UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE,	)	
Plaintiff,	)	
v.	)	Civ. No. 14-1500 (CKK)
FEDERAL ELECTION COMMISSION,	)	OPPOSITION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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This case asks the Court to decide the constitutionality of event-driven disclosure requirements concerning the sources and financing of certain clearly and objectively defined "electioneering communications" ("ECs"). The challenged EC disclosure rules apply only to advertisements that refer to a clearly identified candidate for federal office, and that are (a) publicly distributed, (b) via certain specific mediums, (c) within 60 days before a federal primary or general election, and (d) in the jurisdiction in which the identified candidate is running for office. Less than five years ago, in *Citizens United v. FEC*, 558 U.S. 310 (2010), eight Justices of the Supreme Court squarely decided the exact question presented here and held that "the public has an interest in knowing who is speaking about a candidate shortly before an election" and this "informational interest alone" is sufficient to uphold the constitutionality of the statutory disclosure requirements for federal ECs. *Id.* at 369.

Plaintiff asks this Court to hold that "only communications that 'expressly advocate the election or defeat of a clearly identified candidate'" may be constitutionally subject to the EC disclosure requirements. (Compl. ¶ 122; *see* Pl's. Mem. of Law in Supp. of Mot. for a Prelim. Inj. at 4-5 ("Pl.'s Mem.").) The plaintiff in *Citizens United* made the same argument and the Supreme Court explicitly "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369. The Court, in an earlier case, had imposed such a limitation on a statutory provision that prohibited corporations and unions from directly financing certain communications with their general treasury funds. But in *Citizens United*, the Court refused to "import a similar distinction into [the] disclosure requirements" for ECs. *Id.* at 368-69. The Court was clear and unequivocal: it not only refused to impose a functional-equivalent-of-express-advocacy limitation on the EC disclosure rules, as plaintiff proposes here, the Court also

held that such disclosure requirements are constitutional "even" as applied to "ads [that] only pertain to a commercial transaction." *Id.* at 369.

This Court is bound by the Supreme Court's holding in *Citizens United*, which directly resolves the only legal question in this case in favor of the Federal Election Commission. The Court should accordingly deny plaintiff's Motion for a Preliminary Injunction, which the parties and the Court have agreed to consolidate with a final determination of the merits of this case,[1] and enter judgment in favor of the Commission.

BACKGROUND

I. RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("the Act" or "FECA"), codified at 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457), including the amendments added by the Bipartisan Campaign Reform Act.[2] The Commission is empowered to "formulate policy" with respect to the Act, 52 U.S.C. § 30106(b)(1) (2 U.S.C. § 437c(b)(1)), and "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 52 U.S.C. §§ 30107(a)(8), 30111(a)(8), (d) (2 U.S.C. §§ 437d(a)(8), 438(a)(8), (d)).

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[1] *See* Joint Stipulation of the Parties and Order of the Court as to the Scope of Plaintiff's Allegations and Claims (Sept. 10, 2014) (Docket No. 14) (memorializing the parties' agreement and the Court's order that consideration of plaintiff's Motion for Preliminary Injunction shall be consolidated with a determination of the merits of this case).

[2] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. To avoid confusion, this submission will indicate in parentheses the former Title 2 citations.

A. The Origin of "Electioneering Communications"

FECA places limits on the amount individuals may contribute to candidates, their campaigns, and other political committees and parties. 52 U.S.C. § 30116(a) (2 U.S.C. § 441a(a)). In addition, FECA prohibits corporations and labor organizations from making contributions to federal candidates or their authorized committees, except through such entities' separate segregated funds (also known as political action committees or PACs). *Id.* §§ 30118(a), (b)(2)(C) (2 U.S.C. §§ 441b(a), (b)(2)(C)).[3] And, before the Supreme Court's decision in *Citizens United*, FECA prohibited corporations and unions from making any "expenditures," defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made . . . for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A)(i) (2 U.S.C. § 431(9)(A)(i)); *see id.* § 30118(a) (2 U.S.C. § 441b(a)). FECA also requires periodic disclosure of contributions and certain expenditures and disbursements to the FEC, which then makes the information available to the public. *Id.* § 30104 (2 U.S.C. § 434).

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

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[3] FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i) (2 U.S.C. § 431(8)(A)(i)).

Following *Buckley*, Congress amended the Act to provide that an "independent expenditure" is "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 52 U.S.C. § 30101(17) (2 U.S.C. § 431(17)). The Act requires that all independent expenditures above $250 be timely reported to the Commission for disclosure to the public. 52 U.S.C. § 30104(c)(1) (2 U.S.C. § 434(c)(1)).

The separate FECA provision prohibiting corporations and labor organizations generally from making independent expenditures using their general treasury funds, 52 U.S.C. § 30118 (2 U.S.C. § 441b), was not at issue and not struck down in *Buckley*.[4]

Following the Supreme Court's narrowing construction of independent "expenditure," corporations and unions generally could use their general treasury funds to finance independent communications that discussed candidates as long as they stopped short of express advocacy. By the end of the 1990s, groups had begun to spend millions of dollars on ads that avoided words of express advocacy but, under the guise of advocating for or against an issue, in essence urged the election or defeat of federal candidates. *See McConnell v. FEC*, 540 U.S. 93, 126-128 (2003). Congress determined that because the express advocacy standard was easy to evade, corporations and labor unions were able "to fund broadcast advertisements designed to influence federal elections . . . while concealing their identities from the public." *Id*. at 196-97.

[4] In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Supreme Court held that incorporated advocacy organizations possessing certain characteristics cannot constitutionally be barred from using general treasury funds to make independent expenditures. This holding applied to corporations that were formed for the sole purpose of promoting political ideas, that did not engage in business activities, and that did not accept contributions from for-profit corporations or unions. *Id.* at 263-64.

To address this and other developments in federal campaign finance, Congress enacted the Bipartisan Campaign Reform Act ("BCRA") in 2002, which, *inter alia*, imposed new financing restrictions and disclosure requirements for ECs. BCRA §§ 201-204, 116 Stat. 88-90, 52 U.S.C. §§ 30104(f)(1)-(2), 30118(a), (b)(2) (2 U.S.C. §§ 434(f)(1)-(2), 441b(a), (b)(2)); *see also McConnell*, 540 U.S. at 126.

Under BCRA, an "electioneering communication" is any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office, is publicly distributed within 60 days before a general election or 30 days before a primary election, and is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A) (2 U.S.C. § 434(f)(3)(A)); 11 C.F.R. § 100.29(a)(2). BCRA prohibited the financing of electioneering communications with corporate or union general treasury funds. 52 U.S.C. §§ 30104(f)(3)(A)(i), 30118(a), (b)(2) (2 U.S.C. §§ 434(f)(3)(A)(i), 441b(a), (b)(2)).

