No. 16-743

In The
Supreme Court of the United States

INDEPENDENCE INSTITUTE,
a Colorado nonprofit corporation,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

ARGUMENT

I. Neither *McConnell* nor *Citizens United* forecloses the Independence Institute's as-applied challenge.

The government suggests that this case is "materially indistinguishable" from, and consequently "foreclosed" by, two of this Court's rulings: *McConnell v. Federal Election Commission*, 540 U.S. 90 (2003), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Mot. 9-10. Because this is the government's sole substantive argument, and because the Independence Institute's proposed speech bears no resemblance to the communications considered in either of those cases, summary treatment is inappropriate.

1. *McConnell*, as a facial challenge, did not foreclose future as-applied challenges. *McConnell*, 540 U.S. at 199 ("our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement."). A mere three years after that decision, this Court again held that "[i]n upholding [BCRA] against a facial challenge, [the Court] did not purport to resolve future as-applied challenges." *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410, 411-412 (2006) (per curiam) ("*WRTL I*").[1]

[1] The government ignores *WRTL I*, a case explicitly raised in the Jurisdictional Statement. J.S. at 16 n.3.

2. *McConnell* plainly did not bless attempts to regulate genuine issue speech. Instead, it permitted the government to impose disclosure and disclaimer requirements upon "advertisements [that] do not urge the viewer to vote for or against a candidate in so many words, [but that] are no less clearly intended to influence the election." 540 U.S. at 193. No such "sham" advocacy is present in this case.

The Commission relies upon the Court's statement that it was not persuaded "that 'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.'" Mot. at 11 (quoting *McConnell*, 540 U.S. at 193). But it ignores the context in which that statement was made. In particular, it fails to mention that "express advocacy" meant speech containing "magic words" calling for a specific electoral action. *McConnell*, 540 U.S. at 191 (defining express advocacy and explaining the "magic words" test's origins); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam) (examples of magic words). And it avoids the very next sentence, which clarifies that the Court was distinguishing between sham issue speech and the genuine article. *McConnell*, 540 U.S. at 193 ("[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.").

The Court, then, was permitting an expansion of disclosure regulation to include speech lacking "magic words," and it was doing so because "the unmistakable lesson from the record in [that] litigation . . . is that *Buckley*'s magic-words requirement is functionally

meaningless." *Id*. That conclusion was not speculative; it was based upon a record showing that "the vast majority" of ads lacking magic words had an electioneering purpose. *Id*. at 206.[2]

The Institute's advertisement does not have such a purpose, and so *McConnell* is inapplicable even on its own terms. Nevertheless, the Commission attempts to expand its holding to reach "the entire range of 'electioneering communications,'" even where a particular communication does not electioneer. Mot. at 11 (quoting *McConnell*, 540 U.S. at 196). This is a misreading of *McConnell*, as that opinion itself recognized and as the foregoing discussion makes clear. *McConnell*, 540 U.S. at 206 n.88 ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.").[3]

Accordingly, *McConnell* does not foreclose Appellant's case.

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[2] The FEC made no attempt to build a similar record – or, indeed, any record – specific to the facts of this case. App. 10 ("[T]he Commission did not even respond to the Institute's Statement of Undisputed Material Facts.").

[3] The Commission notes that this particular reference to genuine issue ads dealt with a statutory ban on electioneering communications, and not on the lesser burdens imposed by compelled disclosure. Mot. at 15. But the statement itself refers to "regulation" more broadly, an understanding that accords with the many other instances where the Court distinguished between "so-called" issue speech and the real thing. *See* J.S. 14-15; *McConnell*, 540 U.S. at 199 (reserving future as-applied challenges to disclosure).

3. Without *McConnell*, the Commission must rely upon the ads for *Hillary: The Movie* being "materially indistinguishable" from the Institute's proposed ad.[4] Mot. at 11. But as-applied rulings only bind materially similar cases. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (noting as-applied relief is a "narrower remedy" than a facial ruling and the outcome may change based on differing circumstances); *cf. Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292, 2305 (2016) (even under the doctrine of claim preclusion, "development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.").

