UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENCE INSTITUTE, Appellant, v. FEDERAL ELECTION COMMISSION, Appellee.	)	No. 14-5249 REPLY & OPPOSITION

APPELLEE FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE AND IN OPPOSITION TO APPELLANT'S CROSS-MOTION FOR SUMMARY REVERSAL

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Appellant Independence Institute has responded to the Federal Election Commission's ("FEC" or "Commission") showing that summary affirmance is warranted by repeating the same arguments it made to the district court, including its irrelevant arguments about an FEC implementing *regulation* that is not at issue in this challenge to *statutory* provisions of the Federal Election Campaign Act ("FECA" or the "Act") that the Supreme Court has twice upheld. Summary affirmance is appropriate where, as here, "[t]he merits of the parties' positions are so clear as to warrant summary action." *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar. 11, 2013) (*per curiam*). Where a "sound basis" exists for summary disposition, parties are "particularly encouraged to file dispositive motions," since the "result can be a major savings of time, effort, and resources for the parties, counsel, and the Court." *D.C. Circuit Handbook of Practice and Internal Procedures* 28 (Nov. 12, 2013). The relevant facts and law have been abundantly briefed already through Independence Institute's Verified Complaint, Application for a Three Judge Court, Motion for Preliminary Injunction, the Commission's Oppositions to Independence Institute's Application for a Three-Judge Court and Motion for Preliminary Injunction, and each of Independence Institute's Replies to the Commission's Oppositions. Independence Institute's arguments in its Combined Motion for Summary Reversal and Response to Federal Election Commission's Motion for Summary Affirmance ("Appellant's

Cross-Motion and Response") largely rehash identical authorities and arguments presented to the district court.

The district court correctly held that Independence Institute's claims were so insubstantial in light of previous Supreme Court decisions that a statutory three-judge court provision was inappropriate, and that the Commission was entitled to judgment as a matter of law. Mem. Op. and Order, Civ. No. 14-1500 (CKK) (D.D.C. Oct. 6, 2014) (Dist. Ct. Docket Nos. 23 and 24) (attached as Exhibits 1 and 2 to FEC's Motion for Summary Affirmance ("FEC Mot.")). No further briefing or argument will alter that conclusion. Indeed, despite its complaints about the district court's expeditious resolution of the merits of its challenge — *to which Independence Institute consented* — Independence Institute has not identified a single issue for which it needs to submit further briefing or argument in support of its claims. This Court should summarily affirm the decision below and deny Independence Institute's request for summary reversal.

I. THE DISTRICT PROPERLY DENIED INDEPENDENCE INSTITUTE'S APPLICATION FOR A THREE-JUDGE COURT

As the Commission explained in its summary-affirmance motion (FEC Mot. at 17), the district court correctly recognized its duty to make the "'initial determination of whether [Independence Institute's claims were] required to be heard and determined by a three-judge court,'" and properly applied this Court's rule that "'[a] single district judge need not request that a three-judge court be

convened if a case raises no substantial claim or justiciable controversy.'" Mem. Op. at 6 (quoting *Feinberg v. Federal Deposit Ins. Corp.*, 522 F.2d 1335, 1338 (D.C. Cir. 1975) (construing 28 U.S.C. § 2284)); *Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011). This Court has held, and the court below correctly observed, that "[c]onstitutional claims may be regarded as insubstantial if they are 'obviously without merit,' or if their 'unsoundness so clearly results from the previous decisions of (the Supreme Court) as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" *Feinberg*, 522 F.3d at 1338-39 (citations omitted); Mem. Op. at 6; *see also Schonberg*, 792 F. Supp. 2d at 17 (applying this Court's interpretation of 28 U.S.C. § 2284 in *Feinberg* to section 403(a) of the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14, reprinted at 52 U.S.C. § 30110 note (2 U.S.C. § 437h note)).

Independence Institute attempts to sidestep the district court's important gatekeeping role in ensuring that the designation of a three-judge court pursuant to section 403(d)(2) of BCRA is limited to *substantial* constitutional challenges. 116 Stat. 113-14. That gatekeeping function not only reduces unnecessary burdens on lower court judges, but it further ensures that the Supreme Court is not improperly burdened with mandatory direct appeals in insubstantial challenges like this one, which merely seeks to relitigate the precise

constitutional question that the Supreme Court answered less than five years ago in *Citizens United v. FEC*, 558 U.S. 310 (2010). *See infra* pp. 9-15. Indeed, the Supreme Court has instructed that courts should employ an "overriding policy . . . of minimizing the mandatory docket of [the Supreme] Court in the interests of sound judicial administration." *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 98 (1974); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." (citation and internal quotation marks omitted)); *accord MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam).