Congress also required certain disclosures concerning the sources and financing of permitted electioneering communications. The reporting requirements at issue in this case provide that any "person" (defined to include any corporation, labor organization, or other group, 52 U.S.C. § 30101(11) (2 U.S.C. § 431(11))) that spends over $10,000 to produce or air an electioneering communication must file a statement with the Commission. 52 U.S.C. § 30104(f)(1), (2)(A) (2 U.S.C. § 434(f)(1), (2)(A)). The statement must identify, in relevant part, the person making the EC disbursement and the amount and date of the disbursement. BCRA provides two options for disclosing the required information about the funds used to finance electioneering communications:

> (E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence . . . directly to this account for electioneering communications, [the Act requires disclosure of] the names and addresses of all

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

52 U.S.C. § 30104(f)(2)(E)-(F) (2 U.S.C. § 434(f)(2)(E)-(F)).

As explained below, after the Supreme Court held in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), that corporations and unions have a constitutional right to make certain types of electioneering communications (*i.e.*, those that do not contain express advocacy or its "functional equivalent"), the Commission promulgated regulations to address the reporting requirements related to such newly permitted corporate- or union-financed ECs. *See infra* pp. 7-8.

B. The Supreme Court Resolved Facial and As-Applied Constitutional Challenges to BCRA's EC Provisions in *McConnell, WRTL*, and *Citizens United*

When BCRA's electioneering communication amendments were challenged as facially unconstitutional, the Supreme Court initially upheld the scope of the statutory definition of "electioneering communication" at 52 U.S.C. § 30104(f)(3)(A)(i) (2 U.S.C. § 434(f)(3)(A)(i)), as well as both the disclosure provision at 52 U.S.C. § 30104(f) (2 U.S.C. §§ 434(f)), and the spending prohibitions at 52 U.S.C. §§ 30118 and 30120 (2 U.S.C. §§ 441b and 441d). *See McConnell*, 540 U.S. at 194, 201-02, 207-08. In upholding the EC definition, which was not limited to "communications expressly advocating the election or defeat of particular candidates," the Court rejected the notion that *Buckley* established a "constitutionally mandated line" between express candidate advocacy and issue advocacy. *Id.* 189-90 (explaining that *Buckley*'s "express

advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law"). It further observed that unlike FECA's definition of "expenditure," BCRA's EC definition did not raise any vagueness concerns; on the contrary, its elements "are both easily understood and objectively determinable." *Id.* at 194.

As to the EC disclosure requirements, the Court explained that such requirements are constitutional because they serve the important governmental interests of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," and "do not prevent anyone from speaking." *Id*. at 196, 201 (internal quotation marks omitted).

Four years after *McConnell*, in *WRTL*, the Supreme Court considered an as-applied challenge to BCRA's prohibition on the financing of ECs with corporate and union treasury funds and partially invalidated it. The controlling opinion held BCRA's ban unconstitutional as applied to a corporation's advertisements that did not constitute express advocacy or "the functional equivalent of express advocacy." 551 U.S. at 476, 478-79.[5] A communication is the "functional equivalent of express advocacy," the controlling opinion explained, only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70. The Court in *WRTL* did not address BCRA's EC disclosure provisions.

After the decision in *WRTL*, the Commission promulgated regulations, *inter alia*, to account for the new category of permissible electioneering communications financed with corporate or union treasury funds. The rules provide that when a corporation finances an EC, the

[5] Before *WRTL*, only corporations that qualified under the criteria established by the Supreme Court in *MCFL* could make electioneering communications, *see supra* note 4, but *WRTL* permitted *all* corporations and unions to make electioneering communications that did not contain express advocacy or its functional equivalent. *See* 551 U.S. at 480-81.

corporation must also report "the name and address of each person who made a donation aggregating $1,000 or more to the corporation . . . for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).[6] If the disbursement is made out of a "segregated bank account established to pay for electioneering communications," however, the corporation making the EC need only identify those individuals who contributed $1,000 or more to the account itself. 11 C.F.R. § 104.20(c)(7)(ii).

In 2010, the Supreme Court in *Citizens United* revisited the constitutionality of prohibitions on using corporate and union general treasury funds to finance independent expenditures and electioneering communications, as well as the Act's disclosure requirements for electioneering communications. Citizens United, a nonprofit corporation, sought to distribute a film about then-Senator Hillary Clinton, who at the time was a candidate in the Democratic Party's 2008 Presidential primary elections. 558 U.S. at 319-20. Citizens United also sought to distribute several ads promoting the film. *Id.* at 320.

The Court found that Citizens United's movie was "in essence, . . . a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." *Id.* at 325. Applying *WRTL's* "objective" "functional-equivalent test," the Court concluded that "there [was] no reasonable interpretation of [the movie] other than as an appeal to vote against Senator Clinton," and it was accordingly subject to the challenged financing prohibitions. *Id.* at 326.

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[6] Although plaintiff correctly notes (Compl. ¶¶ 55, 124) that this regulation has been challenged in a separate, ongoing litigation, the regulation remains valid, in force, and binding on the Commission. The Court of Appeals for the D.C. Circuit has found that "[t]he FEC's promulgation of 11 C.F.R. § 104.20(c)(9) reflects an attempt by the agency to provide regulatory guidance under the BCRA following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of 'electioneering communications,'" and accordingly remanded the case to the district court for further consideration under the Administrative Procedure Act. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (per curiam).

The court then invalidated FECA's prohibition on the use of corporate and union general treasury funds to finance independent expenditures, as well as BCRA's similar prohibition on the use of such funds to finance electioneering communications. 558 U.S. at 365-66.

In a portion of the opinion that eight Justices joined, however, the Court reaffirmed the part of *McConnell* that upheld BCRA's electioneering communication disclosure requirements on their face, and further upheld those disclosure requirements as applied to both Citizens United's movie and its proposed "commercial advertisements" that "only attempt[ed] to persuade viewers to see the film" and that contained no advocacy. 558 U.S. at 366-71; *see Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (explaining that Citizens United's proposed ads "did not advocate Senator Clinton's election or defeat; instead they proposed a commercial transaction — buy the DVD of *The Movie*"). Even though the "ads only pertain[ed] to a commercial transaction," the Supreme Court held that "the public has an interest in knowing who is speaking about a candidate shortly before an election" and the government's "informational interest alone" was a sufficient basis for upholding the constitutionality of the EC disclosure provision as applied to the promotional ads. *Citizens United*, 558 U.S. at 369.

In reaffirming the constitutionality of the EC disclosure provision, the Supreme Court reiterated the caveat, which it had noted in *Buckley* and again in *McConnell*, that "as-applied challenges [to facially valid disclosure provisions] would be available if a group could show a reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 367 (citing *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74) (internal quotation marks omitted).

II. PLAINTIFF'S CLAIMS

According to the complaint, plaintiff Independence Institute is a Colorado nonprofit corporation established in 1985 that is organized and claiming exemption from income taxes under 26 U.S.C. §§ 501(c)(3), 170(b)(1)(A)(vi) and Colorado Revenue Statute §§ 6-16-103(1), 7-21-101. (Compl. ¶¶ 2, 14.) Plaintiff alleges that it "conducts research and educates the public on various aspects of public policy [and] . . . its educational endeavors include advertisements that mention" officeholders, who are sometimes "candidates for office" and who direct public policies. (*Id.* ¶ 2.) Plaintiff has elected treatment under section 501(h) of the Internal Revenue Code, enabling it to spend a portion of its budget on lobbying. (*Id.* ¶¶ 27-28.)

