UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center, Democracy 21 and Public Citizen, Inc. are nonprofit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have participated in several of the Supreme Court cases cited by plaintiff as forming the basis of its First Amendment challenge, including *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010). *Amici* thus have substantial expertise in the legal issues raised in this case, and a demonstrated interest in the challenged federal disclosure provisions.

Both parties have consented to *amici*'s participation in this case.

SUMMARY OF ARGUMENT

Plaintiff Independence Institute challenges the constitutionality of the federal "electioneering communication" ("EC") disclosure provisions, 52 U.S.C. § 30104(f) (formerly codified at 2 U.S.C. § 434(f)), as applied to an ad it proposes to run on broadcast television shortly before the 2014 general election that refers to U.S. Senators Mark Udall and Michael Bennet. Senator Udall is a candidate for re-election in 2014. As such, the ad constitutes an EC and the provisions at issue here require plaintiff to make certain disclosures about its spending for the ad.

The crux of plaintiff's argument is that its ad does not constitute express advocacy or its functional equivalent, and disclosure laws must be limited to these two forms of communications. But plaintiff's case fails for the simple reason that that the Supreme Court specifically considered, and rejected, this precise argument in both *McConnell* and *Citizens United*.

Congress enacted the disclosure law at issue here as part of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, to "correct the flaws" of the disclosure regime established by the Federal Election Campaign Act ("FECA"). *McConnell*, 540 U.S. at 193-94. Concerned about vague language in the original FECA disclosure provisions, the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), had construed these earlier provisions "to reach only . . . communications that expressly advocate[d] the election or defeat of a clearly identified candidate." *Id.* at 80 (emphasis added). As a result, the Court narrowed the law to the point that groups engaged in electoral advocacy could easily evade disclosure simply by omitting "magic words" of express advocacy. To address this problem, Congress enacted the law challenged here, "coin[ing] a new term, 'electioneering communications,' to replace the narrowing construction of [the Federal Election Campaign Act's] disclosure provisions adopted by [the Supreme] Court in *Buckley*." *McConnell*, 540 U.S. at 189. And to avoid the vagueness concerns that led to *Buckley*'s narrowing construction, Congress defined "electioneering communication" by reference to clear, objective criteria: an "electioneering communication" is a "broadcast, cable, or satellite communication" that "refers to a clearly identified federal candidate," is "targeted to the relevant electorate," and airs within sixty days of general election or thirty days of a primary election or nominating convention. 52 U.S.C. § 30104(f)(3).

The Supreme Court upheld the EC disclosure requirements first on their face in *McConnell*, and then as applied to communications containing neither express advocacy nor its functional equivalent in *Citizens United*.

In *McConnell*, much as plaintiff does here, the challengers attacked the EC provisions on grounds that they regulated "'communications' that do not meet *Buckley*'s definition of express advocacy." 540 U.S. at 190. The Court flatly rejected this assertion, however, and made clear

that "the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id*. at 191-92. The Court consequently upheld the EC disclosure provisions on their face as to "the entire range of electioneering communications," regardless of whether such communications constituted express advocacy or the functional equivalent of express advocacy. *Id*. at 196.

In *Citizens United*, the EC disclosure provisions were again challenged, this time as applied to Citizens United's advertisements promoting a documentary about then-candidate Hillary Clinton. The group argued that, because the ads took no position on any candidates' suitability for office, they were not the equivalent of express advocacy and that therefore disclosing the group's funders "would not provide [the public] with information relevant to the electoral process." Br. for Appellant at 15, 51, *Citizens United*, 558 U.S. 310 (No. 08-205). The Supreme Court found that although the ads may not have qualified as express advocacy or its functional equivalent, the public nevertheless had "an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. In so holding, the Supreme Court specifically "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.

This challenge is no more than an attempt to relitigate an issue squarely put to rest by *McConnell* and *Citizens United*. Plaintiff makes no secret of its intent, asserting openly that the "terse" section in *Citizens United* upholding the EC disclosure provisions can be dismissed as "dicta." Memorandum of Law in Support of Motion for a Preliminary Injunction (Sept. 4, 2014) ("PI Br.") at 5. According to plaintiff, it is unconstitutional to impose BCRA's contributor disclosure provisions—which require a group that spends more than $10,000 on "electioneering communications" in a year to disclose those contributors giving $1,000 or more—if the EC

constitutes "pure" or "genuine" issue advocacy. *See* PI Br. at 6, 14. But the *Citizens United* Court unambiguously rejected exactly this attempt to limit the EC disclosure requirements to express advocacy or its functional equivalent. Plaintiff's entire 26-page brief is an effort to persuade this Court that the eight Members of the Supreme Court who upheld the disclosure provisions in *Citizens United* did not mean what they said.

