute advances the common sense proposition that before the state may regulate an "electioneering communication," and compel registration with the state and public disclosure of a group's donors, that communication must, in fact, electioneer. This is because the State's interest justifying compelled registration and disclosure—a disfavored action under the First Amendment—is limited to the regulation of speech with, at a bare minimum, some nexus to advocacy for and against candidates.

The Secretary sidesteps this elementary point, instead insisting that so long as he provides an "objective definition of electioneering"—a phrase he uses no less than 14 times—his responsibilities are at an end. *See*, *e.g.*, Ans. Br. at 16. That is incorrect. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972); *cf Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 649 (7th Cir. 2006) (applying *Grayned*).

In its preeminent case in this area of the law, the Supreme Court demanded that campaign finance disclosure laws survive "exacting scrutiny." *Buckley*, 424 U.S. 1, 64 (1976) (per curiam) ("[w]e long have recognized that significant

encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny"). This "strict test"—imported in *Buckley* from *NAACP vs. Alabama* and other civil rights era victories—"is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Therefore the Court limited the FECA's regulation of speech to only that which is "unambiguously campaign related," and imposed the "express advocacy" test for determining what speech that includes. *Id*. at 80-81.

The Secretary appears to believe that *Buckley* was decided only on vagueness grounds. Ans. Br. at 17 ("*Buckley* held that a particular statutory phrase—'for the purpose of …influencing…[an] election'—is unconstitutionally vague and must be confined by an 'express advocacy' limitation, when used to trigger both speech restrictions and disclosure requirements") (quoting *Buckley*, 424 U.S. at 63, 77-78) (ellipses, em dashes, and brackets in Ans. Br.). This understanding colors the entire Answer Brief. *See*, *e.g.*, Ans. Br. at 18 (quoting *McConnell v. FEC*, 540 U.S. 93, 194 (2003)).

But *Buckley* also constrained FECA on grounds of overbreadth. In fact, as the Court clearly recognized, vagueness is in part dangerous not only because it

provides insufficient guidance to the regulated public, but also because vague provisions are susceptible to overbroad interpretations. *See*, *e.g.*, *Id*. at 80 ("[t]o insure that the reach of [FECA] *is not impermissibly broad*, we construe 'expenditure'… to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate") (emphasis added). While the First Amendment doctrines of vagueness and overbreadth are related, and are often both implicated by poorly-drafted statutes, they are distinct. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 41 (10th Cir. 2013) ("[t]he overbreadth doctrine is an alternative facial challenge theory similar to, but distinct from, vagueness"); *Jordan v. Pugh*, 425 F.3d 820, 827-28 (10th Cir. 2005) (examining Supreme Court precedent between the two doctrines).

The Secretary's "objective definition of electioneering" standard is easy to apply. This is necessary, but not sufficient. The law may be perfectly clear in application, but unconstitutionally cover too much speech and activity on an as-applied basis. *See*, *e.g. N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010) (describing difference between *facial* overbreadth and its use in as-applied challenges). The State has made little effort to show that its "objective definition" is not, in certain cases, overbroad. None of the Secretary's cited cases involve a communication similar to the Institute's proposed ad. *See* section II(c),

infra (discussing Secretary's cited circuit courts of appeal cases) *and compare*, Op. Br. at 3-4 (Institute's proposed ad) *with* Ans. Br. at 27-28.

For example, an "objective definition of electioneering" could include any communication that unambiguously refers to any state office holder or state employee within 60 days of a general election. Such a definition would be both "objective" and oppressive. It would cover references to the reelection of a state senator, but also discussions of the University of Colorado's head football coach. Such a rule, while objective, would encompass too much speech—including every Colorado-focused sports blog. Similarly, an "objective" definition covering all broadcast ads during an election year would not be vague, but would be overbroad and patently unconstitutional.

Simply put, the State may not regulate whatever it wishes as "electioneering," and gloss over the fact that a communication, in fact, does not electioneer. Focusing on an "objective definition" elevates form over substance and, however convenient for regulators and courts, is unconstitutional. Under Colorado law, an organization cannot ask for any action by the elected government official within 30 days before a primary or 60 days before a general election without disclosing its donors. That rule is overbroad and unconstitutional.