Plaintiff alleges that it wishes to finance and publicly distribute a radio advertisement that will clearly mention Colorado Senator Mark Udall, a candidate in the November 2014 general election, within 60 days of that election. (*Id.* ¶¶ 30-32.) Plaintiff alleges that it intends to spend more than $10,000 on the advertisement, which will reach more than 50,000 listeners in the Denver metropolitan area, *i.e.* the advertisement will air in the jurisdiction in which Senator Udall is seeking reelection. (*Id.* ¶¶ 33-34; *see also* Pl.'s Mem. at 2-3.) According to the Complaint, the proposed advertisement will read as follows:

> Let the punishment fit the crime.
>
> But for many federal crimes, that's no longer true.
>
> Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt.
>
> And for what purpose?
>
> Studies show that these laws don't cut crime.
>
> In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons.

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

(Compl. ¶ 35.)

Plaintiff alleges that it wishes to solicit contributions of over $1,000 from individual donors, independent of its general fundraising efforts for other programs, to broadcast this advertisement before the November 2014 election in which Senator Udall is participating (*id.* ¶¶ 36-37) and that it "does not wish to disclose and report its donors" (Pl.'s Mem. at 4).

Plaintiff's complaint seeks declaratory and injunctive relief regarding the scope of BCRA's definition of "electioneering communication" and the disclosure requirements attendant to communications that meet that definition. (Compl. Prayer for Relief A-B.) Plaintiff alleges that its proposed advertisement "is genuine issue speech" and argues that the statutory definition of "electioneering communication" is unconstitutionally overbroad because it is not limited to communications containing "an appeal to vote for or against a specific candidate." (*Id.* ¶¶ 113, 116.) Plaintiff further argues that the EC disclosure requirements cannot constitutionally be applied to its proposed advertisement based on its contention that for groups that "do not have 'the major purpose of political activity, . . . only communications that 'expressly advocate the election or defeat of a clearly identified candidate' are subject to disclosure." (*Id.* ¶ 122 (quoting *Buckley*, 424 U.S. at 80).)

III. PROCEDURAL HISTORY

On September 4, 2014, plaintiff filed its Motion for a Preliminary Injunction (Docket No. 5). On September 10, following the parties' telephonic status conference with the Court two days earlier, the parties filed a Joint Stipulation of the Parties and Order of the Court as to the Scope of Plaintiff's Allegations and Claims ("Joint Stipulation and Order"), which the Court entered as an Order on the same day. (Joint Stipulation and Order (Docket No. 14).) The Joint Stipulation and Order establishes that plaintiff "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 as a result of plaintiff's compliance with [the EC reporting requirements]." (*Id.* at 1.) It further memoralizes the parties' agreement, and the Court's order, that the Court's consideration of plaintiff's Preliminary Injunction Motion will be consolidated with resolution of the merits of this case. (*Id.*)

ARGUMENT

I. STANDARD OF REVIEW

In the Joint Stipulation and Order, the parties agreed, and the Court ordered, that Plaintiff's Motion for Preliminary Injunction shall be considered as a motion for summary judgment.[7] The question before the Court, therefore, is whether either party is entitled to judgment as a matter of law upon material facts that are not genuinely disputed. *Am. Fed'n of Gov't Emps, Local 446 v. Nicholson*, 475 F.3d 341, 342 (D.C. Cir. 2007); *GCI Health Care Ctrs., Inc. v. Thompson*, 209 F. Supp. 2d 63, 67 (D.D.C. 2002); Fed. R. Civ. P. 56. Because the

[7] For that reason, the Commission is not addressing the preliminary injunction factors that are relevant only to determining whether a plaintiff is entitled to *temporary* relief — *i.e.* irreparable harm, the balance of interests, and the public interest. These factors are not relevant to this Court's final resolution of the merits of this case.

parties have agreed to consolidate Plaintiff's Motion for Preliminary Injunction with a resolution of the merits, "disposition of the preliminary injunction motion will end this case." *Morris v. Dist. of Columbia*, No. 14-0338 (RC), 2014 WL 1648293, at *2 n.1 (D.D.C. Apr. 25, 2014); *see Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994) ("The general point is that when the eventual outcome on the merits is plain at the preliminary injunction stage, the judge should, after due notice to the parties, merge the stages and enter a final judgment.").

II. AS THE SUPREME COURT HAS HELD, THE EC DISCLOSURE PROVISIONS ARE CONSTITUTIONAL

A. The Challenged EC Provisions Are Subject to Intermediate Scrutiny

Plaintiff challenges the disclosure requirements for ECs set forth in 52 U.S.C. § 30104(f)(1)-(2) (2 U.S.C. § 434(f)(1)-(2)) and the statutory definition of "electioneering communication" in 52 U.S.C. § 30104(f)(3)(A)(i) (2 U.S.C. § 434(f)(3)(A)(i)), which determines the scope of communications subject to those requirements. (Compl. Prayer for Relief A-B.)

The Supreme Court has repeatedly held that disclosure provisions "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201). The en banc Court of Appeals for the D.C. Circuit has recognized the same. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). Thus, and as plaintiff acknowledges (Pl.'s Mem. at 8), "First Amendment challenges to disclosure requirements in the electoral context . . . [are] reviewed . . . under what has been termed 'exacting scrutiny.'" *Doe v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases). "That standard 'requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Citizens United*, 558 U.S. at 366-67).

The "Supreme Court has not limited the government's acceptable interests" in the disclosure context; "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirement." *SpeechNow*, 599 F.3d at 696 (quoting *Citizens United*, 558 U.S. at 366). The Supreme Court "has approvingly noted that 'disclosure is a less restrictive alternative to more comprehensive regulations of speech.'" *Id.* (quoting *Citizens United*, 558 U.S. at 369).

As the Court of Appeals for the D.C. Circuit recognized in *SpeechNow*, "[t]he Supreme Court has consistently upheld . . . reporting requirements against facial challenges." *Id.* at 696-97 (discussing *Buckley*, *McConnell*, and *Citizens United*, and distinguishing *Davis v. FEC*, 554 U.S. 724 (2008)). In particular, the Supreme Court has specifically upheld the EC disclosure requirements challenged here based on the government's "sufficiently important" interest in "providing the electorate with information." *Citizens United*, 558 U.S. at 366-67; *McConnell*, 540 U.S. at 196; *see also SpeechNow*, 599 F.3d at 696 (discussing *McConnell* and *Citizens United*). In *Citizens United*, moreover, the Court held that the EC disclosure requirements are constitutional as applied to an advertisement that "only attempt[ed] to persuade viewers to see [a] film" because "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. The Court expressly refused to limit the permissible scope of EC disclosure requirements to communications that are equivalent to express candidate advocacy. *Id.*

B. BCRA's Definition of "Electioneering Communication" is Clear, Objective, and Constitutional

In *McConnell*, the first time the Court had an occasion to review the constitutionality of BCRA, the Court acknowledged that whereas FECA had "limited the coverage of [its] disclosure requirement to communications expressly advocating the election or defeat of particular

candidates," BCRA's definition of "'electioneering communication' is not so limited." 540 U.S. at 189. The Court held that *Buckley* did not establish a "constitutionally mandated line" between express candidate advocacy and issue advocacy and that *Buckley*'s "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *Id.* at 190. The Court found that BCRA's EC definition did not raise any of the vagueness concerns that had led the *Buckley* Court to create its "express advocacy" construction of the otherwise vague statutory definition of "expenditure." *Id.* at 194. The Court concluded that because the elements of the EC definition "are both easily understood and objectively determinable . . . the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite" in evaluating the constitutional scope of BCRA's definition of electioneering communications. *Id.* (citation omitted).