Furthermore, plaintiff offers no basis to distinguish its case from *Citizens United*. That plaintiff is organized under Section 501(c)(3) of the Internal Revenue Code, unlike Citizens United, which was organized under Section 501(c)(4), is of no import. The Supreme Court has never premised the constitutionality of a disclosure requirement on the tax status of the spender. Similarly irrelevant is whether plaintiff is required to report all of its donors of over $1,000, as BCRA requires, or only those donors who earmarked their contributions for the purpose of financing ECs, as permitted by a Federal Election Commission (FEC) rule. The Supreme Court upheld the statutory EC disclosure provisions prior to the adoption of the FEC rule and has never suggested that comprehensive donor disclosure is constitutionally suspect. *McConnell*, 540 U.S. at 194-202.[1]

In short, plaintiff's extraordinary request that this Court disregard two controlling Supreme Court decisions to strike down the EC disclosure provisions as applied to its advertisement should be rejected, its motion for preliminary injunction denied and its complaint dismissed.

[1] The fidelity of the FEC rule to the statute is being challenged in a pending case in this district. *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012), *rev'd, Ctr. for Indv'l Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012), *on remand* No. 1:11-cv-00766 (argument heard, Oct. 29, 2013). Some of the *amici* here are counsel to the plaintiff in that case.

ARGUMENT

I. The Supreme Court Has Upheld the Electioneering Communications Disclosure Provisions Against Both Facial and As-Applied Challenges.

Plaintiff's case is squarely foreclosed by *McConnell* and *Citizens United*. The Supreme Court has twice considered—and twice upheld—the challenged BCRA disclosure provisions: first facially in *McConnell*, 540 U.S. at 196, and then as applied in *Citizens United*, 558 U.S. at 367. There is no justification for this Court to revisit a question that the Supreme Court has already answered.

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

The "major premise" of the facial challenge in *McConnell* was that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy." 540 U.S. at 190. The *McConnell* plaintiffs argued that disclosure requirements could not constitutionally extend to electioneering communications "without making an exception for those 'communications' that do not meet *Buckley*'s definition of express advocacy." *Id.*; *see also* Br. for Appellants McConnell et al. at 44-45, *McConnell*, 540 U.S. 93 (No. 02-1674). But the Supreme Court flatly rejected this argument, finding that neither its prior precedents nor the First Amendment "requires Congress to treat so-called issue advocacy differently from express advocacy" in the disclosure context. *McConnell*, 540 U.S. at 194.

The *McConnell* Court noted that *Buckley* had found the "'for the purpose of . . . influencing' a federal election" language in FECA's disclosure provisions vague and had consequently construed the statute to reach only express advocacy communications. *Id.* at 191 (internal quotation marks omitted). But the Court explained that its decision in *Buckley* was "specific to the statutory language" before it, *id.* at 192-93, and refused the plaintiffs' attempts to

elevate *Buckley*'s express advocacy limitation—which was "an endpoint of statutory interpretation"—into "a first principle of constitutional law." *Id.* at 190. Ultimately, the vagueness concerns "that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy [were] simply inapposite" with respect to BCRA's definition of "electioneering communication," which was "both easily understood and objectively determinable." *Id.* at 194.

The Court thus upheld BCRA's EC disclosure provisions on their face, finding that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements"—providing the electorate with information, deterring corruption, and enabling enforcement of the law—"apply in full to BCRA." *Id.* at 196. BCRA serves these interests, the Court held, because it requires speakers "to reveal their identities so that the public is able to identify the source of the funding behind" candidate-related speech that occurs in close proximity to an election. *Id.* (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (per curiam)).

Plaintiff highlights that the *McConnell* Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," and argues that as a result, the Court "left open the possibility for future, as-applied challenges" to the EC disclosure provisions. PI Br. at 12 (citing *McConnell*, 540 U.S. at 206 n. 88). But plaintiff fails to acknowledge that the Court made that observation in discussing BCRA's *ban on expenditures*, not its *disclosure* requirements, and the *McConnell* Court expressly applied different constitutional standards to the two types of laws. 540 U.S. at 205, 231. *McConnell*'s mention of "genuine issue ads" did not apply to disclosure laws.

Plaintiff also fails to note that the Court upheld the EC disclosure requirements as "to the entire range of 'electioneering communications,'" *id.* at 196, even though it had acknowledged

that the definition of "electioneering communications" potentially encompassed both express advocacy and "genuine issue ads." *Id*. at 206 (noting that "precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties"). In so holding, the majority indicated that the governmental interests that had led the *Buckley* Court to uphold FECA's disclosure provisions also supported disclosure of electioneering communications, even if some percentage of "genuine issue ads" were covered by the EC disclosure requirement.

B. *Citizens United* Upheld BCRA's EC Disclosure Provisions as Applied to Advertisements That Were Plainly *Not* the Functional Equivalent of Express Advocacy.