II. The State's informational interest is limited to unambiguously campaign related speech.

The state's law cannot survive exacting scrutiny unless its interest—the guidepost against which its tailoring efforts must be measured—is properly defined. The "informational interest" is a term of art developed in the case law since *Buckley*. It is not simply anything the government believes that the people of Colorado might consider interesting, nor does the informational interest generate a general right for donor disclosure so that citizens may "evaluate [a communication] for themselves." Ans. Br. at 34.

Rather, the "informational interest" comes directly from the Supreme Court's *per curiam* decision in *Buckley*. 424 U.S. at 81. The Secretary agrees that *Buckley* controls, but appears to believe that it was modified, or essentially overruled, by *McConnell* and *Citizens United*. Ans. Br. at 17, 20. In this, the Secretary errs. He conflates *Buckley*'s discussion of "express advocacy" with the Court's separate focus on speech that is "unambiguously campaign related." Express advocacy is a *subset* of unambiguously campaign related speech. The Supreme Court simply drew the line at express advocacy in *Buckley* because the underlying statute was both vague and overbroad. Thus "the express advocacy restriction was an endpoint of statutory interpretation," but one "born of an effort to avoid constitutional infirmities." *McConnell*, 540 U.S. at 190, 192. But even

statutes which regulate with precision still must go no further than regulating unambiguously campaign related speech.

a. *Buckley* defined the state's informational interest as limited to unambiguously campaign related speech and disclosure concerning the "candidate's constituencies."

The *Buckley* Court was concerned that FECA's definition of "expenditure" would reach the activities of organizations engaged in "pure[] issue discussion[s]." *Buckley*, 424 U.S. at 79. The *Buckley* Court thus limited expenditure disclosure to the state's informational interest, which was to "help[] voters to define more of the candidates' constituencies." *Id*. at 81. In furtherance of that goal, the Court limited FECA's reach to speech that "expressly advocate[d] for the election or defeat of a clearly defined candidate." *Buckley*, 424 U.S. at 79-80. In doing so, the Court was performing its duty to save, if possible, legislative intent—in this case, ensuring that a vague and overbroad statute was narrowed to apply only to speech concerning elections.

All this is merely another way of restating that Colorado's campaign finance law must survive exacting scrutiny. The government must demonstrate that its regulation, in this application, serves a sufficiently important state interest. It must show that the government's informational interest in the funders of campaign speech is applicable to the proposed communication in this case. *See Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

"In the First Amendment context, fit matters." *McCutcheon v. FEC*, 572 U.S. ____, ____, 134 S. Ct. 1434, 1456 (2014).

Amici suggest that the "unambiguously campaign related" standard is a novel standard newly raised on appeal. Br. of *Amici Curiae* Campaign Legal Center, Democracy 21, and Public Citizen at 2. *Amici* are mistaken. The Seventh Circuit in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014) stated that "[t]o protect against an unconstitutional chill on issue advocacy by independent speakers, *Buckley* held that campaign-finance regulation must be precise, clear, and may only extend to speech that is 'unambiguously related to the campaign of a particular federal candidate.'" (quoting *Buckley*, 424 U.S. at 80). Likewise, in 2008 a district court in this Circuit noted *Buckley*'s standard: "Supreme Court precedent makes clear that campaign finance laws may constitutionally regulate only those activities that are unambiguously campaign related." *Nat'l Right to Work Legal Def. and Ed. Found. v. Herbert*, 581 F. Supp. 2d 1132, 1144 (D. Utah 2008) (citing *Buckley*, 424 U.S. at 80).

The Independence Institute has consistently offered the unambiguously campaign related standard as a means of applying exacting scrutiny to Article XXVIII. The District Court recognized this argument:

> 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.