Moreover, in the specific context of the statutory disclosure requirements for electioneering communications, *McConnell* held that "*Buckley* amply supports application of [those] disclosure requirements to the *entire range* of 'electioneering communications.'" *Id.* at 196 (emphasis added). That portion of the decision was joined by eight Justices and belies plaintiff's suggestion (Pl.'s Mem. at 5) that the Court in *McConnell* upheld the disclosure portion of the EC "regime" only "insofar as the regulated advertisements contain express advocacy or its functional equivalent."[8] Instead, the Court concluded that requiring disclosure for *all* electioneering communications serves "the competing First Amendment interests of individual

[8] Plaintiff misleadingly quotes (Pl.'s Mem. at 12) language from *McConnell*'s discussion of the provision that *prohibited* corporations and unions from financing any ECs with their general treasury funds as purported support for its erroneous claim that the Court in *McConnell* intended to exclude "genuine issue ads" from the scope of BCRA's EC *disclosure* requirement. The relevant part of the *McConnell* opinion (addressing disclosure) explicitly contradicts that claim. *See McConnell*, 540 U.S. at 194, 196 (explaining that the Court "ha[s] rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy").

citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 196-97 (internal quotation marks and citation omitted). In contrast, allowing plaintiff to distribute, during the period shortly before a federal election, a broadcast advertisement that refers to a federal candidate "while concealing" the sources of financing of that advertisement from the public "does not reinforce" plaintiff's First Amendment rights, but would compromise "the competing First Amendment interests" of the electorate. *Id.* at 197, 201 (internal quotation marks and citation omitted).[9]

More recently, eight Justices in *Citizens United* again agreed that the full scope of BCRA's EC definition was constitutional in the disclosure context (*i.e.*, the only context in which ECs remain subject to regulation) and need not be limited based on the absence of candidate advocacy from of a particular communication. 558 U.S. at 320-21 (summarizing BCRA's EC definition); *id.* at 368-69 ("reject[ing] th[e] contention" that EC disclosure requirements "must be confined to speech that is the functional equivalent of express advocacy").

[9] For example, plaintiff's compliance with the EC disclosure requirements could help the public evaluate the Independence Institute's advertisement. There has been public interest in plaintiff's funding even outside the electioneering context, confirming that the public uses funding sources to evaluate the messages it receives. *See* Frank Smyth, *The Times Has Finally (Quietly) Outed an NRA-Funded "Independent" Scholar*, The Progressive, (Apr. 23, 2014), http://www.progressive.org/news/2014/04/187663/times-has-finally-quietly-outed-nra-funded-%E2%80%9Cindependent%E2%80%9D-scholar (last visited Sept. 19, 2014) (questioning the independence of an Independence Institute scholar who has "establish[ed] himself as an independent authority on gun policy issues," including by testifying before Congress and writing opinion pieces for the Wall Street Journal, "even though he and his Independence Institute have received over $1.42 million including about $175,000 a year over eight years from the NRA"); Eli Stokols, *NRA Money Behind Lawsuit Challenging New Colo. Gun Control Laws*, Fox31 Denver (May, 29, 2013, 9:56 p.m.), http://kdvr.com/2013/05/29/nra-money-behind-lawsuit-challenging-new-colo-gun-control-laws/ (last visited Sept. 19, 2014) (describing a large "fundraiser organized by the Independence Institute in support of its lawsuit challenging [Colorado's] new gun control laws" and noting that "the lawsuit . . . is mostly being funded not by grassroots donations but by the biggest Second Amendment rights group in the world[, t]he National Rifle Association").

McConnell and *Citizens United* highlight the fundamental flaw in plaintiff's central argument in this case (Pl.'s Mem. at 4), *i.e.*, the argument that disclosure requirements cannot constitutionally be applied to speech that lacks express candidate advocacy. The *McConnell* Court explicitly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." 540 U.S. at 194. The Court in *Citizens United* similarly rejected a request to "import" into the context of EC disclosure requirements the distinction between express advocacy (and its function equivalent), on the one hand, and issue advocacy, on the other. 558 U.S. at 368.

Moreover, in the few years since the Court decided *Citizens United*, a number of the federal Courts of Appeals have embraced *Citizens United* in concluding that *Buckley*'s distinction between express candidate advocacy and issue advocacy does not apply in the context of campaign-finance disclosure requirements. *See, e.g.*, *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 819 (7th Cir. 2014) (discussing the Supreme Court's explanation in *McConnell* "that the express-advocacy line drawn in *Buckley* was 'an endpoint of statutory interpretation, not a first principle of constitutional law'" (quoting *McConnell*, 540 U.S. at 190)); *Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir. 2013) (explaining that in *Citizens United*, "in addressing the permissible scope of disclosure requirements, the Supreme Court not only rejected the 'magic words' standard urged by Plaintiff but also found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address even ads that 'only pertain to a commercial transaction'" (citation omitted)), *cert. denied*, 134 S. Ct. 2288 (2014); *Real Truth About Abortion v. FEC*, 681 F. 3d 551-52 (4th Cir. 2012) (citing *Citizens United*'s holding that "mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy and 'only pertain to a commercial transaction'"

(quoting *Citizens United*, 558 U.S. at 369)); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) (citing *Citizens United* for the proposition that "the distinction between issue discussion and express advocacy has no place in First Amendment review of . . . disclosure-oriented laws"); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) (concluding, in light of *Citizens United*, that "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable").

Plaintiff's assertion (Compl. ¶ 113) that BCRA's definition of "electioneering communication" is overbroad to the extent that it imposes disclosure obligations on an "advertisement [that] is not 'an appeal to vote for or against a specific candidate"' conflicts directly with the Supreme Court's holdings to the contrary in *McConnell* and *Citizens United*, and simply ignores the Court's clarification that *Buckley* did not establish a "constitutionally mandated line" between express candidate advocacy and issue advocacy. *McConnell*, 540 U.S. at 190. Count 1 of plaintiff's complaint is thus foreclosed by those decisions and accordingly should be dismissed.

C. BCRA's EC Disclosure Requirements Are Constitutional, Including As Applied to Plaintiff's Proposed Advertisement

1. The EC Disclosure Requirements Are Substantially Related to the Government's "Sufficiently Important" Informational Interest

In addition to rejecting "the failed argument" that BCRA's definition of "electioneering communication" "improperly extends to both express and issue advocacy," the Supreme Court in *McConnell* upheld the EC disclosure requirements that plaintiff likewise seeks to relitigate here.