Citizens United confirmed that the EC disclosure provisions were constitutional even as applied to the small "percentage" of ads that were not express advocacy or the functional equivalent of express advocacy.

Citizens United's challenge to the EC disclosure provisions relied principally on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), which addressed BCRA's limits on *expenditures*, not its *disclosure* requirements. *Id.* at 457. In *WRTL*, the Court concluded that BCRA's prohibition on corporations' ability to use money from their general treasuries to fund electioneering communications could constitutionally apply only to speech that was "express advocacy or its functional equivalent," and not to "'issue advocacy[]' that mentions a candidate for federal office." *Id*. at 456, 481. Citizens United, citing *WRTL*'s holding that BCRA's *expenditure* restrictions could only reach "express advocacy and its functional equivalent," sought "to import a similar distinction into BCRA's *disclosure* requirements." *Citizens United*, 558 U.S. at 368-69 (emphasis added). The Supreme Court in *Citizens United*, however, "reject[ed] this contention." *Id.* at 369. The Court explained that the constitutional limitations it

had established with respect to expenditure limits did not apply to disclosure requirements, reasoning:

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found § 441b [BCRA's ban on paying for electioneering communications with corporate general treasury funds] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, *we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy*.

Id. at 369 (emphasis added) (internal citations omitted). The Court could scarcely have made its conclusion any clearer: disclosure requirements may extend beyond express advocacy and its functional equivalent.

Plaintiff—in a futile attempt to escape the clear holding of *Citizens United*—claims that this entire section of the decision was dicta. It contends that "[t]he Court had already concluded that *Hillary and the ads promoting it* were the equivalent of express advocacy," which, if true, would have meant the Court did not need to consider whether disclosure must be limited to express advocacy. PI. Br. at 15-16 (emphasis added) (quoting *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014)).

This is a patent mischaracterization. Although the Court determined that Citizens United's *movie* was the functional equivalent of express advocacy, it made no similar finding with respect to *the advertisements* for the movie, 558 U.S. at 325—and it was the *advertisements* to which the disclosure analysis was addressed. *Id.* at 367-71. And to the extent that plaintiff is suggesting that Part IV of *Citizens United* is non-precedential, that is plainly incorrect: Part IV was necessary to the judgment in *Citizens United* and is therefore a binding holding of the Court.

Likewise, Plaintiff cannot explain away the weight of the Court's holding by disparaging it as "brief," "terse," or "truncated." PI. Br. at 5, 14. Even if Justice Kennedy did not expound at great length on the validity of the disclosure provisions, that is no justification for defying the binding judgment of the Supreme Court. Indeed, if the disclosure portion of the decision is "brief," as plaintiff remarks, it is because that aspect of the challenge did not present a close question. The parties themselves agreed that the advertisements were not express advocacy,[2] and the district court likewise found that the ads "did not advocate Senator Clinton's election or defeat." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (per curiam). Express advocacy requires the use of certain "magic words," *McConnell*, 540 U.S. at 191, and "the functional equivalent of express advocacy" requires that a communication be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70. Neither test is met by a ten-second ad that states, in its entirety, "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie," followed by a link to the movie's website. *Citizens United*, 530 F. Supp. 2d at 276 n.2. Plaintiff makes no serious attempt to argue otherwise.

Plaintiff also makes too much of *Citizens United*'s passing reference to the advertisements as containing "pejorative references" to Senator Clinton's candidacy. PI Br. at 15-17. The Court offered that term as part of its description of the promotional ads, not as an element of its constitutional analysis. 558 U.S. at 368. There is nothing in *Citizens United* to suggest that a "pejorative reference" is necessary to satisfy BCRA's statutory definition of electioneering communication, let alone that such a limitation is constitutionally required.

[2] *See* Br. for Appellant at 51, *Citizens United*, 558 U.S. 310 (No. 08-205) (public's "informational interest is inapplicable to Citizens United's advertisements because they do not expressly or impliedly advocate a candidate's election or defeat"); Br. for Appellee at 36 ("[T]he advertisements are not the functional equivalent of express advocacy.").

Indeed, the *McConnell* Court had upheld "application of [BCRA's] disclosure requirements to the *entire range* of 'electioneering communications,'" without regard to their "pejorative" nature. 540 U.S. at 196 (emphasis added). Had the Court in *Citizens United* wished to overrule its holding and limit disclosure to "pejorative" references, it would have done so explicitly. Moreover, the Court's reasoning—that the public has an interest in knowing who is speaking about a candidate near the time of an election and that disclosure requirements do not prevent anyone from speaking—applies equally to communications whether they are "pejorative" or not.