Or. JA 154 (emphasis in original). The Institute made this argument before the District Court in the briefing and oral argument below. *See*, *e.g.*, V. Compl. JA 25 ¶¶ 79-81, and JA 27 ¶ 88 ("There is no test in Colorado for assessing the nature of a communication, or the manner in which it mentions a candidate"); Mem. of L. in Supp. of Mot. for Prelim. Inj. JA 51 (citing *Buckley*, 424 U.S. 80, 81); Reply to Secretary's Opp. To Motion for Prelim. Inj./Mot. for Summ. J. JA 132-134; Tr. JA 168 *ll* 5-11 ("Again, the burden in this case is on the State. And part of the difficulty is that the electioneering communication definition makes no attempt to build the sort of record that *Buckley* would have recognized as rendering a communication as unambiguously campaign related whether that's because express advocacy or some other understanding in connection with a[n] election").

Likewise, *amici* claim that "the informational interest recognized by *Buckley* in connection to FECA's disclosure requirements applies equally to the disclosure of ballot measure advocacy even though this latter activity is clearly 'issue advocacy.'" [1] Br. of *Amici Curiae* Campaign Legal Center at 25. Of course, the

[1] This Circuit has not found such a strong connection between the informational interest and speech about ballot issues under Supreme Court precedent. *Sampson v. Buescher*, 625 F.3d 1247, 1256-57 (10th Cir. 2010) ("We must therefore analyze the public interest in knowing who is spending and receiving money to support or

Institute's ad is not about any ballot issue before the Colorado voters in 2014.[2] But *Amici*'s claims prove the Institute's point: the informational interest is not tied to any one test, but instead secured to the government's interest in speech *about elections*—whether for candidates or ballot measures. The informational interest cannot extend to *any* speech the government may declare an interest in—such a ruling would require overruling *Buckley*, which the Supreme Court has not done, and turn exacting scrutiny into rational basis review.

b. *McConnell*, *Wisconsin Right to Life*, and *Citizens United* adopted *Buckley*'s understanding of the need for a nexus between an election and regulated speech. In each case, the speech considered was unambiguously campaign related.

McConnell was an omnibus facial challenge to nearly every aspect of the Bipartisan Campaign Reform Act ("BCRA"). *McConnell*, 540 U.S. at 194 (discussing the facial overbreadth claims against the electioneering communications provisions of BCRA). The facial challenge was based on a record

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oppose a ballot issue. It is not obvious that there is such a public interest….The Supreme Court has sent a mixed message regarding the value of financial disclosure in a ballot-issue campaign. Perhaps its view can be summarized as 'such disclosure has some value, but not that much'").

[2] *Compare* Legislative Council of the Colorado General Assembly, Res. Pub. No. 639, 2014 Ballot Information Booklet and Recommendation on Retention of Judges (2014) *with* JA 13-14 (Institute's ad). One initiative, dealing with universal healthcare in Colorado, only gathered one-third of the required signatures for ballot access and suspended its campaign in October 2013—ten months before the Institute's ad. *See* Healthcare for All Colorado, Initiative #12 *available at* http://www.healthcareforallcolorado.org/initiative_12_parent. The failed initiative did not deal with Colorado's Health Benefit Exchange.

"over 100,000 pages" long. *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (per curiam) *aff'd in part and rev'd in part* 540 U.S. 93. On that extensive record, the Supreme Court found that the electioneering communication ads were unambiguously campaign related in the "vast majority" of instances. *McConnell*, 540 U.S. at 206 (discussing the rise of "sham issue ads" in the context of BCRA's ban on electioneering communications by corporations). Put differently, the *McConnell* plaintiffs did not "carry their 'heavy burden' of establishing that *all* enforcement of the law should therefore be prohibited." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 455 (2007) ("*WRTL II*") (quoting and applying *McConnell*, 540 U.S. at 207).

In short, *McConnell* relied on a factual finding that in the vast majority of instances in the record before the *McConnell* Court, electioneering communications *were* equivalent to express advocacy—and thus, unambiguously campaign related. But, by definition, it did not discuss those rare cases that were not. That is why an as-applied challenge involving genuine issue speech is necessary.

As this Court's sister circuits have noted, and contrary to the Secretary's assertion, *McConnell* likewise did not alter *Buckley*'s campaign speech/issue speech distinction. Ans. Br. at 26. The Ninth Circuit has explicitly held that "*McConnell* 'left intact the ability of courts to make distinctions between express

advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.'" *ACLU of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (quoting *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004)).