Independence Institute also grossly overstates the relevant inquiry for determining whether its claims are insubstantial. Contrary to Independence Institute's assertion, summary affirmance of the decision below does not require this Court to conclude that the Supreme Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United* "must wholly foreclose *all* future as-applied challenges to [the Act's] regulation of electioneering communications" ("ECs"). (Appellant's Cross-Mot. and Response at 11 (emphasis added); *see id.* at 12 (arguing erroneously that "[h]ere, this Court must decide whether

[*McConnell* and *Citizens United*] close the courthouse door to *all* speakers wishing to mention a candidate — *whatever the context* — during the electioneering communications window") (emphases added).) Nor has the Commission "so argue[d]." (*Id.* at 11; *compare* FEC Mot. at 9 (describing Independence Institute's challenge to the EC rules "as applied to its proposed radio advertisement" and arguing that "the district correctly held [that] *this case* is 'foreclosed by clear United States Supreme Court precedent") (emphasis added).) Summary affirmance is appropriate if this Court agrees with the court below that "clear United States Supreme Court precedent" wholly forecloses *this* challenge to the statutory provisions regulating disclosure of ECs. Mem. Op. at 2.[1]

[1] Although Independence Institute is correct that *McConnell* did not foreclose all future as-applied challenges to the EC provisions, it makes that point not by citing the relevant portion of *McConnell* but by citing instead to a subsequent decision recognizing the availability of as-applied challenges to the former *prohibition* on ECs financed with corporate or union general treasury funds. (Appellant's Mot. and Response at 11-12 (citing *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006)).) As the Commission explained in the court below, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), *McConnell*, and *Citizens United* all 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. (FEC Opp'n to Prelim. Inj. Mot. at 31-32 (Dist. Ct. Docket No. 19) (citing *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 198; *Buckley*, 424 U.S. at 74)).) That carve-out is inapplicable here. Independence Institute stipulated, and the district court ordered, 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 Independence Institute's donors to

Independence Institute is thus plainly wrong when it suggests that the district court erred by considering the substantiality of its claims rather than automatically certifying them to a three-judge court. (Appellant's Cross-Mot. and Response at 14.) And it is equally wrong in suggesting that the district court, having concluded that appellant's claims were too insubstantial to certify to a three-judge court, erred by proceeding to resolve the merits itself. Independence Institute itself describes the substantiality determination as "akin" to the determination of whether a complaint can "survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." (*Id.* at 10-11.) Here, the district court did precisely what it was supposed to do. *See Feinberg*, 522 F.2d at 1338-39. Moreover, as detailed below, Independence Institute *expressly consented* to both the substance and procedure of the merits consideration that the district court undertook.

II. INDEPENDENCE INSTITUTE EXPRESSLY CONSENTED TO THE DISTRICT COURT'S CONSIDERATION OF THE MERITS, AND THE COURT BELOW FULLY CONSIDERED INDEPENDENCE INSTITUTE'S CLAIMS

Independence Institute's arguments about the propriety of the district court's consideration of the merits and its characterization of the district-court proceedings as "truncated" are utterly baseless and indeed surprising given that Independence

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any threats, harassment, or reprisals. Mem. Op. at 1 & n.1, 4, 12; Joint Stip. and Order of the Court as to the Scope of Plaintiffs' Allegations and Claims at 1 (Dist. Ct. Docket No. 14).

Institute explicitly consented to that court's consideration of the merits of its claims and to the schedule and scope of the parties' merits briefing.