In short, BCRA requires disclosure for "electioneering communications," a term defined without regard to whether a communication is "genuine issue advocacy" or "pejorative." Congress deliberately omitted such distinctions to avoid the vagueness concerns raised in *Buckley*, and the Supreme Court specifically relied on the objective character of BCRA's definition of "electioneering communications" in finding it constitutional. *McConnell,* 540 U.S. at 194. Plaintiff here has staked out a position that would render BCRA unconstitutional—notwithstanding the Supreme Court's clear holdings otherwise—because it reaches advertisements that are not express advocacy or its functional equivalent. Accepting plaintiff's argument would overturn binding Supreme Court precedent.

C. Plaintiff Can Provide No Legal Authority to Support Its Position.

Plaintiff, in a curious attempt to escape the clear weight of controlling Supreme Court authority, invokes a host of *lower* court cases. Even if these decisions could override Supreme Court precedent—which they obviously cannot—they are either outdated or not on point.

i. ***Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975)**

First, plaintiff urges this Court to discount *McConnell* and *Citizens United* and to rely instead on *Buckley v. Valeo*—not the Supreme Court's opinion in that case, but rather an unappealed portion of the D.C. Circuit's 1975 opinion. *See Buckley*, 424 U.S. at 10 n.7; *Buckley v. Valeo*, 519 F.2d 821, 869-70 (D.C. Cir. 1975). It argues that the appellate *Buckley* decision stands for the proposition that "groups seeking only to advance discussion of public issues or to influence public opinion" cannot be constitutionally subject to disclosure; because plaintiff believes it is such a group, it argues that *Buckley* supports its exemption from the EC disclosure provisions. PI Br. at 20 (citing *Buckley*, 519 F.2d at 873).

As an initial matter, the appellate *Buckley* decision predated the Supreme Court's rulings in *McConnell* and *Citizens United*, and the latter two rulings would supersede anything in the former that might conflict with them. Moreover, the *Buckley* appellate decision considered a very different disclosure law, and unsurprisingly, given its vintage, did not consider the question central to this case: whether express advocacy and its functional equivalent mark the outer boundary of permissible disclosure requirements. Thus, far from conflicting with *McConnell* or *Citizens United*, the decision simply does not address the same issues. Furthermore, plaintiff approaches the appellate *Buckley* decision at such a level of generality that its argument lacks any substance. It simply recites a few select passages from the decision relating to issue advocacy—e.g., "compelled disclosure . . . can work a substantial infringement on the associational rights of those whose organizations take public stands on public issues," PI Br. at 20 (citing 519 F.2d at 872)—and then states, in conclusory fashion, that these passages compel this Court to find the EC disclosure provisions unconstitutional. *Id.* These selected outtakes from the decision, of course, do no such thing.

A more substantive review of the *Buckley* appellate decision demonstrates that the law at issue was entirely different than the EC disclosure provisions challenged in this case, and that its analysis is consequently inapplicable here. The provision reviewed by the court of appeals, FECA § 308, required an organization to "file reports . . . as if [it] were a political committee," *id.* at 869-70, if it was responsible for any of the following:

> (1) "any act directed to the public for the purpose of influencing the outcome of an election"; or (2) by "any material" "publishe(d) or broadcast() to the public" which "refer(s) to a candidate (by name, description, or other reference)" and which (a) "advocate(es) the election or defeat of such candidate," or (b) "set(s) forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office)," or (c) is "otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate."

Id. (alterations in original).

Section 308 differs from the EC law here because it included the same vague language that necessitated the Supreme Court's creation of the express advocacy test in *Buckley*. Section 308 applied to "any act directed to the public for the purpose of influencing the outcome of an election," *id.* at 869, using terminology almost identical to the "for the purpose of . . . influencing" formulation the Supreme Court later found to raise constitutional vagueness concerns. *Buckley*, 424 U.S. at 79-80. The Court of Appeals held that this language lacked the "precision essential to constitutionality." *Buckley*, 519 F.2d at 877-78. By contrast, the Supreme Court has described the EC definition in BCRA as "both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194 (citing 2 U.S.C. § 434(f), now codified at 52 U.S.C. § 30104(f)). Indeed, the BCRA definition relied on bright-line tests precisely to avoid the vagueness concerns raised by the disclosure requirements in the original FECA.

Second, section 308 required a group that engaged in covered activity to "file reports with the [Federal Election] Commission as if such person were a *political committee*." *Buckley*,

519 F.2d at 870 (emphasis added). Then, as today, political committee status meant *ongoing* quarterly reporting, regardless of whether the organization engaged in any election-related activity, as well as an array of organizational and record-keeping requirements. *See, e.g.*, Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, 1276; 52 U.S.C. § 30104(a)-(b) (quarterly and other ongoing reports); *id.* § 30102(h) (governing use of bank accounts); *id.* § 30103 (statements of organization and termination requirements). The EC disclosure requirement, by contrast, consists of an event-driven one-time report that must be filed if and only if a group spends more than $10,000 on ECs in a covered period. 52 U.S.C. § 30104(f). No organizational or recordkeeping requirements are triggered. *Id.* The EC provisions at issue here are simply not comparable to section 308, and consequently the court of appeals' decision in *Buckley* does not bear upon the analysis of the EC disclosure provisions here.