Likewise, albeit in the context of a speech ban, the Chief Justice has noted that express advocacy or its functional equivalent is a subset of unambiguously campaign related speech. *WRTL II*, 551 U.S. at 456 ("We now confront such an as-applied challenge. Resolving it requires us first to determine whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office*, or instead* a 'genuine issue a[d]'" (quoting *McConnell*, 540 U.S. at 206) (brackets in *WRTL II*, but emphasis added).

It is true that the *Citizens United* Court stated that the "functional equivalent of express advocacy" test was inapplicable to electioneering communications disclosure. *Citizens United*, 558 U.S. at 369. But the 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.

In any event, *Citizens United*'s speech, including the ads in support of *Hillary: The Movie*, was unambiguously campaign related. The ads for *Hillary* contained "pejorative" statements about Hillary Clinton's *candidacy*. *Citizens*

United, 558 U.S. at 368 ("[the ads] referred to then-Senator Clinton by name shortly before a primary and contained pejorative references *to her candidacy*") (emphasis supplied). The ads, reproduced in *Citizen United*'s district court opinion, are illustrative. One ad, called "Wait," stated: "If you thought you knew everything about Hillary Clinton… wait 'til you see the movie." *Citizens United v. FEC*, 530 F.Supp. 2d 274, 276 n.2 (D.D.C. 2008) *aff'd in part and rev'd in part*, 558 U.S. 310. Another ad in *Citizens United* said that then-Senator Clinton "looks good in pant suit" but the organization's movie was about "the [*sic*] everything else." *Id*. n.3 ("Pants" ad). Finally, the ad "Questions" asks, "Who is Hillary Clinton?" with responses—overwhelmingly negative—by the film's participants about then-Senator Clinton's character and fitness for the Presidency. *Id*. n.4.

As discussed in the Opening Brief, *Buckle*y remains good law. Op. Br. at 43 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). *McConnell* was a facial challenge that never overruled *Buckley*. *Citizens United* was an-as-applied challenge based on ads that commented "pejoratively" upon a candidacy. All three Supreme Court cases—*Buckley*, *McConnell*, and *Citizens United*—must be read together, and doing so demonstrates that the Supreme Court has never permitted a state to compel disclosure from an organization for speech discussing an issue of public importance without an unambiguous relationship to a particular campaign.

c. The Secretary has pointed to no case, because there is none, where the state's informational interest was permitted to reach speech that was not unambiguously campaign related.

This case presents a unique set of facts. The Institute wished to run an ad that is not about a candidacy or election, but instead concerns an issue it has studied for years. None of the as-applied cases cited by either the District Court or the Secretary are on-point because none of the other cases focused on genuine issue speech that is "unambiguously *not* campaign related." JA 154.

The closest the District Court came was a citation to registered lobbying laws in *United States v. Harriss*, 347 U.S. 612, 625 (1954). JA 155-56. *Harriss* is an odd choice—particularly given the *Buckley* Court's positive citations of that case as a source for its narrowing construction of FECA. *Buckley*, 424 U.S. at 77-78.

The only case in the Tenth Circuit relied upon by the Secretary is *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013).[3] *Free Speech*, however, centered on

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[3] *Amici curiae* Colorado Ethics Watch and Colorado Common Cause believe that this Court's recent decision in *Citizens United v. Gessler*, 773 F.3d 200 (10th Cir. 2014), ruled on this issue. Actually, in that recent case, Citizens United asked this Court to delineate the scope of Colorado's media exemptions as applied to new media outlets. *Id*. at 209 ("On the record before us, we hold that the First Amendment requires the Secretary to treat Citizens United the same as the exempted media"). Indeed, "[b]ecause *the only relief sought* by Citizens United in this case is that it benefit from the same exemptions as the exempted media, we can grant it no relief from any disclosure requirements applied to its advertising." *Id*. at 218 (emphasis added). The Independence Institute's claims and prayed-for