Independence Institute filed its complaint and motion for a three-judge court on September 2, 2014. Two days later, on Thursday, September 4, it filed a motion for a preliminary injunction. The following Monday, September 8, the district court held an on-the-record telephonic conference with the parties and, with the parties' consent, established a briefing schedule for Independence Institute's motions for a three-judge court and for a preliminary injunction. (Minute Order, Sept. 8, 2014.) As the court's September 8 Minute Order reflects, the court further instructed the parties to meet and confer regarding whether to consolidate briefing on Independence Institute's preliminary-injunction motion with briefing on the merits, and to inform the court jointly of the parties' decision by the following day, including by jointly proposing any alterations to the just-established briefing schedule. (*Id.*)

On September 9, as reflected in the district court's Minute Order issued that day, the parties jointly advised the court of their agreement (a) to consolidate briefing on Independence Institute's preliminary-injunction motion with briefing on the merits, and for the district court to consider Independence Institute's motion for a preliminary injunction as a summary-judgment motion; (b) to maintain the briefing schedule the court had set for Independence Institute's preliminary-

injunction motion; (c) that Independence Institute would *not* file any additional substantive briefing; and (d) that the parties would file a stipulation as to certain matters no later than September 10. (Minute Order, Sept. 9, 2014.)

On September 10, the parties filed a joint stipulation regarding the scope of Independence Institute's allegations and claims, which the district court entered as an order that same day. (Joint Stip. and Order of the Court as to the Scope of Plaintiffs' Allegations and Claims (Dist. Ct. Docket No. 14) ("Joint Stipulation and Order").) The Joint Stipulation and Order specified the scope of Independence Institute's claims — that the case presented *only* "an as-applied challenge to 52 U.S.C. § 30104(f)(l)-(2) based upon the content of the Independence Institute's intended communication, and not the possibility that its donors will be subject to threats, harassment, or reprisals." (*Id.* at 1.) It also reiterated "Independence Institute's agreement not to supplement its Motion for Preliminary Injunction with supplemental substantive briefing or evidence," and the parties' agreement "for the Court to consider [Independence Institute's] Motion for Preliminary Injunction as a Motion for Summary Judgment and to follow the briefing schedule set forth in the [district court's] September 9, 2014 Minute Order." (*Id.* at 1-2.)

Independence Institute never objected to the district court's consideration of the merits of its claims or to the scope or schedule of such merits consideration, nor did it seek an opportunity to provide additional briefing or evidence, nor did it

ever request a hearing on either of its then-pending motions. As explained above, it was given clear opportunities to do any or all of these things. Independence Institute's belated complaints (Appellant's Cross-Mot. and Response at 13) that the district-court proceedings were "truncated" ring hollow. It fails to identify any aspect of its claims that the district court failed to give the "'fullest consideration.'" (*Id.*) Independence Institute's baseless allegations of procedural deficiencies are contrary to the record below and provide no basis for plenary briefing here.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT INDEPENDENCE INSTITUTE'S CLAIMS ARE FORECLOSED BY SUPREME COURT PRECEDENT

The Commission previously demonstrated that the decision below should be summarily affirmed because the Supreme Court's "unambiguous language" in *Citizens United* clearly and directly forecloses Independence Institute's similar constitutional challenge here. (FEC Mot. at 9-17.) Independence Institute still has failed to identify any flaw in the district court's analysis or holding, or to explain why *Citizens United* does not foreclose this challenge. Instead, it "acknowledges the [government's] informational interest in providing the public with knowledge about 'who is speaking about a candidate shortly before an election,'" (Appellant's Cross-Mot. and Response at 15 (quoting *Citizens United*, 558 U.S. at 369) (emphasis added)), and that its proposed advertisement spoke about a former candidate shortly before an election. (*Id.* at 1-2 (explaining that Independence

Institute's proposed ad, which it sought to air in the weeks leading up to the November 2014 general election, "exhorted the listener to contact [a candidate then seeking re-election] and tell [the candidate] to support" a proposed piece of legislation).)[2] It further acknowledges that the relevant legal question is "whether, *in this instance*, [the Act's] electioneering communications disclosure regime survives exacting scrutiny[]." (*Id.* at 15.) And it concedes that "the *Citizens United* Court stated that the 'functional equivalent of express advocacy' test was inapplicable to electioneering communications disclosure." (*Id.* at 22 (quoting *Citizens United*, 558 U.S. at 369).)