***ii. Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014)**

Plaintiff rests its request that this Court dismiss part of the Supreme Court's *Citizens United* decision as "dicta" on the Seventh Circuit's decision in *Barland*. *See* PI Br. at 15. But *Barland* provides no more support for plaintiff than the D.C. Circuit's opinion in *Buckley*.

In *Barland*, the Seventh Circuit stated—incorrectly—that the *Citizens United* Court had determined that Citizens United's promotional advertisements for *Hillary: The Movie* were the functional equivalent of express advocacy. 751 F.3d at 836. Based upon this faulty premise, the Seventh Circuit concluded that the Supreme Court's rejection of the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy" was merely *dicta*. *Id.* Nonetheless, the Court recognized that it was bound by that dicta, and that *Citizens United* definitively held (as had the Seventh Circuit itself in an earlier

decision) "that the 'distinction between express advocacy and issue discussion does not apply in the disclosure context.'" *Id.* (quoting *Ctr. for Indv'l Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012)).

Barland further acknowledged that Citizens United's "language relaxing the express-advocacy limitation applies . . . to the specifics of the disclosure requirement at issue there," *id.*—which is, of course, the same EC disclosure requirement as is at issue here. *Barland* thus recognized that in the "specific context" of "the disclosure requirement for electioneering communications," *Citizens United* "declined to apply the express-advocacy limiting principle." *Id.* *Barland* is unequivocal on this point: It states plainly that "*Citizens United* approved event-driven disclosure for federal electioneering communications" and that "[i]n that specific . . . context"—exactly the same as the context here—"the Court declined to enforce *Buckley*'s express-advocacy limitation." *Id.* *Barland* thus does not merely fail to support the plaintiff's claim; it is fatal to that claim. *Barland* held only that significantly more burdensome, "political committee" requirements may not be imposed on the basis of issue advocacy. *See id.* at 837. Whatever the merit of that holding, it cannot assist plaintiff in light of *Barland*'s frank acknowledgment that *Citizens United* precludes any claim that the EC disclosure requirements at issue here are limited to express advocacy.

In any event, no fair reading of *Citizens United* would support the conclusion that its discussion of express advocacy is dicta. The portion of the opinion that the *Barland* court cites discusses Citizen United's *movie*, not the advertisements for the movie. *See id.* at 824 (citing *Citizens United*, 558 U.S. at 324-25). The Supreme Court determined that the movie was the functional equivalent of express advocacy,[3] but it made no similar finding with respect to the

[3] Citizens United also challenged the application of those requirements to the movie itself, which was critical of then-Senator Clinton, but both the Supreme Court and Citizens United focused principally

advertisements for the movie. *Citizens United*, 558 U.S. at 324-25. Both Citizens United and the government agreed that these advertisements did not constitute "the functional equivalent of express advocacy." *See* Br. for Appellant at 51, *Citizens United*, 558 U.S. 310 (No. 08-205); Br. for Appellee at 36. The Court in no way indicated that it disagreed with this consensus.

Moreover, the Court in *Citizens United* expressly grounded its rejection of the as-applied challenge to the disclosure provisions in that case on the proposition that the interest in disclosure is not limited to express advocacy but rather extends broadly to advertisements that discuss candidates near the date of an election. The Court's stated grounds for its holding cannot be characterized as "dicta" merely because a lower court believes that the Court *could* have reached the same result on narrower grounds. Rather, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [the courts] are bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996). As Judge Rogers has put it, "the *reasoning* of a Supreme Court case also binds lower courts." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (opinion concurring in denial of rehearing).

In any event, if *Barland*'s characterization were correct, and the promotional ads at issue in *Citizens United* had been deemed the "functional equivalent of express advocacy," then logically it would follow that virtually any ad that mentions a candidate is the functional equivalent of express advocacy. Otherwise expressed, if a communication stating that "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie" is express advocacy, then *a fortiori* plaintiff's proposed ad is as well. Plaintiff's argument thus collapses in on itself: If Citizens United's ads were regulable as "express advocacy," then so, too, is

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on the ads for the movie. 558 U.S. at 371. After finding disclosure constitutional as applied to the ads, the Court simply noted that disclosure was also constitutional as applied to the movie "for the same reasons." *Id.* at 371.

plaintiff's ad, and the breadth of the EC disclosure provision is immaterial, because plaintiff's ad in this taxonomy is squarely in the purview of campaign finance regulation.

