No. 14-1463

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INDEPENDENCE INSTITUTE,
Plaintiff-Appellant,

v.

WAYNE WILLIAMS, in his official capacity
as Colorado Secretary of State,
Defendant-Appellee.

On Appeal from the United States District Court for the
District of Colorado (No. 1:14-CV-02426-RBJ)

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER, DEMOCRACY 21 AND PUBLIC CITIZEN IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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GLOSSARY

BCRA	-	Bipartisan Campaign Reform Act of 2002
EC	-	Electioneering Communication
FEC	-	Federal Election Commission
FECA	-	Federal Election Campaign Act
PAC	-	Political Committee

STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(C)(1), *amici curiae* are aware of no prior or related appeals in this Court.

STATEMENT OF INTEREST[1]

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 many of the Supreme Court cases cited by Independence Institute 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. All parties have consented to *amici*'s participation in this case.

SUMMARY OF ARGUMENT

Appellant Independence Institute (the "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 proposed to run on local broadcast television shortly before the 2014 general election. The ad referred to Governor John Hickenlooper who was a candidate for office. It is thus an EC under Colorado law and the challenged statutory provisions would have required the Institute to make disclosures about its spending for the ad.

[1] No party or party's counsel authored this brief in whole or in part, and no person, other than the *amici curiae* Campaign Legal Center, Democracy 21 and Public Citizen contributed money intended to fund the preparation or submission of this brief.

The crux of the Institute's argument below was that this ad was not 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*. Accordingly, the district court below upheld the challenged disclosure law, explaining that *Citizens United* made clear that "the distinction between issue speech and express advocacy has no place in the context of disclosure requirements." *Independence Institute v. Gessler*, --- F.Supp.3d ----, 2014 WL 5431367, *6 (D. Colo. Oct. 22, 2014).

On appeal, the Institute presses the same erroneous constitutional argument, but attempts to refresh it with new terminology, declaring now that the test for a disclosure law is whether it extends beyond "unambiguously campaign related" communications. Appellant's Opening Br. (Jan. 7, 2015) at 8. Thus, instead of requesting an exception for its ad because it is "pure issue advocacy," *see* Gessler, 2014 WL 5431367 at *7, the Institute now demands an exception because the ad is allegedly not "unambiguously campaign related." It is unclear if the Institute intends for its new "unambiguously campaign related" test to supplement, or to supplant, the standard test it earlier relied on for the "functional equivalent of express advocacy." But regardless of the Institute's intent, relabeling its argument does not make its case any stronger.

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, the Institute's case was properly dismissed by the district court.

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 such "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[s]" 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 the Institute asserts here: that the law regulated "'communications' that do not meet *Buckley*'s definition of express advocacy" (or rephrased in the Institute's new terminology, that the law regulated communications that were not "unambiguously campaign related"). 540 U.S. at 190. The Supreme Court rejected this attack, 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." *Citizens United*, 558 U.S. at 369.

According to the Institute, however, it is nevertheless unconstitutional to apply Colorado's EC disclosure law because the EC definition requires disclosure in connection to "pure issue advocacy" or speech that is not "unambiguously campaign related." Appellant Br. at 26-27. But the Supreme Court in *McConnell* and *Citizens United* directly rejected exactly this type of attempt to limit the federal EC disclosure requirements. This Court should likewise reject the Institute's attempt to limit Colorado law here.

ARGUMENT

I. The Institute'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 settled question in connection with 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.* 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. Consequently the Court 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 Institute argues, nevertheless, that *McConnell* "does not foreclose as-applied challenges" to EC disclosure laws, citing the Court's statement that "'the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.'" Appellant Br. at 36-37 (quoting *McConnell*, 540 U.S. at 206 n.88). The Institute fails to acknowledge, however, that the Court made that observation in discussing BCRA's *ban on corporate expenditures* for

ECs, not its *disclosure* requirements. The Court has made clear that expenditure bans and disclosure laws are subject to different standards of review and implicate different governmental interests. 540 U.S. at 205, 231. The *McConnell* Court's reservations about a corporate expenditure ban are thus not germane to a disclosure law.

The Institute 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 the Court 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 considered a challenge to the EC disclosure provisions as applied to Citizens United's film, *Hillary: The Movie* and three promotional ads for the movie. In making this challenge, the plaintiffs relied principally on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*")—but *WRTL* 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." *Citizens United*, 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 not have made its conclusion any clearer: disclosure requirements may extend beyond express advocacy and its functional equivalent.

The Institute—in a futile attempt to escape *Citizens United*'s clear holding—implies that this entire section of the decision was dicta. Appellant Br. at 20 n.10, 45 n.15 (citing *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014)). It contends that the Court had already concluded that the movie and its promotional ads were the equivalent of express advocacy, or in the Institute's current parlance, "unambiguously campaign related." Appellant Br. at 39-40.

But 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. The Institute's suggestion that the disclosure section of *Citizens United* is non-precedential—or somehow distinguishable from this case—is plainly incorrect. The Court's holding on the scope of disclosure laws was necessary to its judgment and is controlling here.