McConnell, 540 U.S. at 195. The Court concluded that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements," including "providing the electorate with information," apply in full to BCRA." *Id.* at 196. BCRA's requirement of disclosure for "the *entire range* of 'electioneering communications'" is accordingly constitutional. *Id.* (emphasis added).

Whereas *McConnell* upheld the EC disclosure requirements on their face, *Citizens United* considered the requirements in a context directly analogous to the circumstances presented in plaintiff's complaint. Like plaintiff here, "Citizens United is a nonprofit corporation." *Citizens United*, 558 U.S. at 319. And like the advertisement Independence Institute wishes to finance and distribute, the ads at issue in *Citizens United* mentioned the name of a federal candidate — then-Senator Hillary Clinton — but "did not advocate Senator Clinton's election or defeat." *Citizens United*, 530 F. Supp. 2d at 280; *see id.* at 276 nn. 2-4 (quoting scripts of Citizens United's proposed ads). The Court acknowledged that Citizens United's proposed ads "only attempt[ed] to persuade viewers to see the film" about Senator Clinton, but found that this was not a basis for invalidating the EC disclosure requirements as applied to that nonprofit organization. *Citizens United*, 558 U.S. at 369. "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* The Court held that the government's "informational interest alone is sufficient" to uphold the EC disclosure requirements as applied to Citizens United's proposed commercial advertisements.

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

interest in ensuring the public can know who is speaking about a candidate in an ad that "only pertain[s] to a commercial transaction." *Citizens United*, 558 U.S. at 369. Likewise, if disclosure of a commercial ad that "only attempt[ed] to persuade viewers to see [a] film" about a candidate was substantially related to the government's informational interest in *Citizens United*, *id.*, then disclosure of plaintiff's proposed ad must also be substantially related to the government's informational interest here. *See Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 429-32 (E.D. Va. 2012) (explaining that "*Citizens United* 'upheld BCRA's disclosure requirements for all electioneering communications — including those that are *not* the functional equivalent of express advocacy,'" and concluding that certain communications discussing energy policy and the Affordable Care Act are subject to federal disclosure requirements for ECs (citing *Citizens United*, 558 U.S. at 366-67; quoting *Real Truth*, 681 F.3d at 551)).

In any event, not only do *Citizens United* and *McConnell* clearly and directly establish the constitutionality of the EC disclosure requirements as applied to plaintiff's proposed ads, those decisions are consistent with the Supreme Court's earlier decisions finding that the government's informational interest is sufficient to justify mandatory disclosure relating to two different forms of "pure" issue advocacy. First, the informational interest has been recognized extensively in the context of issue advocacy regarding ballot initiatives. *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999) (upholding requirement to disclose donations made to organizations to pay ballot-initiative petition circulators); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure . . . ."); *see also Brumsickle*, 624 F.3d at 1016 ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on

speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."). This is particularly noteworthy here because the Supreme Court has held that ballot-initiative activity is inherently issue-focused and does not have the same corruptive potential as spending to influence candidate elections. *Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (footnote and citations omitted)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 n.15 (1995) (quoting *Bellotti*). These cases further undermine plaintiff's claim that the government lacks a sufficiently important interest in requiring the disclosure of "issue advocacy": The government's legitimate disclosure interest necessarily extends to issue speech "so that the people will be able to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32; *see supra* note 9.

Second, courts are nearly unanimous in upholding mandatory disclosure of lobbying expenditures on the basis of the government's interest in informing the public as to who is attempting to sway the resolution of public issues and how they are attempting to do so. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) ("[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures."); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009) (rejecting a "constitutional challenge to Congress' latest effort to ensure greater transparency . . . [b]ecause nothing has transpired [since the Supreme Court decided *Harriss*] to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue"); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (upholding state lobbyist disclosure statutes in light of state interest in helping citizens "apprais[e] the integrity and performance of officeholders and

candidates, in view of the pressures they face"); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 512 (8th Cir. 1985) (per curiam) (quoting *Harriss*).[10] Lobbying, like issue advocacy, typically does not involve candidate campaigns; it is issue-oriented political activity protected by the First Amendment. Thus, these cases make clear that the government's interest in providing information to the public extends beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues, just as plaintiff claims it wishes to do here.

2. All of Plaintiff's Attempts to Minimize, Distinguish, or Disregard Citizens United *Lack Merit*

In apparent recognition that *Citizens United* directly and completely forecloses all of plaintiff's constitutional arguments, plaintiff alternatively attempts to minimize the significance of the Supreme Court's eight-Justice holding on the constitutionality of disclosure for ECs without candidate advocacy — including by characterizing that part of the decision as "terse" and "dicta" (Pl.'s Mem. at 5, 14) — or to distinguish that holding based on inaccurate characterizations of the advertisements at issue in *Citizens United* and immaterial differences between Citizens United and plaintiff here (*id.* at 14-18). Based on such arguments, plaintiff contends that the Court need not apply *Citizens United* here, and should rely instead on general "principles" articulated in the *Buckley v. Valeo* Court of Appeals decision issued 27 years before the provisions plaintiff challenges were enacted. (*Id.* at 6, 18-20 (discussing *Buckley*, 519 F.2d

[10] *See also Comm'n on Indep. Coll. & Univ. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 494-95 (N.D.N.Y. 1982) ("The lobby law serves to apprise the public of the sources of pressure on government officials, thus better enabling the public to access their performance." (footnote omitted)); *Am. Civil Liberties Union of N.J. v. N.J. Election Law Enforcement Comm'n*, 509 F. Supp. 1123, 1129 (D. N.J. 1981) ("The voting public should be able to evaluate the performance of their elected officials in terms of representation of the electors' interest in contradistinction to those interests represented by lobbyists." (citation omitted)); *Kimbell v. Hooper*, 665 A.2d 44, 49 (Vt. 1995) ("Vermont's lobbyist disclosure law is a reasonable means of evaluating the lobbyist's influence on the political process.").

821 (D.C. Cir. 1975) (per curiam)). As explained below, none of these arguments has any merit.

a. The Portion of Citizens United *Upholding EC Disclosure Requirements as Applied to Communications Lacking Any Candidate Advocacy is a Constitutional Holding That is Binding on This Court*

Plaintiff appears to suggest that the Court should accord less deference to the portion of *Citizens United* that addresses the EC disclosure requirements because that part of the Court's opinion is succinct. (Compl. ¶ 81 (acknowledging that the Court in *Citizens United* "specifically upheld BCRA's disclosure and disclaimer requirements[] [b]ut 'this part of the opinion is quite brief'") (citing *Citizens United*, 558 U.S. at 372; quoting *Barland*, 751 F.3d at 824); Pl.'s Mem. at 5, 14 (characterizing portion of *Citizens United* upholding EC disclosure requirements as "brief," "terse," and "truncated").) Setting aside the exaggerated tone of plaintiff's characterizations, it is unremarkable that the portion of *Citizens United* addressing the electioneering disclosure requirements, which embraces, reaffirms, and applies well-settled law, is significantly shorter than other parts of the majority opinion, which reconsider and reverse the Court's own precedent. More importantly, the Court's ability to resolve a clear-cut constitutional challenge in the span of six pages plainly does not diminish the authoritative significance of a constitutional holding by the Supreme Court.