Unsurprisingly, every Circuit to have addressed the permissible scope of political disclosure has recognized that *Citizens United* compels the conclusion that disclosure is not limited to express advocacy. Indeed, a different Seventh Circuit panel held that disclosure may extend beyond express advocacy just two years ago. *See Madigan*, 697 F.3d at 484 ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny."). As noted by the First Circuit, *Citizens United* made clear that "the distinction between issue discussion and express advocacy has no place in First Amendment review" of "disclosure-oriented laws." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); *see also Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("[T]he position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."). The Second Circuit has likewise recently agreed that "[i]n *Citizens United*, the Supreme Court expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy,' because disclosure is a less restrictive strategy for deterring corruption and informing the electorate." *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) (quoting *Citizens United*, 558 U.S. at 369). This Court should follow the growing consensus that *Citizens United* means what it says.

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

The Supreme Court's decisions holding that the EC disclosure requirements are constitutional without regard to whether they apply to express advocacy or issue advocacy are no

anomalies. They are fully consistent with longstanding Supreme Court precedent recognizing that the broad public interest in knowing the identity of those financing political advocacy extends far beyond communications containing express advocacy or its functional equivalent. The error of plaintiff's contrary position is underscored by two types of disclosure laws regulating "issue advocacy" that have been approved by the Supreme Court, namely laws relating to lobbying and ballot measure advocacy.

First, as the Supreme Court noted in *Citizens United*, it has long approved of disclosure in context of lobbying. 558 U.S. at 369 (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)) (recognizing that the "Court has upheld registration and disclosure requirements on lobbyists").

In *Harriss*, the Supreme Court considered the Federal Regulation of Lobbying Act, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report information about their clients and their contributions and expenditures. 347 U.S. at 615 & n.1. After evaluating the Act's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests. The Supreme Court explained that:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. . . . Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.

Id. at 625. The fact that the Lobbying Act was unrelated to candidate campaigns and instead pertained only to issue speech was not constitutionally significant. The Supreme Court nonetheless found that the disclosure it required served the state's informational interest and "maintain[ed] the integrity of a basic governmental process." *Id*. at 625; *see also Nat'l Ass'n of*

Mfrs. v. Taylor, 582 F.3d 1, 15-16 (D.C. Cir. 2009) (upholding provision of federal lobbying disclosure act).[4]

Importantly, *Harriss* also recognized that even "grassroots" or "indirect" lobbying, i.e., communications to persuade the *public* to lobby government officials, may be constitutionally subject to disclosure. 347 U.S. at 620; *see also id*. at 621 n.10 (noting that the Act covered lobbyists' "initiat[ion] of propaganda from all over the country, in the form of letters and telegrams," to influence the acts of legislators). "Grassroots lobbying" communications generally describe a legislative action favored by the sponsor, and urge the public to contact the relevant lawmakers regarding this action. *See, e.g.*, *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 511 (8th Cir. 1985) (upholding Minnesota disclosure requirement as applied to four communications sent from the NRA to its Minnesota members urging them to contact their state legislators about pending legislation). That these "classic" issue ads can be subject to disclosure gives lie to plaintiff's claim that only communications containing the functional equivalent of express advocacy can be constitutionally regulated.

In a similar vein, the Supreme Court has expressed approval of statutes requiring the disclosure of expenditures relating to ballot measures, although such statutes also lack a connection to candidates and thus do not constitute express advocacy or the functional equivalent of express advocacy. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on corporate expenditures to influence ballot measures, but did so in part because the state's interests could be achieved constitutionally through the less restrictive

[4] The *Harriss* decision has been followed by lower courts, which have uniformly upheld state lobbying statutes on the grounds that the state's informational interest in lobbying disclosure outweighs the associated burdens. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996); *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985); *Comm'n on Ind. Colleges and Univs. v. N.Y. Temp. State Comm'n*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982).

means of disclosure: "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. Citing *Buckley* and *Harriss*, the Court emphasized "the prophylactic effect of requiring that the source of communication be disclosed." *Id.* The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to committees formed to support or oppose ballot measures. Although the Court struck down the contribution limit, it based this holding in part on the disclosure that the law required from ballot measure committees. *See id.* at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

These precedents have led multiple circuits to conclude that requiring disclosure of the donors financing ballot measure advocacy is constitutional, just as disclosure of the donors financing candidate advocacy is. *See, e.g.*, *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) ("The [Supreme] Court has repeatedly acknowledged the constitutionality of state laws requiring the disclosure of funds spent to pass or defeat ballot measures."). In a recent challenge to Florida's ballot measure disclosure law, for instance, the Eleventh Circuit strongly rejected the "[c]hallengers' proposed distinction between ballot issue elections and candidate elections," emphasizing that this was "not supported by precedent" and could not "compel a departure from *Citizens United*." *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (U.S. 2013); *see also Madigan*, 697 F.3d at 480

("Educating voters is at least as important, if not more so, in the context of initiatives and referenda as in candidate elections.").