"facial and as applied challenges against 11 C.F.R. § 100.22(b), alleging its definition of 'express advocacy' [was] unconstitutionally vague and overbroad." *Id.* at 791. In other words, *Free Speech* is a case about federal PAC status—triggered by group's engaging in "express advocacy"—and the FEC's regulatory processes. Free Speech, a nonprofit organization formed in 2012—a Presidential election year—wished to air several advertisements. At issue in *Free Speech* were the ads that the FEC could not decide were "express advocacy" under its regulations at 11 C.F.R. § 100.22(b). *Id.* at 795 ("Plaintiff urges that section 100.22(b) is impermissibly vague based on the fact that the FEC did not 'issue a conclusive opinion' as to whether some of Plaintiff's proposed ads constituted express advocacy in the advisory opinion process"). The full range of advertisements are found in the underlying advisory opinion request before the FEC—AO 2012-11 (Free Speech).

Each of those ads was about the candidacy of President Obama. For example, the "Environmental Policy" radio ad said, "Obama cannot be counted on to represent Wyoming values and voices as President. This November, call your neighbors. Call your friends. Talk about ranching." AO 2012-11 (Free Speech) at 7. The companion Facebook ad for "Environmental Policy" claimed, "Obama's policies are a tragedy for Wyoming ranchers, and he does not represent our

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relief are different, which is why no party relies upon *Citizens United v. Gessler*. Ans. Br. at 6-7 n.3.

values." *Id*. The "Educated Voter" ad went even further: "Obama, A President destructive of our natural rights. Real voters vote on principle. Remember this nation's principles." *Id*. at 8-9. Whether these ads could trigger PAC status is a distinct legal issue from the one at bar. As importantly, the Institute's advertisement bears no relationship to these communications.

The Answer Brief claims sister circuits have approved of such disclosure. Ans. Br. 27-28. The District Court also believed this case has been litigated before. JA 156. It has not. The facts, especially the speech at issue, in each cited case is highly distinguishable.

For example, in *Real Truth About Abortion v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012), the organization hired an actor to voice then-candidate Obama and state how his election "would change America," including with regard to several of Mr. Obama's policy positions. The Real Truth ad is focused on the candidacy of then-Senator Obama. It began, "(Women's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?" *Id*. Even in the opening line, the ad stakes out the political affiliation of the candidate. The ad then, using an "[a]ctor's voice mimicking Obama's voice," details alleged policy positions of the candidate—including that he would "[a]ppoint more liberal Justices on the U.S. Supreme Court," a point that only makes sense in the context of a campaign for the Presidency and that office's appointment power. *Id*.; U.S. CONST. art. II, § 2. The

ad, called "Change"[4] ends, "Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?" *Id*. The Real Truth ads were run within the electioneering communication window. *Id.* at 547.

Likewise, the "Survivor" advertisement claimed that then-Senator Obama's position on abortion "reveals a lack of character and compassion that should give everyone pause." *Id*. The "Survivor" ad faulted then-state-senator Obama for votes on various bills before the Illinois state senate. *Id*. The ad went so far as to state: "For four years, Obama has tried to cover-up his horrendous votes by saying the bills didn't have clarifying language he favored. Obama has been lying." *Id*. The Real Truth ads were clearly about the candidacy of Barack Obama.

The First Circuit's case of *McKee* did include an electioneering communication-like provision of Maine law. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 42 (1st Cir. 2011). But the proposed ads were clearly about the performance in-office of the legislators pushing for marriage reform in the state: "Legislator Z and some politicians in Maine *can't fix the real problems in these troubled times*, but they've got time to push gay marriage on Maine families? Call Legislator Z and tell him/her: 'Don't mess with marriage.'" *Id*. at 49 (emphasis

[4] The name of the ad is a play on President Obama's 2008 campaign messaging—which from the beginning focused on the need for "change" in Washington. *See*, *e.g.*, ASSOCIATED PRESS, "Obama officially announces run for the White House" CHICAGO BUSINESS NEWS Feb. 7, 2007 *available at* http://web.archive.org/web/20090220201332/http://www.chicagobusiness.com/cgi-bin/news.pl?id=23835.

added). Much like *Real Truth*'s ads, the *McKee* ads were focused on the performance and personal characteristics of candidates.