Plaintiff's alternative attempt to minimize the impact of *Citizens United* — declaring its disclosure holding to be "dicta" (Compl. ¶ 87 (quoting *Barland*, 751 F.3d at 836)) — is just as misguided. That interpretation of the Court's constitutional analysis appears to be premised on plaintiff's mistaken assertion that the advertisements at issue in *Citizens United* "were the 'functional equivalent of express advocacy.'" (Compl. ¶ 126; *see id.* ¶ 87.) They were not. The Supreme Court's decision and the underlying district court decision both make clear that the advertisements at issue in *Citizens United* were "commercial advertisements" that "only

attempt[ed] to persuade viewers to see [a] film," *Citizens United*, 558 U.S. at 368-69, and that "did not advocate Senator Clinton's election or defeat," *Citizens United*, 530 F. Supp. 2d at 280. Plaintiff's own Memorandum makes this clear. (Pl.'s Mem. at 16 (describing one of Citizens United's proposed ads, which mentioned Hillary Clinton by name but neither identified her as a candidate nor contained any language advocating her election or defeat).) Plaintiff offers no explanation of how an ad that merely "compliment[ed] Mrs. Clinton's fashion sense" and referenced a film about "everything else" satisfies *WRTL*'s objective standard, which "define[s] the functional equivalence of express advocacy as a communication which is 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" (*Id.* at 13, 16 (quoting *WRTL*, 551 U.S. at 469-70).)

Further undermining plaintiff's characterization of Citizens United's ads is the fact that Citizens United itself argued that the EC disclosure requirements "must be confined to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 368. That argument would have been self-defeating if Citizens United's ads met that standard.

It is thus clear that the Supreme Court considered and "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy," *id.* at 369, precisely because doing so was necessary to uphold the EC disclosure requirements as applied to Citizens United's proposed ads, which were *not* the functional equivalent of express advocacy. Far from dicta, this part of the Court's analysis was essential to its constitutional holding. Indeed, as noted below, numerous Courts of Appeals have thus relied on the Supreme Court's controlling constitutional holding regarding the permissible scope of disclosure requirements in *Citizens United* to reject constitutional challenges to other federal and state disclosure requirements. *See infra* pp. 25-27 & nn. 11, 12.

b. Plaintiff's Out-of-Circuit Authorities Confirm That Citizens United *Forecloses This Challenge*

Plaintiff purports to rely (Pl.'s Mem. at 14-15, 17) on decisions from the Courts of Appeals for the Fourth and Seventh Circuits, but both *Real Truth* and *Barland* confirm that *Citizens United* forecloses plaintiff's claims.

In *Real Truth*, the Court of Appeals for the Fourth Circuit held that the Commission's regulatory definition of "express advocacy" is "constitutional, facially and as applied to Real Truth's intended advertisements," and "is consistent with the test developed in *Wisconsin Right to Life* and is not unduly vague." 681 F.3d at 555. The Court of Appeals was addressing Real Truth's claim that its proposed ads could "be construed as '*independent expenditures* . . . subjecting it to disclosure requirements and potentially making it a [political committee] subject to further regulation." *Id.* at 547 (citing 52 U.S.C. § 30101(17) (2 U.S.C. § 431(17)) and 11 C.F.R. § 100.22(b)) (emphasis added). As plaintiff here has explained (Compl. ¶ 43), independent expenditures, *i.e.* "communications that expressly advocate for or against a specific candidate — are not 'electioneering communications.'" Thus, plaintiff's characterization (Pl.'s Mem. at 17) of *Real Truth* as a case that "considered" ECs is mistaken.

To the extent the Fourth Circuit's analysis in *Real Truth* has any relevance here, it directly supports the FEC's argument that EC disclosure requirements are constitutional as "applied to ads that merely *mention* a federal candidate." *Id.* at 552. The Court of Appeals explained that in *Citizens United*:

> The [Supreme] Court . . . upheld BCRA's disclosure requirements for all electioneering communications — including those that are *not* the functional equivalent of express advocacy. [*Citizens United*, 130 S. Ct.] at 914-16 ("We reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy"). In this portion of the opinion, joined by eight Justices, the Court explained that because disclosure "is a less restrictive alternative to more comprehensive regulations of

> speech," mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy and "only pertain to a commercial transaction." *Id.* at 915. If mandatory disclosure requirements are permissible when applied to ads that merely *mention* a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible.

Id. at 551-52 (footnote omitted).[11]

The opinion of the Seventh Circuit Court of Appeals in *Barland*, which plaintiff chiefly relies on, (Pl.'s Mem. at iv), also confirms that *Citizens United* is dispositive of plaintiff's claims here. In *Barland*, the court distinguished the Supreme Court's analysis of BCRA's EC disclosure requirements from the separate context of Wisconsin's organizational and reporting requirements for state political committees. *Barland*, 751 F.3d at 836. The Seventh Circuit in *Barland* (unlike the Fourth Circuit in *Real Truth* and other Courts of Appeals in other cases, *see supra* pp. 25-26 & n.11) questioned the extent to which *Citizens United*'s holding regarding the permissible scope of disclosure requirements applies outside the context of the EC disclosure

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[11] Other Courts of Appeals have similarly relied on the Supreme Court's constitutional analysis of EC disclosure requirements in *Citizens United* to reject constitutional challenges to other federal and state disclosure requirements. *See, e.g.*, *SpeechNow*, 599 F.3d at 696, 698 (holding that FEC may constitutionally require SpeechNow to comply with political committee reporting and registration requirements, including requirement to disclose contributions made towards administrative expenses).; *Free Speech*, 720 F.3d at 795-96, 798 (explaining that in *Citizens United*, "the Supreme Court upheld federal disclaimer and disclosure requirements applicable to *all* 'electioneering communications'" and relying on *Citizens United* in upholding the Commission's regulatory definition of express advocacy, which helps determine the applicability of disclosure requirements for independent expenditures and organizations that qualify as federal political committees); *Madigan*, 697 F.3d at 484, 490 (explaining that *Citizens United* "explicitly rejected the plaintiff's attempt to graft the express advocacy/issue discussion dichotomy onto the constitutional law of campaign finance disclosure" and upholding state provision requiring groups "whose major purpose is *not* electoral politics" to register and report as state political committees); *Nat'l Org. for Marriage, Inc. v. Sec'y, State of Fla.*, 477 Fed. Appx. 584, 585 (11th Cir. May 17, 2012) (per curiam) (relying on portion of *Citizens United* upholding EC disclosure requirements in rejecting facial and as-applied challenge to state disclosure laws); *McKee*, 649 F.3d at 52-61 (relying on *Citizens United*'s disclosure holding and upholding state-law definitions of and disclosure requirements for independent expenditures and political committees); *Brumsickle*, 624 F.3d at 1005-20 (same).

