UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

INDEPENDENCE INSTITUTE, Plaintiff, v. SCOTT GESSLER, in his official capacity as Colorado Secretary of State, Defendant.	No. 1:14-CV-02426-RBJ

UNOPPOSED MOTION OF THE CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN, INC. TO PARTICIPATE AS *AMICI CURIAE* WITH SUPPORTING BRIEF *AMICI CURIAE*

The Campaign Legal Center (CLC), Democracy 21 and Public Citizen, Inc. respectfully move this Court for leave to file the attached Brief *Amici Curiae*. Counsel for defendant Gessler and counsel for plaintiff Independence Institute have consented to our *amici* participation. This motion is unopposed.

As grounds for this motion, *amici* would show unto the Court that:

1. CLC, Democracy 21 and Public Citizen have a longstanding, demonstrated interest in the operation of political disclosure laws such as the "electioneering communication" ("EC") disclosure provisions challenged in this case. Colo. Const. art. XXVIII §§ 2(7)(a), 6(1). The challenged law, like the federal EC disclosure provisions, 52 U.S.C. § 30104(f), is crucial to "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof[.]" *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

2. The CLC is a nonpartisan, nonprofit organization that works in the area of campaign finance law, and participates in state and federal court litigation throughout the nation

regarding contribution limits, disclosure, political advertising, enforcement issues, and other campaign finance matters. It also participates in rulemaking and advisory opinion proceedings at the Federal Election Commission to ensure that the agency is properly enforcing federal election laws.

3. Democracy 21 is a nonprofit, nonpartisan organization dedicated to making democracy work for all Americans through support of campaign finance and other political reforms. To accomplish these goals, it conducts public education efforts, participates in litigation involving the constitutionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are properly enforced and implemented.

4. Public Citizen, Inc., a national government-reform and consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long advocated for campaign finance laws that combat the appearance and reality of corruption of public officials. Public Citizen lawyers often appear as counsel in litigation involving campaign finance issues, and Public Citizen itself frequently participates in such litigation as *amicus curiae*.

5. The *amici* have substantial experience and expertise in the issues raised in this case. CLC, Democracy 21 and Public Citizen have participated in numerous cases addressing federal campaign finance law, including the Supreme Court cases reviewing the constitutionality of the federal EC disclosure provisions, *McConnell* and *Citizens United v. FEC*, 558 U.S. 310 (2010). *Amici* thus have a unique perspective and specific experience that can assist the court beyond what the parties may provide.

6. *Amici* movants believe the attached brief *amici curiae* will assist the Court in considering the issues presented in this case. The attached brief outlines the constitutional

analysis conducted by the Supreme Court in its review of the federal EC disclosure requirements in *McConnell* and *Citizens United*, and presents relevant judicial authority on other states' disclosure laws and related laws requiring disclosure in the context of lobbying and ballot referenda.

7. This filing is timely because this motion and the attached brief are being filed on the date that defendant's opposition to plaintiff's motion for preliminary injunction is due.

8. Counsel for *amici* consulted with counsel for the parties about their consent to the filing of the attached memorandum. Counsel for both plaintiff and defendant consented to the participation of *amici*.

Wherefore, *amici* movants CLC, Democracy 21 and Public Citizen respectfully request that the Court grant leave to file the attached Brief *Amici Curiae* Supporting Defendant. CLC, Democracy 21 and Public Citizen do not request the opportunity to participate in oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2014, I electronically filed the foregoing Motion with supporting Brief *Amici Curiae* with the Clerk of the Court of the U.S. District Court of the District of Colorado by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

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UNITED STATES DISTRICT COURT
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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 a demonstrated interest in the challenged Colorado disclosure law. Both parties have consented to *amici*'s participation in this case.