The Ninth Circuit's decision in *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), is likewise distinguishable on its facts. *Brumsickle* centered on a ballot initiative and ads that *purposefully* avoided mentioning the ballot initiative. *Id*. at 1014. According to the Court of Appeals, the organization tried to make a distinction "between an advertisement saying, 'physician-assisted suicide is bad policy,' *at a time when a measure like Initiative 1000 is on the ballot* and an advertisement saying, 'vote against Initiative 1000.'" *Id*. (emphasis added). That is, Human Life attempted to claim only express advocacy may be regulated. *Id.* The ads at issue, though, were unambiguously related to the ballot initiative before voters that year—Initiative 1000.

Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012) does not support the Secretary's position. *Madigan* was a facial challenge to an Illinois statute for *inter alia* "electioneering communications" and PAC status. *Id.* at 470. Like *Citizens United*, the case centered on a IRC § 501(c)(4) organization. *Id*. at 471. While the Seventh Circuit upheld the statute, it did so with the important caveat that "Illinois's definition of 'electioneering communication' is limited by language nearly identical to that used in *Wisconsin Right to Life* to define the functional equivalent of express advocacy." *Id.* at 485. That is, the statue at issue

was already tailored. In Colorado, the Secretary attempted to adopt a similar limitation by administrative rule, but it was struck down by the Colorado courts. *Colo. Ethics Watch v. Gessler*, 2013 COA 172M ¶¶ 58-60 (Colo. Ct. App. 2013) (striking down Secretary's Rule 1.7, 8 COLO. CODE REGS. § 1505-6, adopting a "functional equivalent of express advocacy" test). Consequently, Colorado's law remains much more broad than Illinois' electioneering communications regulations and *Madigan* is not applicable.

Likewise, in *Barland*, 751 F.3d at 838, the Seventh Circuit upheld a Wisconsin law that regulated as "electioneering communications"

> only [those] contain[ing] either *Buckley*'s magic words or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate" or, alternatively, is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

(internal citations and quotation marks omitted). That is, the *Barland* court only upheld the provisions of the Wisconsin law that had a nexus to campaigns. In doing so, it used a combination of tests—from *Buckley*'s magic words to *WRTL II*'s functional equivalence test. Under *Barland*'s understanding of Wisconsin law, genuine issue advocacy does not trigger the burdens of electioneering communications disclosure.

While the Secretary admits that "*some* state statutes implicate the constitutional concerns at issue in *Buckley,*" and cites *Vermont Right to Life v.*

Sorrell, 758 F.3d 118, 135 (2d Cir. 2014), he goes on to cite that opinion as authority helpful to his position. Ans. Br. at 18 n.5 (noting constitutional concerns) (emphasis in orginal); *id.* at 27 n.9 (relying on case). But unlike the situation in Colorado, Vermont's statutory definition included a limiting test. *Vt. Right to Life*, 758 F.3d at 123 (statute limited to "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"). Again, much of the Second Circuit's analysis was focused on the PAC status provisions of Vermont law, rather than an electioneering communications regulation that already adopted a test to determine if the communication actually, in fact, electioneered. The "promotes or supports…or attacks or opposes" limitations were key to the Second Circuit's facial upholding of the Vermont statute. *Id.* at 128-29. Colorado law imposes no such limit.

Iowa Right to Life Committee, Inc. v. Tooker is also inapposite. That case does not even center on an advertisement, but instead on PAC status, direct contributions, and independent expenditures. *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 581-82 (8th Cir. 2013) ("For 2010 election, IRTL wanted to, but did not, make an independent expenditure over $750 to support the election of a candidate for [Iowa] Attorney General. IRTL also wanted to, but did not, make a $100 contribution to the same candidate"). The Secretary cannot claim that

Colorado's electioneering communications regulation does not impose PAC-like burdens and yet cite cases concerning state PAC regulations. *See*, *e.g.*, Ans. Br. at 41-43.