requirements at issue in *Citizens United* (and here). *Id.* But the Court fully accepted the applicability of that holding to federal ECs as defined and regulated in 52 U.S.C. § 30104(f) (2 U.S.C. § 434(f)). *Id.* The court explained that "*Citizens United* approved event-driven disclosure for federal electioneering communications — large broadcast ad buys close to an election" and acknowledged that the Supreme Court "declined to enforce *Buckley*'s express-advocacy limitation" in that precise context. *Id.* (quoting Seventh Circuit's earlier holding in *Madigan*, 697 F.3d at 484, that the "'distinction between express advocacy and issue discussion does not apply in the disclosure context'" and stating that *Citizens United* "relax[ed] the express-advocacy limitation" for "the onetime, event-driven disclosure rule for federal electioneering communications").[12]

The Seventh Circuit in *Barland* may have questioned the extent to which *Citizens United*'s disclosure holding applies outside the context of the EC disclosure requirements at issue in *Citizens United* and this case, but no court has embraced plaintiff's interpretation that the holding does not apply to the precise context in which it was articulated by eight Justices of the Supreme Court.

[12] In *Madigan*, another panel of the Seventh Circuit Court of Appeals held more broadly, in the context of a constitutional challenge to various state campaign-finance disclosure requirements, that "[w]hatever 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." 697 F.3d at 484. It further observed that "[w]ith just one exception, every circuit that has reviewed First Amendment challenges to disclosure requirements since *Citizens United* has concluded that such laws may constitutionally cover more than just express advocacy and its functional equivalents, and in each case the court upheld the law." *Id.* at 484 (footnote omitted); *see id.* at 484 n.17 (collecting cases).

c. Whether Plaintiff's Proposed Advertisement is "Pejorative" Is Irrelevant

Whether plaintiff's proposed advertisement is "pejorative" (Pl.'s Mem. at 17) has no bearing on the extent to which *Citizens United* and the cases upon which it relies are binding here. Indeed, plaintiff makes too much of the Supreme Court's subjective, parenthetical description of the ads at issue in *Citizens United* as being "in [the Court's] view, pejorative." Compl. ¶ 87; *Citizens United*, 558 U.S. at 320. The Court quoted the objective statutory definition of "electioneering communication" and at no point purported to limit the scope of that definition, or the disclosure requirements attendant to it, to communications that the Court or anyone else subjectively views as pejorative (or complimentary). *Citizens United*, 558 U.S. at 321 ("An electioneering communication is defined as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election. The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is 'publicly distributed.'") (quoting 52 U.S.C. § 30104(f)(3)(A) (2 U.S.C. § 434(f)(3)(A)); 11 C.F.R. § 100.29(a)(2)).

Plaintiff may view a "pejorative" statement about a candidate as "the functional equivalent of express advocacy" (Compl. ¶ 87), but the Supreme Court requires more. "[T]he functional-equivalent test is objective: 'a court should find that [a communication] is the functional equivalent of express advocacy *only if it is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate*.'" *Citizens United*, 558 U.S. at 325 (quoting *WRTL*, 551 U.S. at 469-70) (emphasis added); *id.* at 336 (explaining that Citizens United's movie "qualifies as the functional equivalent of express advocacy" because "there is no reasonable interpretation of [it] other than as an appeal to vote against Senator Clinton").

Thus, whether plaintiff's proposed advertisement is "genuine issue speech" or not "pejorative" (Pl.'s Mem. at 23) is irrelevant. As explained above, *Citizens United* holds that "[e]ven if the ads *only pertain to a commercial transaction*, the public has an interest in knowing who is speaking about a candidate shortly before an election" and the EC disclosure requirements are thus constitutional as applied to communications that lack express advocacy or its functional equivalent. 558 U.S. at 369 (emphasis added). "Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Brumsickle*, 624 F.3d at 1016; *see also supra* pp. 20-22 (discussing cases from the Supreme Court and other courts holding that the government's informational interest is sufficiently important to justify mandatory disclosure relating to issue advocacy).

d. It Makes No Difference Which Subsection of the Internal Revenue Code Plaintiff Relies On For Its Tax Exemption

Plaintiff incorrectly asserts (Compl. ¶ 126) that the fact that it is organized under a different subsection of the tax code than Citizens United makes this case "distinctly different" from *Citizens United*. The majority opinion in *Citizens United* makes no mention of the particular section of the tax code Citizens United was organized under; it simply describes the group as "a nonprofit corporation," *Citizens United* 558 U.S. at 319, a broad category that includes plaintiff Independence Institute as well. The fact that the Supreme Court did not exempt a whole category of nonprofits from the EC disclosure requirements is unsurprising, since such a categorical exemption would be inconsistent with the Court's broad holding that "disclosure is a less restrictive alternative to more comprehensive regulations of speech" that furthers the public's important "interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369. Clearly the public's interest in knowing who financed and distributed an

electioneering communication is not altered based on which particular subsection of the Internal Revenue Code that entity relies on for its tax exemption. As the Court of Appeals for the Seventh Circuit has observed, "the voting 'public has an interest in knowing who is speaking about a candidate shortly before an election,' whether that speaker is a political party, a nonprofit advocacy group, a for-profit corporation, a labor union, or an individual citizen." *Madigan*, 697 F.3d at 490 (quoting *Citizens United*, 558 U.S. at 369).

In any event, plaintiff's assertion (Pl.'s Mem. at 18) that "[t]he tax code specifically protects § 501(c)(3) donor lists from public disclosure" does not advance its First Amendment argument; nonprofits claiming tax exemption under section 501(c)(4) (like Citizens United) are similarly exempt from having to disclose the names of their donors to the public. *See* 26 U.S.C. § 6104(b), (d)(3)(A).[13] So even setting aside the fact that *Citizens United* clearly is not as limited as plaintiff would like it to be, plaintiff's proffered basis for limiting that opinion to nonprofits claiming tax exemption under section 501(c)(4) — the fact that the tax code "protects § 501(c)(3) donor lists from public disclosure" (Pl.'s Mem. at 18) — also applies to section 501(c)(4) nonprofits, *i.e.*, the entities that plaintiff admits *are* covered by the *Citizens United* opinion. Thus plaintiff's emphasis of its particular type of nonprofit status fails to identify any relevant distinction from the facts in *Citizens United*.