SUMMARY OF ARGUMENT

Plaintiff Independence Institute challenges the constitutionality of Colorado's "electioneering communication" ("EC") disclosure provisions, Colo. Const. art. XXVIII §§ 2(7)(a), 6(1), as applied to an ad it proposes to run on local broadcast television shortly before the 2014 general election that references Governor John Hickenlooper. This ad constitutes an EC under Colorado law, and the provisions at issue require plaintiff to make certain disclosures about its spending for the ad. The crux of plaintiff's argument is that this ad does not constitute express advocacy or its functional equivalent, and that disclosure laws must be limited to these two forms of communications. But the Supreme Court specifically considered, and rejected, this precise argument in both *McConnell* and *Citizens United*.

The Colorado EC disclosure law challenged here is modeled on the federal EC disclosure law, 52 U.S.C. § 30104(f), that was enacted as part of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, and *twice* upheld by the Supreme Court against First Amendment challenge—on its face in *McConnell* and as applied in *Citizens United*.

The challenged Colorado law is similar to the federal model in all material respects, and accordingly, plaintiff's motion for preliminary injunction should be denied and its case dismissed.

Congress enacted the EC disclosure law to improve existing disclosure provisions in the Federal Election Campaign Act ("FECA"), which had been construed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) "to reach only ... communications that *expressly advocate[d]* the election or defeat of a clearly identified candidate." *Id.* at 80 (emphasis added). Under FECA, political advertisers could easily evade disclosure simply by omitting "magic words" of express advocacy. Congress enacted the EC disclosure provisions "to replace the narrowing construction of [FECA's] disclosure provisions adopted … in *Buckley*," *McConnell*, 540 U.S. at 189, and defined "electioneering communication" more broadly to include "broadcast, cable, or satellite communication[s]" that "refer[] to a clearly identified federal candidate," and air within sixty days of general election or thirty days of a primary election or nominating convention. 52 U.S.C. § 30104(f)(3).

The federal EC law was challenged on its face in *McConnell* on exactly the same grounds as plaintiff asserts here: that the law regulated "'communications' that do not meet *Buckley*'s definition of express advocacy." 540 U.S. at 190. The Supreme Court flatly rejected this assertion, however, and upheld the EC disclosure provisions as to "the entire range of electioneering communications," regardless of whether such communications constituted express advocacy or its functional equivalent. *Id*. at 196.

In *Citizens United*, the BCRA disclosure provisions were again challenged, this time as applied to advertisements promoting a documentary about then-candidate Hillary Clinton. All the

parties agreed that the ads were not express advocacy or its equivalent. Br. for Appellant at 51, *Citizens United*, 558 U.S. 310 (No. 08-205); Br. for Appellee at 36. But the Supreme Court held in an 8-1 decision that the public nevertheless had "an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. The 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.

The Colorado EC law, enshrined in the state constitution, is materially identical to the federal EC law, using the same "easily understood and objectively determinable" criteria for defining an EC. *McConnell*, 540 U.S. at 194. It requires disclosures in connection with broadcast and print communications that "unambiguously refer[] to any candidate" and are distributed "within thirty days before a primary election or sixty days before a general election" to "an audience that includes members of the electorate for such public office." Colo. Const. art. XXVIII § 2(7)(a). Like its federal analogue, the Colorado EC law advances the public's "interest in knowing who is speaking about a candidate shortly before an election." According to plaintiff, however, it is nevertheless unconstitutional to apply Colorado's EC disclosure law to what it describes as "pure issue advocacy." *See* PI Br. at 6. But the Supreme Court in *McConnell* and *Citizens United* Court unambiguously rejected exactly this type of attempt to limit the federal EC disclosure requirements to express advocacy and its functional equivalent. This Court should likewise reject plaintiff's attempt to limit Colorado law here.

ARGUMENT

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

The Supreme Court has twice considered—and twice upheld—the federal EC disclosure provisions: facially in *McConnell*, 540 U.S. at 196, and as applied in *Citizens United*, 558 U.S. at 367. In both cases, the Supreme Court rejected attempts to limit the federal disclosure law to express advocacy or its functional equivalent. There is no reason for this Court to revisit this resolved question in connection to a materially similar state EC disclosure law.