The Institute's ad bears no resemblance to those at issue in *Citizens United*, for the reasons already stated in the Jurisdictional Statement. J.S. at 20 (discussing nature of the ads in *Citizens United*); *id*. at 31 (discussing the apolitical nature of the Institute's ad). Those ads "sp[oke] about a candidate" – in her role as a candidate – "shortly before an election." *Citizens United*, 558 U.S. at 369; *see also id*. at 368 (noting "references to her candidacy").[5] They made pejorative

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[4] The Commission cannot rely upon *Hillary: The Movie* itself, which merited the overwhelming majority of this Court's attention, because that film was the functional equivalent of express advocacy. *Citizens United*, 558 U.S. at 325 ("*Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.").

[5] *See* Br. of *Amicus Curiae* Senate Majority Leader Mitch McConnell at 11 ("But context matters. The messages at issue in

references to her candidacy and encouraged the purchase of a film that was itself the functional equivalent of express advocacy. *Id*. at 326.

In sharp contrast, the Institute's ad, reproduced at J.S. 6-7, "focus[es] on a legislative issue, take[s] a position on the issue, exhort[s] the public to adopt that position, and urge[s] the public to contact public officials with respect to the matter." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL II*"). It does "not mention an election, candidacy, political party, or challenger; and [it does] not take a position on a candidate's character, qualifications, or fitness for office." *Id*.[6] Simply put, the Institute's issue-focused ad is unquestionably distinct from *Citizens United*'s candidate-focused ads. The government's insistence to the contrary is unpersuasive.

Neither *McConnell*'s facial ruling upholding disclosure for sham issue advocacy, nor *Citizens United*'s as-applied discussion of ads denigrating Senator Clinton's presidential campaign, can foreclose the challenge presented here. For that reason alone, the government's motion should be denied.

Citizens United fell directly into the ambit of campaign-related speech.").

[6] *See* Br. of *Amicus Curiae* McConnell at 16 ("Like the advertisements addressed in *WRTL II*, the Institute's advertisement is pure issue speech.").

II. The FEC has failed to demonstrate a substantial governmental interest in the Institute's issue speech.

Because of its mistaken belief that this as-applied challenge to BCRA's disclosure requirements is foreclosed, the Commission has consistently disregarded the need to demonstrate an interest in controlling the Institute's particular communication. Its failure to do so is fatal to its defense. *See WRTL II*, 551 U.S. at 478 (holding, in the context of strict scrutiny, that a governmental interest must "support[ ] *each application* of a statute restricting speech") (Roberts, C.J., controlling opinion) (emphasis in original).

Buckley explicitly defined the government's informational interest as "increas[ing] the fund of information concerning those who *support* the candidates," such that voters can better define "the candidates' constituencies." *Buckley*, 424 U.S. at 81 (emphasis added). Consequently, the Court restricted the informational interest to situations involving "spending that is unambiguously related to the campaign of a particular federal candidate," *id*. at 80, because it was only in that context that disclosure would provide any information about a candidate's *supporters*. *Bates v. City of Little Rock*, 361 U.S. 517, 524 (1960) (demanding the government "demonstrate[ ] so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect"); *see also WRTL II*, 551 U.S. at 465 (setting the "formidable" task of showing a governmental interest

and concomitant tailoring when "regulat[ing] . . . ads [that] are *not* express advocacy or its equivalent") (citation omitted) (emphasis in original).

The informational interest is particularly weak here. The advertisement tells voters nothing about the Institute's view of the pending election, or of the named senators' fitness for office, and so compelled disclosure adds nothing to the fund of information about the senators' constituencies.[7] The district court believed otherwise, stating that "the advertisement could very well be understood by Coloradoans as criticizing the Senate candidate's position." App. 26; *see also* Mot. at 8. But there was nothing in the ad itself supporting this view, and whether viewers "could very well" adopt a particular interpretation is not the standard. *See Buckley*, 424 U.S. at 80 (limiting disclosure of expenditures to "spending that is unambiguously related to the campaign of a particular federal candidate"); *WRTL II*, 551 U.S. at 467 (rejecting intent-and-effect test); *id*. at 470 (restricting analysis to whether the ad itself "is susceptible of no reasonable interpretation other than as an appeal to vote").