These three points are interrelated and they collectively foreclose Independence Institute's challenge. *Citizens United* makes that conclusion inescapable. In rejecting Citizens United's argument that applying the EC

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[2] As the Commission noted in its summary-affirmance motion, the FEC does not contend that Independence Institute's appeal has become moot in light of the exception for disputes that are capable of repetition yet evading review. (*See* FEC Mot. at 10 n.2; *see also* Appellant's Cross-Mot. and Response at 5 n.1.) Nevertheless, Independence Institute's assertions in its Motion and Response that the Act "mandates disclosure of the Independence Institute's donors if it runs *the proposed advertisement*" (Appellant's Cross-Mot. and Response at 8 (emphasis added); *see id.* at 24 (same)) is no longer correct, because, as the Commission explained in its summary-affirmance motion, after the November 2014 elections, the particular proposed advertisement Independence Institute has described in this case no longer meets the statutory definition of an EC. (FEC Mot. at 10 n.2 (citing 52 U.S.C. § 30104(f)(3)(A) (2 U.S.C. § 434(f)(3)(A)).)

disclosure requirements to its advertisements would not serve any informational interest, because they "only attempt[ed] to persuade viewers to see [a] film," the Court explained 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 informational interest alone is sufficient* to justify application of [the EC disclosure requirements] to these ads." 558 U.S. at 369 (emphases added). In other words, the Court held that even where, as here, a communication lacks any campaign advocacy but nevertheless mentions a candidate shortly before an election, the EC disclosure requirements survive exacting scrutiny based on "the informational interest alone." *Id.* As the district court held, "the Supreme Court's clear instructions in *Citizens United*" thus directly answer the question in this case. Mem. Op. at 6.

Independence Institute nevertheless continues to press its "futile" attempt to distinguish this case from *Citizens United*. *Id.* In its district court briefs, Independence Institute insisted that the advertisements at issue in *Citizens United* were the functional equivalent of express advocacy, or at least "could fairly be characterized" as such. (Pl.'s Reply in Support of its Mot. for Prelim. Inj. at 9 (Dist. Ct. Docket No. 22); *see id.* at 11 (arguing that "[i]f the only nice thing that could be said about [Hillary Clinton] is that she wears a suit well, it follows that [she] is of poor moral character and unqualified for office").) As the district court

explained, however, Independence Institute "d[id] not even attempt to indicate where in *Citizens United* the Supreme Court held that the advertisements were the functional equivalent of express advocacy" and "the Supreme Court's own language contradicts th[at] conclusion." Mem. Op. at 9-10 & n.10; *see id.* at 13 n.13 (noting the district court's "doubt[] that the advertisements in *Citizens United* could satisfy the strict standard for being considered the functional equivalent of express advocacy," which includes only communications that are "'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate'") (quoting *Citizens United*, 558 U.S. at 324-25; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007)).

Although Independence Institute appears to have abandoned its specific argument that the ads at issue in *Citizens United* were the "functional equivalent of express advocacy," its latest contention — that "*all* of the communications at issue in *Citizens United* were unambiguously campaign related" — is just a reformulation of that same argument. (Appellant's Cross-Mot. and Response at 18; *see id.* at 20-21 (stating that speech that "functions in the same way" as express advocacy "is 'unambiguously campaign related'").) Independence Institute's "unambiguously campaign related" argument is thus equally unfounded and contradicted by *Citizens United* for all of the same reasons. Independence Institute purports to distinguish this case from *Citizens United* by emphasizing that its

proposed ad does not "speak[] about the candidate's fitness for office" (*id.* at 16), but it fails to explain its assertion that stating "that the only 'kind word' that could be said about Senator Clinton was '[s]he looks good in a pant suit'" is "unambiguously related to her Presidential campaign." (*Id.* at 19.) And it fails to identify any other references to Hillary Clinton that it contends are comments on her candidacy or fitness for office.

The district court correctly found that "the Supreme Court did not determine that the *Hillary* advertisements were the equivalent of express advocacy," and its holding that the Supreme Court's "refusal to import the express advocacy limitation to the disclosure context was . . . a holding that ultimately encompasses the facts in this case" should be summarily affirmed.[3]

The decision below similarly undermines Independence Institute's continued attempt to distinguish *Citizens United* as a case that concerns only "commercial