A. *McConnell* Upheld the Federal EC 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 plaintiffs argued that disclosure requirements could not constitutionally extend to ECs "without making an exception for those 'communications' that do not meet *Buckley*'s definition of express advocacy." *Id.* 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. *Id.* 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. *Id.* at 191 (internal quotation marks omitted). The Court explained, however, that *Buckley*'s holding was "specific to the statutory language" of FECA, *id.* at 192-93, and refused to elevate *Buckley*'s express advocacy limitation—"an endpoint of statutory interpretation"—into "a first principle of constitutional

law." *Id.* at 190. The vagueness concerns "that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy [were] simply inapposite" with respect to BCRA's "easily understood and objectively determinable" EC definition. *Id.* at 194. The Court thus upheld BCRA's EC disclosure provisions, finding that "the important state interests that prompted *Buckley* to uphold FECA's disclosure requirements"—providing the electorate with information, deterring corruption, and enabling enforcement of the law—"apply in full to BCRA." *Id.* at 196. The BCRA disclosure provisions serve these interests, the Court held, by requiring 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.* (citation omitted).

Plaintiff argues, nevertheless, that *McConnell* still "left open the possibility of future, as-applied challenges" to EC disclosure laws, citing the Court's statement that it "'assumed the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.'" PI Br. at 13 (quoting *McConnell*, 540 U.S. at 206 n.88). Plaintiff fails to acknowledge, however, that the Court made that observation in discussing BCRA's *ban on corporate expenditures* for ECs, not its *disclosure* requirements. *McConnell* expressly applied different constitutional standards to the two types of laws. 540 U.S. at 205, 231.

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 EC definition potentially encompassed both express advocacy and "genuine issue ads." *Id*. at 206. 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 ECs, even if some percentage of "genuine issue ads" were covered by the EC disclosure requirement.

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

Citizens United confirmed that EC disclosure provisions are constitutional even as applied to ads that do not constitute express advocacy or its functional equivalent.

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 restrictions on corporate spending on ECs, not its disclosure requirements for ECs. *Id.* at 457. In *WRTL*, the Court concluded that BCRA's prohibition on corporate funding of ECs 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." 558 U.S. at 368-69 (emphasis added). The Supreme Court "reject[ed] this contention," *id.* at 369, explaining that the constitutional limitations it had established with respect to expenditure limits did not apply to disclosure requirements:

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

Id. (emphasis added) (internal citations omitted). The Court could 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 *Citizens United*'s clear holding—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 (emphasis added) (quoting *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014)). This is a 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 *ads* that were the focus of the disclosure analysis. *Id.* at 367-71. Plaintiff's suggestion that Part IV of *Citizens United* is non-precedential is plainly incorrect: Part IV was necessary to the judgment 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, "brevity" is no justification for ignoring a 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, 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 conceivably met by Citizens United's promotional ad that stated, in its entirety, "[i]f you thought you knew everything about Hillary Clinton ... wait 'til you see the movie," 530 F. Supp. 2d at 276 n.2. Plaintiff makes no serious attempt to argue otherwise.[1]

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 communication must contain a "pejorative reference" to be permissibly subject to disclosure. Indeed, *McConnell* had upheld "application of [BCRA's] disclosure requirements to the *entire range*" of ECs, without regard to their "pejorative" nature. 540 U.S. at 196 (emphasis added). Had the Court in *Citizens United* wished to overrule that 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—applies equally to communications whether they are "pejorative" or not.