These courts recognize what plaintiff refuses to accept: that the informational interest recognized by *Buckley* in connection to FECA's disclosure requirements applies equally to the disclosure of ballot measure advocacy even though this latter activity is clearly "issue speech." As the Ninth Circuit has "repeatedly" recognized, the interests that support disclosure in the context of candidate elections "apply just as forcefully, if not more so, for voter-decided ballot measures." *Getman*, 328 F.3d at 1105. *See also, e.g.*, *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2011). The weight of the case law acknowledges that "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Human Life*, 624 F.3d at 1016; *see also McKee*, 649 F.3d at 57.

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

Although plaintiff bills its case as an "as applied" challenge, it functions as a facial overbreadth challenge—or at least, it is not different in substance from the facial challenge brought by the petitioners in *McConnell*. Plaintiff highlights little about its proposed ad that would serve as grounds for an as-applied exemption from disclosure and instead relies on the claim that its ad is not express advocacy or the functional equivalent of express advocacy. But the petitioners in *McConnell* likewise challenged the EC disclosure provisions because they extended beyond express advocacy, and their facial challenge was rejected. 540 U.S. at 190, 196. As this Court has recognized in similar circumstances, "a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a

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

Even if viewed as an as-applied challenge, plaintiff's claim must fail given the Supreme Court's rejection of an as-applied challenge resting on exactly the same theory in *Citizens United*. In *Citizens United*, the Supreme Court recognized only one constitutionally mandated as-applied exemption from a facially valid political disclosure law: where there is "a reasonable probability that [a] group's members would face threats, harassment, or reprisals if their names were disclosed." 558 U.S. at 370; *see also Buckley*, 424 U.S. at 74. Here, plaintiff has expressly disclaimed any concerns about harassment. *See* Joint Stipulation and Order, Sept. 10, 2014 (Doc. 14) ("The parties accordingly agree that this case presents an as-applied challenge to 52 U.S.C. § 30104(f)(1)-(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."). It has consequently abandoned the one basis recognized by the Supreme Court for an as-applied exemption from campaign finance disclosure.

Plaintiff half-heartedly attempts to differentiate its ads from those considered in *Citizens United*, noting, for instance, that it is a 501(c)(3) organization, not a 501(c)(4) organization; but as discussed below, this distinction is irrelevant to the constitutionality of a disclosure law. Plaintiff has failed to distinguish its "as-applied" challenge from either the facial challenge rejected in *McConnell* or the as-applied challenge rejected in *Citizens United*.

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

Plaintiff highlights that it is a group organized under Section 501(c)(3) of the Internal Revenue Code, *see* 26 U.S.C. § 501(c)(3), whereas the plaintiff in *Citizens United* was a Section 501(c)(4) organization, insinuating that the distinction in tax status somehow affects the First

Amendment analysis. PI Br. at 18. But the Supreme Court has never suggested that the constitutionality of the EC disclosure provisions turns on the tax status of the groups subject to the law; to the contrary, the Court has criticized campaign finance laws that discriminate "based on the speaker's identity." *Citizens United*, 558 U.S. at 350.

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

Plaintiff offers no substantive reason to explain why 501(c)(3) organizations are situated differently than 501(c)(4) organizations for purposes of disclosure. It states that "donors to § 501(c)(4) organizations are generally offered less protection than those to § 501(c)(3) groups," and cites 26 U.S.C. § 6104(d)(3)(A) for this proposition. PI Br. at 18. But here plaintiff is simply wrong. The cited section of the Internal Revenue Code provides that *all* tax-exempt groups organized under 501(c) except private foundations are not obligated under federal tax law to disclose their donor information to the public. 26 U.S.C. § 6104(d)(3)(A) ("In the case of an organization which is not a private foundation (within the meaning of section 509 (a)) or a political organization exempt from taxation under section 527, [the law] shall not require the

disclosure of the name or address of any contributor to the organization . . . ."). This provision encompasses both 501(c)(3) and 501(c)(4) organizations. Thus, the provision of the tax code upon which plaintiff relies itself fails to make the distinction between 501(c)(3) and 501(c)(4) groups that plaintiff advances.[5]

B. Under Existing FEC Regulations, Plaintiff Is Required to Report Only Those Donors Who Earmark Their Funds for Electioneering Communications.