[13] Notably, the Commission, in implementing BCRA's definition of ECs, had promulgated a regulation that excluded communications paid for by corporations operating under section 501(c)(3) of the Internal Revenue Code. But this Court, in *Shays v. FEC*, concluded that the regulation was arbitrary and capricious and thus invalidated the rule under the Administrative Procedure Act, because it improperly tied the enforcement of federal campaign-finance rules to the IRS's interpretation and enforcement of federal tax laws and regulations. 337 F. Supp. 2d 28, 124-28 (2004).

e. "Principles" Articulated in the D.C. Circuit's 1975 Buckley *Opinion Do Not Supersede the Supreme Court's Recent Decision Rejecting the Precise Constitutional Challenge Asserted Here*

Plaintiff devotes three pages of its brief (Pl.'s Mem. at 6, 18-20) to arguing that rather than relying on *Citizens United* or *McConnell* (or their progeny), this Court should extend the D.C. Circuit's 27-year-old analysis of a repealed statutory provision to the context of BCRA's EC disclosure requirements. Regardless of whether the general "principles" articulated by the Court of Appeals in *Buckley* "remain good law," (Pl.'s Mem. at 20), this Court need not draw inferences about the applicability of such principles here, where two subsequent Supreme Court decisions directly and explicitly foreclose plaintiff's challenge and multiple Courts of Appeals decisions, including one from the en banc D.C. Circuit, support the conclusion that the disclosure requirements challenged in this case must be upheld. *Citizens United*, 558 U.S. at 366-70; *McConnell*, 540 U.S. at 189-201; *see also, e.g.*, *SpeechNow*, 599 F.3d at 696; *Barland*, 751 F.3d 804, 836; *Free Speech*, 720 F.3d at 795-96, 798; *Madigan*, 697 F.3d at 476-86; *Real Truth*, 681 F.3d at 552; *McKee*, 649 F.3d at 52-61; *Brumsickle*, 624 F.3d at 1003-20. *See supra* pp. 25-27 & nn. 11-12.

III. PLAINTIFF FAILS TO IDENTIFY ANY UNCONSTITUTIONAL BURDEN ARISING FROM THE EC DISCLOSURE REQUIREMENTS

Buckley, *McConnell*, and *Citizens United* recognized that as-applied challenges to disclosure requirements might be appropriate in a single situation: when an organization's disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" of its members. *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74). Plaintiff here has stipulated, and the Court has ordered, however, that this case does not include *any* allegations or evidence that there is a "reasonable probability" that complying with the challenged disclosure provisions will subject plaintiff's donors to any threats,

harassment, or reprisals. (Joint Stipulation and Order at 1.) The *Buckley*, *McConnell*, and *Citizens United* Courts, while recognizing harassment as a *potential* burden, specifically found no evidence or danger of *actual* harassment of the plaintiffs in those cases and held that such evidence would be required to mount an as-applied First Amendment challenge to the Act's disclosure provisions. *Buckley*, 424 U.S. at 69 ("No record of harassment on a similar scale was found in this case.") (footnote omitted); *McConnell*, 540 U.S. at 199 (upholding lower court finding that "concerns" of plaintiffs regarding harassment were unsupported due to "lack of specific evidence"); *Citizens United*, 558 U.S. at 367 (same). The Joint Stipulation and Order in this case conclusively establishes the absence of any evidence or danger of threats, harassment, or reprisals as a result of complying with the challenged disclosure requirements here. (Joint Stipulation and Order at 1.)[14]

In addition, *Citizens United* and *McConnell* clearly foreclose plaintiff's generalized claim (Compl. ¶ 6) that "BCRA's regulation of electioneering communications chills discussion of public policy issues." *See supra* pp. 15-18. But even if such a claim were not foreclosed, plaintiff fails even to allege, let alone offer evidence of, any specific manner in which the EC disclosure requirements would "chill" its ability to exercise its First Amendment rights. And plaintiff has agreed, and the Court has ordered, that it will not "supplement" its Motion with any further "evidence." (Joint Stipulation and Order at 1-2.)

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[14] The Joint Stipulation and Order also highlights plaintiff's misplaced reliance (Pl.'s Mem. at 18) on the fact that Citizens United had disclosed its donors in the past. The Supreme Court noted Citizens United's history of donor disclosure as support for its finding that Citizens United had failed to demonstrate "that its members may face . . . threats or reprisals." 558 U.S. at 370. The Court observed that "contrary" to any alleged threats or reprisals, "Citizens United has been disclosing its donors for years *and has identified no instance of harassment or retaliation*." *Id.* (emphasis added). Because Independence Institute, unlike Citizens United, has affirmatively disavowed any allegations or evidence of threats, harassment, or reprisals, that portion of *Citizens United* has no relevance here. The Court made no mention of Citizens United's history of donor disclosure in its discussion of the constitutionality of the challenged EC requirements.

The Seventh Circuit's *Barland* decision, on which plaintiff relies, distinguished the "one-time, event driven disclosure rule for federal electioneering communications," as "far more modest" than other campaign-finance disclosure requirements and described the scope of the EC requirements as "specific and narrow." *Barland*, 751 F.3d at 836. The disclosure requirements for plaintiff, however, are even narrower than the statute, because, as plaintiff itself recognizes (Pl.'s Mem. at 24), FEC regulations limit the scope of disclosure required for federal ECs financed by corporations. *See* 11 C.F.R. § 104.20(c)(9). To the extent plaintiff's alleged injury is fear of having to disclose "*every* donor who gives more than $1,000 to the organization" even if such donors "do not earmark their donation" or "have no knowledge of the particular electioneering communication" (Compl. ¶ 124), that fear is baseless. As plaintiff acknowledges, "*the Commission does not read the statute in this manner*." (*Id.* (emphasis added).) Indeed, the applicable regulation, 11 C.F.R. § 104.20(c)(9), expressly precludes such an interpretation and instead requires disclosure for corporations only of those who donated "for the purpose of furthering electioneering communications." While it is true, as plaintiff notes (Compl. ¶¶ 55, 124), that the Commission's regulation has been challenged in a separate, ongoing litigation, the regulation remains valid, in force, and binding on the Commission. The existence of a lawsuit challenging the validity of a duly promulgated regulation does not, as plaintiff claims (*id.* ¶ 125), demonstrate that the provision "rests on unsteady footing," nor does it establish any risk that the Commission will abruptly refuse to follow the rule, conduct that itself would render the Commission susceptible to a legal challenge. Moreover, in the very litigation plaintiff identifies (*id.* ¶ 124), the Court of Appeals for the D.C. Circuit has found that "[t]he FEC's promulgation of 11 C.F.R. § 104.20(c)(9) reflects an attempt by the agency to provide regulatory guidance under the BCRA following the partial invalidation of the speech prohibition imposed on

corporations and labor unions in the context of 'electioneering communications,'" and accordingly remanded the case to the district court for further consideration under the Administrative Procedure Act. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (per curiam). That finding is a far cry from demonstrating that the regulation "rests on unsteady footing."

Moreover, if plaintiff would prefer not to rely on section 104.20(c)(9) of the Commission's regulations, the Act and Commission regulations provide plaintiff another option for financing its proposed EC that would also enable it to limit the scope of donors it would have to disclose. As explained *supra* at p. 8 (and as plaintiff acknowledges (Compl. ¶ 53)), if plaintiff finances its proposed EC with funds from a "segregated bank account established to pay for electioneering communications," it would only be required to identify those individuals who contributed $1,000 or more to the account itself. 52 U.S.C. §§ 30104(f)(2)(E) (2 U.S.C. §§ 434(f)(2)(E)); 11 C.F.R. § 104.20(c)(7)(ii).

CONCLUSION

For all the foregoing reasons, plaintiff's Motion should be denied and the Court should award judgment to the Commission.

Respectfully submitted,

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