Colorado law—like its federal analogue—defines "electioneering communications" without regard to whether a communication is "genuine issue advocacy" or "pejorative." If Colorado's EC disclosure law was instead predicated upon a communication's supposed lack of "neutrality,"

[1] Plaintiff describes two of the three promotional ads that were at issue in *Citizens United*, but fails to mention the third. *See* PI Br. at 16-17; *Citizens United*, 530 F. Supp. 2d at 276-77 nn.2-4.

as plaintiff demands, it would implicate the same vagueness concerns raised in *Buckley*, and would ignore the Supreme Court's explicit approval of the "easily understood and objectively determinable" criteria of the federal EC law. 540 U.S. at 194. Plaintiff's argument has no merit, has been rejected by the Supreme Court's clear holdings to the contrary in *Citizens United* and *McConnell*, and should be rejected here.

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 only *lower* court cases, principally the Seventh Circuit's recent decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), which plaintiff claims supports its claim for relief. *See* PI Br. at 14-15. But *Barland* does no such thing.

In *Barland*, the Seventh Circuit stated—incorrectly—that *Citizens United* had determined that the ads for *Hillary: The Movie* were the functional equivalent of express advocacy. 751 F.3d at 836. Based upon this faulty premise, *Barland* 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 "dicta." *Id*. Plaintiff emphasizes this excerpt from *Barland*'s lengthier consideration of *Citizens United*. PI Br. at 14-15. But it fails to acknowledge that the Seventh Circuit also recognized that it was *bound* by that dicta, and that *Citizens United* definitively held (as had the Seventh Circuit itself previously) "that the 'distinction between express advocacy and issue discussion does not apply in the disclosure context.'" 751 F.3d at 836 (quoting *Ctr. for Indv'l Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012)).

Barland recognized that *Citizens United*'s "language relaxing the express-advocacy limitation applies ... to the specifics of the disclosure requirement at issue there," *id*.—which

was, of course, the federal EC disclosure provisions that are the model for the Colorado law at issue here. The Seventh Circuit 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. Like the federal EC disclosure law, Colorado's EC disclosure law requires an event-driven one-time report if and only if a group spends more than a threshold amount on ECs in a calendar year. *Compare* C.R.S.A. § 1-45-108(1)(a)(III) and 52 U.S.C. § 30104(f). Neither the Colorado nor the federal EC law entails any continuous reporting, organizational or recordkeeping requirements.

Barland, however, was reviewing a different type of law—a significantly more burdensome "political committee" law that imposed an ongoing reporting obligation, as well as organizational and recordkeeping requirements. 751 F.3d at 836-38, *citing* GAB § 1.28(3)(b). *Barland* held that *Citizens United* did not compel the conclusion that this type of "PAC-style" regulation could be imposed on the basis of issue advocacy. Whatever the merit of that holding, it cannot assist plaintiff in light of *Barland*'s frank acknowledgment that *Citizens United* precludes any claim that event-driven EC disclosure requirements, such as the law 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 *Barland* cites discusses

Citizen United's *movie*, not the ads for the movie. *See id.* at 824 (citing *Citizens United*, 558 U.S. at 324-25).[2] As noted above, the parties and the lower court agreed that the ads were not the equivalent of express advocacy, and nothing in the Supreme Court's opinion remotely suggests any disagreement with this consensus.[3]

Moreover, *Citizens United* expressly grounded its rejection of the as-applied challenge to the BCRA disclosure provisions on the proposition that the governmental interest in disclosure is not limited to express advocacy but 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). "[T]he *reasoning* of a Supreme Court case also binds lower courts." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (Rogers, J., concurring in denial of rehearing).

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

[3] 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. 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, would be plaintiff's ad, and the breadth of Colorado's EC disclosure law would be immaterial, because plaintiff's ad would fall squarely in the purview of campaign finance regulation.

Every Circuit to have addressed the permissible scope of political disclosure has recognized that *Citizens United* found that disclosure is not limited to express advocacy. Indeed, as *Barland* acknowledges, even the Seventh Circuit has held that disclosure may extend beyond express advocacy. *See Madigan*, 697 F.3d at 484 ("Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny."). *See also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011) (holding 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) ("[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 with "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.