[3] For the same reasons, Independence Institute's latest attempt to distinguish itself based on its tax status — because "[s]ection 501(c)(3) organizations are barred from 'unambiguously campaign related' activity" (Appellant's Cross-Mot. and Response at 28) — is irrelevant and unavailing. And Independence Institute's reiteration (*id.*) of the fact that Citizens United had disclosed its donors ignores the context of the Supreme Court's statement on that point. As the district court explained, "the purpose of the Supreme Court's statement was only to note that Citizens United had 'identified no instance of harassment or retaliation' in its years of disclosing donors, thus defeating the argument that it could not be mandated to disclose because of 'a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed.'" Mem. Op. at 11-12 (quoting *Citizens United*, 558 U.S. at 370). Here, however, "such a probability is not an issue . . . because the parties have stipulated to that effect." *Id.* at 12.

speech," *i.e.*, speech that "is less protected than issue speech, and [which] may therefore be more stringently regulated." (Appellant's Cross-Mot. and Response at 19.) As the district court explained, the Supreme Court's reference to the commercial nature of the advertisements at issue in *Citizens United* "cannot be excised from its context." Mem. Op. at 13. The Supreme Court was explaining that "even though [Citizens United's] advertisement encourage[d] someone to watch the movie rather than vote for a candidate, the public interest still supports disclosure of 'who is speaking about a candidate.'" *Id.* Independence Institute still fails to explain how this portion of *Citizens United* in any way "impl[ies] that the Supreme Court determined that this speech deserved only the lesser First Amendment protections of commercial speech, 'that is, expression related solely to the economic interests of the speaker and its audience.'" *Id.* at 13-14 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980)).

And finally, the decision below properly relied on the Supreme Court's decisions analyzing the constitutionality of the precise statutory provisions at issue in this case rather than this Court's nearly forty-year-old decision concerning an invalidated provision that "bears no resemblance to [the EC] disclosure requirements in [the Act] and sheds no light on th[is] Court's consideration of them." Mem. Op. at 20 n.17. Regardless of whether this Court's analysis in

Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) (en banc), "remains good law" (Appellant's Cross-Mot. and Response at 29), Independence Institute fails to explain how that decision "suggest[s] a different outcome from *Citizens United*." Mem. Op. at 16. It does not.

Independence Institute's simple rehashing of the same arguments that the district court fully considered and rejected fails to refute the Commission's demonstration that summary affirmance is appropriate here.

IV. THE DISTRICT COURT'S DECISION IN *VAN HOLLEN v. FEC* DOES NOT SALVAGE INDEPENDENCE INSTITUTE'S APPEAL

In a last-ditch effort to reinvigorate its appeal, Independence Institute places great emphasis on a recent decision of a district court in this Circuit invalidating 11 C.F.R. § 104.20(c)(9), an FEC regulation establishing disclosure requirements for ECs by most corporations and unions. *See Van Hollen v. FEC*, No. 11-0766-ABJ, ___ F. Supp. 3d ___, 2014 WL 6657240 (D.D.C. Nov. 25, 2014); Appellant's Cross-Mot. and Response at 22-27. Independence Institute's reliance on the decision in *Van Hollen* is completely misplaced.

First, in upholding the constitutionality of the *statutory* EC disclosure requirements, neither the court below nor the Supreme Court in *Citizens United* relied upon — or even mentioned in passing — the regulation struck by the *Van Hollen* court. Therefore, whether the Supreme Court or the district court "anticipat[ed]" the *Van Hollen* decision (Appellant's Cross-Mot. and Response at

25-26) does not matter for the simple reason that the stricken regulation was not a basis for rejecting the statutory constitutional challenges Independence Institute reprises in this case. Moreover, part of *Citizens United*'s holding rested on the fact that Congress sought through the EC provisions to address "a system without adequate disclosure" and create one with "effective disclosure" that is especially "informative" given today's technology. 558 U.S. at 370. That part of the opinion belies Independence Institute's assertion that the Supreme Court was *sub silentio* relying on particular limiting constructions of the statute.

Second, and relatedly, the *Van Hollen* court did not invalidate the FEC disclosure regulation on the basis that it unconstitutionally infringes upon First Amendment rights, as Independence Institute argues in this case. On the contrary, the *Van Hollen* court expressly agreed with the court below that "[i]n *Citizens United*, the [Supreme] Court clearly found that the disclosure requirements in [the Act] — even those that apply to ads that are not express advocacy or its functional equivalent — do not impinge upon constitutional rights." *Van Hollen,* 2014 WL 6657240, at *24 (relying not only on *Citizens United* but also on the district court opinion Independence Institute is appealing here). Based upon the evident constitutionality of the disclosure provisions challenged here, the court in *Van Hollen* invalidated the regulation as arbitrary and capricious under the Administrative Procedure Act because, *inter alia*, the court found that it

"contravene[d] the language and purpose of the statute" by "reduc[ing] disclosure and transparency." *Id.* at *21-23 (emphasis added). Far from lending support to Independence Institute's constitutional challenge, *Van Hollen* rebuts it by echoing the conclusions of the district court and eight justices of the Supreme Court that the statutory disclosure requirements challenged here are constitutional.