III. Even if the state had an adequate informational interest, Colorado law is not properly tailored to that interest.

The Secretary attempts to liken Colorado's electioneering communication regulation to the federal provisions of the same name, arguing that Colorado law is similarly limited in the scope of required disclosure and the burdens of regulation. *See*, *e.g.*, Ans. Br. at 23-24 n.7 (drawing distinction between electioneering communication reports and "ongoing PAC-like regulation"); *id.* at 36-40. But Colorado's law imposes more burdens on would-be speakers than does the federal system.

Unlike the federal electioneering communications threshold of $10,000, in Colorado, spending only $1,000 triggers reporting.[5] *Compare* 52 U.S.C. § 30104(f)(1) *with* COLO. CONST. art. XXVIII § 6(1). Furthermore, federally, a communication must be aimed at 50,000 people in the relevant jurisdiction to trigger regulation. 52 U.S.C. § 30104(f)(3)(C). But Colorado regulates as soon as

[5] Also, though not at issue in this case, the types of activities that qualify as "electioneering communications" are substantially broader in Colorado than the federal counterpart. Federal law only regulates "broadcast, cable, or satellite communication[s]." 52 U.S.C. § 30104(f)(3)(A)(i). But Colorado covers "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." COLO. CONST. art. XXVIII § 2(7)(a) (emphasis added).

the communication is "distributed to an audience that includes members of the electorate for such public office"—there is no *de minimis* threshold. COLO. CONST. art. XXVIII § 2(7)(a)(III).

Additionally, Colorado's scheme is not one time, event driven disclosure like its federal counterpart—or even those upheld in other Circuits. *See*, *e.g.*, *McKee*, 649 F.3d at 43. Instead, once an organization makes an "electioneering communication," Colorado demands regular disclosure reports every two weeks until the election—and again thirty days *after* the election. COLO. CONST. art. XXVIII § 6(1) *and* COLO. REV. STAT. § 1-45-108(2)(a)(I)(D)–(E)). Nevertheless, the Secretary claims that "[w]hen the election is over, nothing more is required" before then citing to the after-election reporting requirement. Ans. Br. at 41.

Regular reporting after reaching the electioneering threshold is no more "event driven" than the regular reporting required after meeting Colorado's PAC threshold. *See* COLO. REV. STAT. §§ 1-45-108(1)(a)(I) and -108(2)(a)(I) (providing similarly-regular reporting for political committees). The Secretary's argument to the contrary, Ans. Br. 41-43, is unpersuasive.

Under the Secretary's theory, any speech that mentions a candidate for elective office can trigger this regular reporting. This may explain why he prefers the phrase "objective definition of electioneering" to the more technical term "electioneering communication"—put simply, Colorado borrowed that term of art

while failing to closely track the substance of the federal law. Therefore the Secretary cannot import cases which upheld the federal law, such as *McConnell v. FEC*, to demonstrate the appropriateness of Colorado's very different system. Nor can he claim that anything the State may "objectively" choose to call "electioneering" has already been reviewed by the federal courts.

IV. The right of private association is a fundamental right, not a privilege extending only to those that can prove—objectively and in advance—that they will suffer threats, harassment, and reprisals.

Under the state's theory, the only viable as-applied challenge is one where there are documented threats, harassments, and reprisals. Ans. Br. 45-48. Moreover, the Secretary states that the Institute "deliberately waived any such claim in a joint stipulation." Ans. Br. at 48. But the joint stipulation reads

> The Independence Institute's challenge does not rely upon the probability that its donors will be subject to threats, harassment, or reprisals as a result of the Institute's filing of an electioneering communications report….. it has neither alleged nor introduced any evidence—nor will it allege or introduce any evidence—that there is a reasonable probability that its donors would face threats, harassment, or reprisals if their names were disclosed…

JA 69. This is not a mere technicality; it shows the Secretary's fundamental misunderstanding of the law. The Institute cannot know *before* speaking if disclosure of its donors will result in actual threats, harassment, or reprisals. Nor could a new organization possibly meet that burden. Yet, the Secretary demands that the Institute prove disclosure is harmful by disclosing its donors first, and then

seeing if harm befalls them. This is circular. Moreover, unlike the *Buckley*, *McConnell*, or *Citizens United* plaintiffs, the Independence Institute is a non-political think tank that does not disclose its donors. Disclosure *itself* is the harm.