Under current FEC rules, a corporation or union making over $10,000 in ECs need disclose only the source of those contributions exceeding $1,000 "*made for the purpose of furthering ECs*." Explanation and Justification for Final Rules on Electioneering Communications ("E & J"), 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007) (emphasis added); 11 C.F.R. § 104.20(c)(9). Nevertheless, plaintiff complains that it "faces the very real possibility of being required to disclose all of its donors" because the status of this regulation is "in doubt." PI Br. at 24. While of course the statutory and regulatory provisions governing EC disclosure could be amended by Congress or modified through litigation—as is the case for all laws—the legal regime in which plaintiff today operates requires groups to disclose only those donors who earmark their funds for ECs. Plaintiff cannot manufacture a constitutionally cognizable injury based upon speculation about how the law may change in the future.

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[5] Nor does the prohibition on "intervening" in a "political campaign" by 501(c)(3) groups under federal tax law, 26 U.S.C. § 501(c)(3), render the application of the EC disclosure provisions to such groups unconstitutional, as plaintiff suggests. The IRS's definition of campaign intervention, *see, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421, is used to determine whether a group meets the criteria for a tax status under Section 501(c)(3), not whether the group should be subject to disclosure under federal election law. The IRS' definition is not—and was not intended to be—coextensive with the activity regulated under FECA. *See, e.g.*, *Shays v. FEC*, 337 F. Supp. 2d 28, 124-28 (D.D.C. 2004) (criticizing FEC for deferring to the IRS standard because "the IRS in the past has not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are . . . considered [to be political activities]" under federal campaign finance law). Moreover, that the Tax Code itself imposes more stringent limits on political activity by 501(c)(3) groups than by 501(c)(4) groups suggests, if anything, that section 501(c)(3) groups are entitled to *less* constitutional protection for their political activities.

Moreover, even if the earmarking limitation set forth in the regulation were not in effect and plaintiff was indeed required to report all of its donors under the EC disclosure provisions, this type of comprehensive disclosure has been repeatedly found to be constitutional.

BCRA on its face requires groups spending over the threshold amount on ECs to either establish a segregated bank account and disclose *all* contributors of $1,000 or more to that account, *see* 52 U.S.C. § 30104(f)(2)(E), or use their general treasury account and disclose *all* contributors of $1,000 or more to the group, *see id.* § 30104(f)(2)(F). The statute thus provides plaintiff with the option to disclose only the donors to a separate account from which it makes disbursements for electioneering communications and to shield its other donors from disclosures.

In any event, the statute itself does not limit donor disclosure to earmarked contributions. In 2007, the FEC promulgated the current regulation limiting disclosure to "only the identities of those persons who made a donation aggregating $1,000 or more *specifically for the purpose of furthering* ECs made by that corporation or labor organization." E & J, 72 Fed. Reg. at 72,911 (emphasis added); *see also* 11 C.F.R. § 104.20(c)(9).[6]

In *McConnell*, the Supreme Court upheld the statutory EC disclosure requirement on its face although it had not yet been modified by the FEC's 2007 rule. Evidently, the Court was not at all troubled that the statute required disclosure of "the names and addresses of *all* contributors" over a specified threshold. 52 U.S.C. § 30104(f)(2)(F) (emphasis added). The FEC rule was in effect when *Citizens United* was decided, but the "earmarking" limitation played no role in the Supreme Court's constitutional analysis and was never mentioned in the Court's opinion. The D.C. Circuit has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117,

[6] This rule was challenged as contrary to the federal statute in *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012), *rev'd*, *Ctr. for Indv'l Freedom v. Van Hollen*, 694 F.3d 108, 112 (D.C. Cir. 2012), *on remand* No. 1:11-cv-00766 (argument heard Oct. 29, 2013), but, as noted above, remains in force today.

2012 WL 1758569 (D.C. Cir. May 14, 2012) (unpublished). Thus, even if plaintiff was not operating under the FEC's 2007 rule, comprehensive disclosure of donors—as required under the federal statute itself—is constitutional.

The courts of appeals have likewise upheld laws that require organizations to disclose all of their donors, even though a given contribution may not have been earmarked for the specific form of advocacy covered by a challenged disclosure law. *See, e.g.*, *Madigan*, 697 F.3d at 472; *Family PAC*, 685 F.3d at 803. Indeed, the Fourth Circuit recently reversed a district court precisely because it imposed an "earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Ctr. for Indv'l Freedom v. Tennant*, 706 F.3d 270, 291 (4th Cir. 2013). As noted by the Seventh Circuit, "an earmarking limitation would mean that groups that make electioneering communications need not disclose who has contributed to pay for those communications unless the donor is dumb enough specifically to direct the organization to use the money for a particular communication." *Madigan*, 697 F.3d at 490 n.27 (citations and internal quotation marks omitted). "The First Amendment does not require a state to build such an escape hatch into reasonable disclosure laws." *Id*. at 489.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiff's motion for preliminary injunction and dismiss its complaint.

RESPECTFULLY SUBMITTED this 19th day of August 2014.

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