First, as noted in *Citizens United*, the Supreme Court has long approved of disclosure in the context of lobbying. 558 U.S. at 369 (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)). In *Harriss*, the Supreme Court considered the Federal Regulation of Lobbying Act, which required all persons "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report information about their clients and their contributions and expenditures. 347 U.S. at 615 & n.1. After evaluating the Act's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests. The Court explained that "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected," and noted approvingly that the Act did not "prohibit these pressures" but "merely provided for a modicum of information" about them. *Id*. at 625. The fact that the Act was unrelated to candidate campaigns and instead pertained only to issue speech was not constitutionally significant: the disclosure it required served the state's informational interest and "maintain[ed] the integrity of a basic governmental process." *Id*. *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).

In a similar vein, the Supreme Court has expressed approval of statutes requiring disclosure of expenditures relating to ballot measures, although such statutes also lack a connection to candidates and thus do not constitute express advocacy or its functional equivalent. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on

corporate expenditures to influence ballot measures, but did so in part because the state's interests could be achieved constitutionally through the less restrictive means of disclosure: "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. Citing *Buckley* and *Harriss*, the Court emphasized "the prophylactic effect of requiring that the source of communication be disclosed." *Id.* The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance 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 donors financing ballot measure advocacy is constitutional, just as is disclosure of donors financing candidate advocacy. *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, the Eleventh Circuit strongly rejected the "[c]hallengers' proposed distinction between ballot issue elections and candidate elections," emphasizing that this distinction was "not supported by precedent" and could not "compel a

departure from *Citizens United*." *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2013); *see also Madigan*, 697 F.3d at 480.

These courts recognize what 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. Given the weight of the case law, "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Human Life*, 624 F.3d at 1016.

III. Plaintiff's As-Applied Challenge to Colorado's Disclosure Law Fails.

A. Plaintiff's "As-Applied" Challenge Is Indistinguishable from the Claims Brought in *McConnell* and *Citizens United*.

Although plaintiff bills its case as an "as applied" challenge, it rests on the same theory as the facial challenge to the federal EC provisions that was rejected in *McConnell*. Plaintiff highlights nothing about its proposed ad that would serve as grounds for an as-applied exemption other than the claim that its ad is not express advocacy or the functional equivalent of express advocacy. But the petitioners in *McConnell* likewise challenged the federal EC disclosure provisions because they extended beyond express advocacy, and their facial challenge was rejected. 540 U.S. at 190, 196. "A plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge court), *aff'd*, 130 S. Ct. 3544 (2010)

Even if viewed as an as-applied challenge, plaintiff's claim must fail given the Supreme Court's dismissal of an as-applied challenge resting on exactly the same theory in *Citizens United*: there, as here, the plaintiffs argued that their ads should be exempted from disclosure on an as-applied basis because they did not constitute express advocacy or its functional equivalent. *Citizens United* adamantly "reject[ed] that contention." Indeed, it recognized only one constitutionally mandated as-applied exemption from a facially valid political disclosure law: where there is "a reasonable probability that [a] group's members would face threats, harassment, or reprisals if their names were disclosed." 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. 22, 2014) (Doc. 19). It has thus failed to claim the one as-applied exemption from a facially valid campaign finance disclosure law recognized by the Supreme Court.

Finally, plaintiff attempts to differentiate itself from the plaintiff in *Citizens United*, and to distinguish Colorado's EC law from its federal counterpart by highlighting "discrepancies" in terms of the media covered and their reporting threshold. But these distinctions are not relevant to the constitutionality of a disclosure law and are not material to the facts presented in plaintiff's as-applied case. Neither effort succeeds.

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

Plaintiff highlights that it is organized under Section 501(c)(3) of the Internal Revenue Code, 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. After *McConnell*, when the FEC created an exemption for 501(c)(3) groups by regulation, it was invalidated. *Shays v. FEC*, 337 F. Supp. 2d 28, 124-28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The district court found this 501(c)(3) exemption to be arbitrary and capricious because it was unrelated to the objectives of the statute. *Id*. at 128. No court has imposed such an exemption as a matter of constitutional law.