Third, as Independence Institute itself acknowledges, "[i]t is true that" that the statute provides a means by which Independence Institute can finance ECs without having to disclose all of its donors by "pa[ying] for its proposed communication[s] out of a 'segregated bank account consisting of funds provided' by contributors." Appellant's Cross-Mot. and Response at 25; 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). Independence Institute attempts to spin this *voluntary* statutory alternative as a "burden[] of establishing, raising money especially for, and maintaining an 'Electioneering Communications Fund.'" (Appellant's Cross-Mot. and Response at 26.) But establishing and raising money through a segregated bank account is an *option*, not an obligation, and, in any event, Independence Institute has not purported to challenge any aspect of that alternative means of financing its ECs. Independence Institute's reliance on cases involving challenges to provisions that *required* certain organizations to register as political-committees, or to create a political committee, or otherwise be subject to speech *bans* (*id.*) is therefore

misplaced. *See supra* n.1 (distinguishing disclosure requirements from financing prohibitions); FEC Mot. at 13-14 (distinguishing disclosure requirements from financing limitations). Those cases are of no help in avoiding *Citizens United*, binding Supreme Court precedent that is squarely on all fours with this case. 558 U.S. at 368-69.

Fourth, and as explained above, Independence Institute's claim that the "Supreme Court has repeatedly held . . . generalized donor disclosure to be unconstitutional" (Appellant's Cross-Mot. and Response at 25) ignores that it has stipulated away the sole basis the Supreme Court has recognized for exempting an organization from the Act's disclosure obligations. *See supra* n.1; Mem. Op. at 1 & n.1, 4, 12; Joint Stipulation and Order at 1.

Fifth and finally, the fact that Congress chose to impose different disclosure requirements for independent expenditures does not demonstrate that the statutory disclosure requirements for ECs are unconstitutional as applied to Independence Institute or in any other circumstance. The EC provisions were part of an effort by Congress to address gaps in the preexisting disclosure regime, including the ability of the public to learn, as candidates and officeholders could, which "corporations or individuals make donations to interest groups that run 'issue ads.'" *McConnell*, 540 U.S. at 128-29 (other internal quotation marks and citations omitted). It is thus unsurprising that the EC provisions are in some respects more comprehensive than

the disclosure requirements for independent expenditures. Moreover, such differences existed when the Supreme Court upheld the statutory EC requirements both on their face and as applied to ads that, like Independence Institute's proposed ad, lacked campaign advocacy. And, as explained above, the Supreme Court in *Citizens United* and the district court in this case both upheld the *statutory* disclosure requirements for ECs without regard to the existence of the implementing regulation struck by the *Van Hollen* court. Moreover, as noted above, *see supra* n.2, Independence Institute is wrong when it asserts that "if [it] runs the ad as proposed in this case — without any candidate advocacy, express or implied — then *all* of [its] donors are subject to disclosure." (Appellant's Cross-Mot. and Response at 24.) That supposed outcome not only is neither "troubling" or "peculiar" (*id.*); given the Act's carefully tailored temporal limits, it is no longer true.

CONCLUSION

The district correctly identified Independence Institute's claims as insubstantial and thus properly resolved the merits of this case in favor of the Commission. Independence Institute's Motion and Response confirm that no further briefing or argument will alter that conclusion. This Court should summarily affirm the decision below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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INDEPENDENCE INSTITUTE, Appellant, v. FEDERAL ELECTION COMMISSION, Appellee.	No. 14-5249 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014, I electronically filed the FEC's Reply in Support of its Motion for Summary Affirmance and in Opposition to Appellant's Motion for Summary Reversal with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, and I will cause four paper copies to be hand-delivered to the Court pursuant to Circuit Rule 27(b). Service was made on the following through CM/ECF:

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