Further, the parties in *Citizens United* 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. The Institute's new test, namely whether the ads are "unambiguously campaign related," appears to be no more than a reformulation of the *WRTL* test for the "functional equivalent of express advocacy." Appellant Br. at 41 (positing that "unambiguously campaign related" communications are a "category of speech which, while falling short of express advocacy, functions in the same way"). But even if these tests are distinct, none of them is conceivably satisfied by Citizens United's promotional ad that stated, in its entirety: "If you thought you knew everything about Hillary Clinton ... wait 'til you see the movie," 530 F. Supp. 2d at 276 n.2. Indeed, if that ad met the Institute's self-devised test for "unambiguously campaign related" speech, then *a fortiori* the Institute's proposed ad would as well.[2]

The Institute also makes too much of *Citizens United*'s passing reference to the advertisements as containing "pejorative references" to Senator Clinton.

[2] The Institute's proposed ad repeatedly disparages the Affordable Care Act and then links Governor Hickenlooper to its implementation. Appellant Br. at 3. Citizens United's 15-word promotional ad, by contrast, had hardly any content beyond the mere mention of Hillary Clinton's name. If Citizens United's promotional ad was the "functional equivalent of express advocacy" or was "unambiguously campaign related," then logically it would follow that virtually any ad that mentions a candidate meets these tests as well. The Institute's argument thus collapses: If Citizens United's ads were permissibly subject to disclosure requirements, as the Supreme Court concluded, then so too is the Institute's ad, and the breadth of Colorado's EC disclosure law is immaterial, because the Institute's ad falls squarely in the purview of disclosure regulation.

Appellant Br. at 40. The Court offered that characterization 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 *McConnell* holding and limit disclosure to ads containing "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 right before an election—applies equally to communications that refer to a candidate whether they are "pejorative" or not.

Colorado law—like its federal analogue—defines "electioneering communications" without regard to whether a communication is "unambiguously campaign related" or "pejorative." If Colorado's EC disclosure law was instead predicated upon a determination of whether a communication was or was not "unambiguously campaign related," as the Institute 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. *McConnell*, 540 U.S. at 194. The Institute's

argument has been rejected by the Supreme Court's clear holdings in *Citizens United* and *McConnell*, and should be rejected here.

C. The Institute Can Provide No Legal Authority to Support Its Position.

The Institute, in an attempt to escape the 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, the Institute 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 (D.C. Cir. 1975). Appellant Br. at 31-34. There, the D.C. Circuit found that a disclosure provision at FECA § 308 was unconstitutionally vague. 519 F.2d at 878. The Institute extrapolates from this holding that the government's interest in disclosure "only extends to speech that is 'unambiguously campaign related.'" Appellant Br. at 34 (quoting *Buckley*, 424 U.S. at 81). But this conclusion does not follow, and the *Buckley* appellate decision is not relevant to this case.

As an initial matter, the appellate *Buckley* decision obviously 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 (terms the Supreme Court had not yet even invented) mark the outer boundary of permissible disclosure requirements. Thus, far from conflicting with *McConnell* or *Citizens United*, the *Buckley* appellate decision simply does not address the same issues.

The law at issue in *Buckley* was entirely different than the EC disclosure provisions challenged in this case, making its analysis 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," 519 F.2d at 869-70, if the organization 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" phrasing that 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)). Similarly, Colorado's EC definition relies on the bright-line employed by the BCRA definition.

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). Colorado's EC disclosure requirement, by contrast,

consists of an event-driven report that must be filed if and only if a group spends more than $1,000 on ECs in a covered period. Colo. Const. art. XXVIII § 6(1). No ongoing organizational or recordkeeping requirements are triggered. *Id.* The EC provisions at issue here are not comparable to section 308, and consequently the court of appeals' decision in *Buckley* does not bear upon their validity.

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

The Institute also attempts to undermine the relevant Supreme Court precedents by invoking a Seventh Circuit case that characterized a section of the Supreme Court's *Citizens United* decision as "dicta." *See* PI Br. at 20 n.10. But *Barland* provides no more support for the Institute than the D.C. Circuit's opinion in *Buckley*.

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* said 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*. The Institute, however, 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 adopted an express advocacy standard only with regard to a law that imposed ongoing reporting obligations, as well as organizational and recordkeeping requirements, on a "political committee." 751 F.3d at 836-38, *citing* GAB § 1.28(3)(b). At the same time, *Barland* 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 Institute'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 the ongoing reporting, organizational or recordkeeping requirements that attend "political committee" status. *Barland* was concerned only with this more onerous "political committee" disclosure regime, holding that *Citizens United* did not

compel the conclusion that this type of "PAC-style" regulation could be imposed on the basis of non-express advocacy. Whatever the merit of that holding, it cannot assist the Institute in light of *Barland*'s explicit 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). As noted above, the parties and the lower court in *Citizens United* agreed that the ads were neither express advocacy nor its functional equivalent, and nothing in the Supreme Court's opinion remotely suggests any disagreement with this consensus.