Plaintiff does not 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 18-19. In fact, the cited section applies to *both* 501(c)(3) and 501(c)(4) groups, and provides that federal tax law does not obligate *any* groups organized under 501(c) (except private foundations) to disclose their donor information to the public. 26 U.S.C. § 6104(d)(3)(A). Thus, the provision of the tax code upon which plaintiff relies itself fails to make the distinction that plaintiff advances.[4]

[4] 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 law to such groups unconstitutional, as plaintiff suggests. The IRS's definition of campaign intervention, *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

C. Colorado's Disclosure Law is Materially Similar to its Federal Counterpart and Is Similarly Tailored to Advance the State's Informational Interests.

In a second attempt to distinguish its case from the as-applied challenge rejected in *Citizens United*, plaintiff notes certain discrepancies between the federal EC law reviewed by the Supreme Court, and the Colorado law at issue here. But these differences are not significant, and even if they were, none are relevant to plaintiff's proposed advertisement.

First, Plaintiff highlights that in addition to the television and radio ads covered by the federal EC disclosure law, Colorado's law covers advertisements in newspapers and mailings as well. But plaintiff acknowledges that its proposed ad is a television broadcast ad, PI Br. at 2, and thus the fact that Colorado's EC law covers additional media is not material in this as-applied challenge: the plaintiff must demonstrate that the law is unconstitutional as applied to it, not to others. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *see also McConnell*, 540 U.S. at 192 (noting longstanding adherence "to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (internal quotation marks and citation omitted).

Second, plaintiff emphasizes that Colorado's $1,000 threshold for EC reporting is lower than the federal threshold, but at the same time admits that its proposed advertisement "will cost well in excess of $1,000," PI Br. at 3, thus obviating any concern about the precise tailoring of Colorado's disclosure threshold. If plaintiff is planning to spend, for example, $5,000 or $15,000 on an advertisement, the exact reporting threshold under Colorado law has no significance to

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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 Shays*, 337 F. Supp. 2d at 124-28 (criticizing the 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).

plaintiff's as-applied challenge. Furthermore, even if plaintiff planned to spend exactly $1,001, the determination of monetary thresholds in campaign finance laws "is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Buckley*, 424 U.S. at 83. The legislature's chosen limits are valid unless they are "wholly without rationality." *Id.*; *see also id.* at 30 ("'[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'"). The courts of appeals have therefore explained that courts "do not review reporting thresholds under the 'exacting scrutiny' framework," but instead must "uph[o]ld such legislative determinations unless they are 'wholly without rationality.'" *McKee*, 649 F.3d at 60; *see also, e.g.*, *Family PAC*, 685 F.3d at 811.

Finally, Colorado's reporting thresholds are undoubtedly reasonable. The difference between Colorado's thresholds, *see* Colo. Const. art. XXVIII § 6(1), and those of BCRA, *see* 52 U.S.C. § 30104(f)(1), (2)(F), reflects the difference in the elections the two laws regulate. Colorado's EC provisions apply to the elections of a mid-sized state, whereas BCRA applies to federal elections, including nationwide presidential elections and senatorial elections in States of all sizes. The disclosure thresholds contained in other state laws reflect this obvious contrast, and in fact, many other states use thresholds well below $1,000. *See* Mass. Gen. Laws ch. 55, § 18F ($250); Wash. Rev. Code § 42.17A.305(1)(b)(ii) ($250); Me. Rev. Stat. tit. 21-A, § 1019-B ($100); S.D. Codified Laws § 12-27-17 ($100). The First Circuit has upheld Maine's $100 threshold. *McKee*, 649 F.3d at 60-61.

In short, none of the differences between the challenged law and its federal model highlighted by plaintiff are material to its as-applied challenge, and in any event, any such variances reflect the different electoral contexts in which the two laws operate.

CONCLUSION

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

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Respectfully submitted,

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