Moreover, the Secretary is simply wrong on the law. The Supreme Court's *Talley v. California* decision, 362 U.S. 60 (1960), stands for the proposition that the right to private association is not limited to groups with a membership subject to threats, harassments, or reprisals. As the *Talley* dissent pointed out, "The record is barren of any claim, much less proof, that [Talley] will suffer any injury whatever by identifying the handbill with his name." *Id*. at 69 (Clark, J. dissenting). Indeed, the dissent claimed that Talley's case was "[u]nlike *NAACP v. Alabama*… [in that] no proof [was proffered] that Talley or any group sponsoring him would suffer economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility." *Id*. (internal citation and quotation marks omitted). Even without any proof of threats or reprisal, the majority held, "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified….The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65 (citing *Bates v. City of Little Rock*, 361 U.S. 516 (1960) and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). *Talley* and its

predecessors informed the reasoning of the *Buckley* Court and its protection of issue speech. *See*, *e.g.*, *Buckley*, 424 U.S. at 81.

While *Buckley* approved disclosure, it did so only after narrowing disclosure to organizations (or activities) that were unambiguously campaign related. *Id*. Because *Buckley* was a facial ruling, it could not have been premised upon a record concerning the threats, harassment, or reprisal of particular donors. Independent of any threats, harassments, or reprisals analysis, then, the *Buckley* Court held privacy of association as a protected constitutional right. *Id*. at 80. In reserving the future possibility that a particular *political committee*—as defined under a narrowed, constitutional statute—could bring an as-applied challenge on the basis of threats, harassment, or reprisals, it was not undoing the underlying work that narrowed the reach of FECA. *Id*. at 74. Nor was it stating that this was the *only* grounds upon which an as-applied case could be brought. This is obvious from the as-applied challenges that were, in fact, subsequently brought. *See*, *e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

The Answer Brief thus attempts to shift the burden of exacting scrutiny. *The government* must show that its efforts have "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. 366-67. The Secretary would turn exacting scrutiny on its head and force plaintiffs to "specifically articulate[] harm to individual donors."

Ans. Br. 46. This view is mistaken. *See*, *e.g.*, *Buckley*, 424 U.S. at 66-67; *Citizens United*, 558 U.S. at 366-67; and *NAACP v. Alabama*, 357 U.S. at 463.

V. The Institute's Ad is unrelated to any campaign.

The mere mention of a candidate—the incumbent governor, no less—cannot be all that is required to regulate speech as an "electioneering communication." The Independence Institute, an established entity in Colorado, identifies itself in the proposed ad. JA at 13 ¶ 31; Op. Br. at 3-4. This makes clear that the proposed ad is "not funded by a candidate or political party." Ans. Br. at 34 (quoting *Citizens United*, 558 U.S. at 368).

But the Institute's proposed ad is focused on an issue, not a candidacy. Unlike the *Citizens United* ads, the Institute's ad does not discuss the governor's record or fitness for office or personal character. The proposed ad is forward looking, asking the governor to take future action on an issue the organization cares deeply about. In other words, the Institute's proposed ad is not close to, or over, the line of campaign speech. This contrasts strongly with the ads in *Real Truth* and the other Circuit Court decisions. *See* discussion in section II(c), *supra*. In the wording of *Buckley* the Institute's ad is not, "by definition, campaign related." *Buckley*, 424 U.S. at 79.

Colorado law imposes an unconstitutional burden upon organizations discussing the government around elections, when people pay most attention, and

insulates the state from speech and advocacy concerning the functioning of government. The State does not alter or cease its functions shortly before an election,[6] and neither should the nonprofit community.

Conclusion

For the forgoing reasons, and those provided in Appellant's Opening Brief, this Court should reverse the district court's decision granting summary judgment to the Secretary.

Respectfully submitted this 16th day of March, 2015.

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[6] Indeed, during this litigation, an election took place replacing both the Secretary of State and the Attorney General. The Departments of State and Law have nonetheless continued to function despite the campaigns of the respective office holders.

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Dated: March 16, 2015

/s/ Tyler Martinez
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