Finally, 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, 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 overwhelming 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 not 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.

A. Disclosure Laws Are Not Limited by an "Unambiguously Campaign Related" Test.

Central to the Institute's appellate brief is the assertion of a new-found principle that disclosure laws can extend only to communications that are "unambiguously campaign related." *See, e.g.*, Appellant Br. at 8, 12-15, 16, 17, 20, 25-28, 35, 38-43, 46, 50.

This assertion appears to be nothing more than an attempt to rephrase the Institute's argument below—i.e., that disclosure laws cannot reach "pure issue advocacy"—because this argument is clearly foreclosed by *McConnell* and *Citizens United*, as the district court correctly concluded. The Supreme Court explicitly rejected the "contention" that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 369. Regardless whether one draws the line between express advocacy and issue advocacy at the "functional equivalent of express advocacy" or "unambiguously campaign related" communications, the Supreme Court has repeatedly affirmed that disclosure laws *can cross this line*. *See Gessler*, 2014 WL 5431367, *7 ("[T]he plaintiff presents no authority that would require, let alone allow, this Court to find a constitutionally-mandated exception for its advertisement on the grounds that it constitutes 'pure issue advocacy.'").

In any event, the Institute's "unambiguously campaign related" test for disclosure has no basis in the law. The phrase appeared in *Buckley*, but was merely

incidental to the Supreme Court's discussion of its narrowing construction of the term "expenditure" to encompass only express advocacy. 424 U.S. at 80.[3] The phrase certainly was not adopted as an independent constitutional test, and has not even been mentioned, much less applied in any subsequent Supreme Court case. The Institute is simply attempting to replace the actual jurisprudential approach to the review of disclosure requirements—*i.e.* an approach that analyzes whether there exists a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed"—with a test more to its liking. *Id*. at 64. This court should reject the Institute's invented standard, and adhere to the established Supreme Court precedent on the scope of permissible disclosure.

[3] Reviewing the context in which the language "unambiguously campaign related" appeared in *Buckley* illustrates the ancillary nature of the phrase. To address "serious problems of vagueness," the *Buckley* Court construed the term "expenditure" in FECA to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. The Court then stated that "this reading is directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate." *Id*. (emphasis added). It is clear that the only "test" created by the *Buckley* Court was the express advocacy standard, and the "unambiguously campaign related" language merely described its application in this context.

B. The Institute's Newly-Formulated "Unambiguously Campaign Related" Requirement Is Contradicted by Supreme Court Decisions Upholding Disclosure Laws in Non-Campaign Related Contexts.

Supreme Court decisions approving laws relating to lobbying and ballot measure advocacy confirm that the constitutionality of a disclosure requirement does not depend on whether the regulated speech is "unambiguously campaign related" or constitutes express advocacy.

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)). The Institute dismisses *Harriss* as an "odd citation for the simple reason that *Buckley* is obviously the better authority and controlling case." Appellant Br. at 50. But this ignores that the *Citizens United* Court obviously disagreed given that it chose to cite *Harriss* for the proposition that disclosure laws could extend beyond express advocacy.

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 federal lobbying disclosure legislation).

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, 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. Again, the Court struck down the contribution limit, basing its 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 issue 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 the Institute 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 advocacy." 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. The Institute's As-Applied Challenge to Colorado's Disclosure Law Fails.

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

Although the Institute 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*. The Institute 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, the Institute's claim must fail given the *Citizens United*'s dismissal of an as-applied challenge that rested on exactly the same theory as here: there, as here, the plaintiff argued that its ads should be exempted from disclosure on an as-applied basis because they did not constitute express advocacy or its functional equivalent. The Supreme Court adamantly "reject[ed] that contention." *Citizens United*, 558 U.S. at 369. 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." *Id*. at 370; *see also Buckley*, 424 U.S. at 74. Here, the Institute has expressly disclaimed any concerns about harassment. *See* Joint Stipulation and Order (Sept. 22, 2014). It has thus failed to claim the one as-applied exemption from a facially valid campaign finance disclosure law recognized by the Supreme Court.

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

The Institute 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 their reporting thresholds and the number of reports required. But these distinctions are not relevant to the constitutionality of a disclosure law and are not material to the facts presented in the Institute's as-applied case.

The Institute, for example, emphasizes that Colorado's $1,000 threshold for EC reporting is lower than the federal threshold. Appellant Br. at 48-49. But at the same time, it admits that its proposed advertisement "will cost well in excess of $1,000," Pl. Mem. of Law in Supp. of Prelim. Inj. (Sept. 4, 2014), at 3, thus obviating any concern about the precise tailoring of Colorado's disclosure threshold. If the Institute 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 its ostensible as-applied challenge. Furthermore, even if the Institute 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 v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2011).

In any event, 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 the Institute 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 affirm the district court's order.

Dated this 4th day of March, 2015.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6535 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that there is no information required to be redacted pursuant to Federal Rule of Appellate Procedure 25(a)(5) and 10th Circuit Rule 25.5.

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