Furthermore, the informational interest does not exist here even under the Commission's own interpretation of that interest. It asserts "that the government has a substantial interest in ensuring that the public is informed about the source of electioneering communications and does not misattribute those

[7] In fact, disclosure in this context could very well mislead voters by suggesting support or opposition where there is none.

communications to the candidate or a political party." Mot. at 13-14. Such confusion is impossible here because the advertisement itself notes that the Institute "[p]aid for" and was "responsible for the content of the advertising" and that the ad was "[n]ot authorized by any candidate or candidate's committee." *See* J.S. at 7.[8]

Thus, lacking any informational interest in the Institute's speech, the Commission can only prevail by applying other, inapplicable, governmental interests erroneously relied upon by the district court. *See* Br.of *Amicus Curiae* McConnell at 23-24; App. 20, 30-33. In particular, given that there can be no anti-corruption interest where expenditures are not coordinated with candidates, the anti-corruption interest cannot sustain disclosure as applied to the Institute's independent issue speech. *See Citizens United*, 558 U.S. at 357 (rejecting application of anti-corruption interest to independent speech). And, this Court has held that the anti-circumvention interest – which by definition can only support regulations ultimately sustained by other interests – cannot merely serve as a prophylaxis upon other prophylaxes. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___, 134 S. Ct. 1434, 1446, 1458 (2014) (Roberts, C.J., controlling opinion). Here, where there is no informational or anti-corruption interest

[8] The Institute's disclaimer presents another important difference between this case and *Citizens United*. There, Citizens United argued that the informational interest could not even justify disclaimers, much less the compelled disclosure at issue here. *Id*., 558 U.S. at 367-69. The Institute's advertisement freely shares the Institute's authorship and disclaims any relationship with the named senators.

whatsoever, the anti-circumvention interest is simply inapplicable.

III. The protections afforded to issue speech and privacy of association will be gravely injured by dismissal or affirmance.

This case presents a substantial federal question not merely because it raises a vital and, as described *supra*, unresolved question of First Amendment law. It also merits this Court's review because the rationale applied by the district court, and defended by the government, would undermine contributors' right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958).

As both the Institute and a number of *amici* have noted, the district court's position is that whenever a communication mentions an officeholder – regardless of the content of the ad – that speech becomes presumptively regulable. *E.g.*, Br. of *Amicus Curiae* United States Chamber of Commerce at 20 ("In the name of the generic informational interest accepted by the district court, legislatures could demand the donor rolls of Planned Parenthood, Black Lives Matter[], the Mexican American Legal Defense Fund, or any other group . . . based on a threadbare connection to elections."). When it was asked to limit disclosure to speech about candidates *qua* candidates, just as this Court had done in *Buckley*, the district court suggested that such a safe harbor would constitute a sort of legal delusion. App.

25 ("[I]t would blink reality to try and divorce speech about legislative candidates from speech about the legislative issues for which they will be responsible.").

If that is indeed the law – if the government may burden any speech it chooses because deciding what is truly campaign related is simply too difficult – then limitations against disclosure are mere matters of legislative grace.[9] The Third Circuit has already applied similar reasoning to uphold a state statute that demanded four years' worth of general donor information from a charity that posted a neutral, nonpartisan voter guide on the Internet. *Del. Strong Families v. Denn*, 793 F.3d 304, 308 (3d Cir. 2014), *cert. denied*, 579 U.S. ___, 136 S. Ct. 2376 (2016) ("[I]ssue advocacy . . . [is] election-related speech . . . that seek[s] to impact voter choice by focusing on specific issues.").[10] And that court is not alone in disregarding the associational privacy of charitable donors. *See Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1314 (9th Cir. 2015) ("[Appellant] is incorrect when it argues that the compelled disclosure *itself* constitutes such an injury, and when it

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[9] It is unsurprising then, that while the *McConnell* Court reviewed BCRA at a time when the law shielded § 501(c)(3) groups from regulation, the Commission finds that fact wholly irrelevant to exacting review of what the government's briefing *concedes* might well be legitimate § 501(c)(3) activity. 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002); Mot. at 18 (stating that the Institute "reasonably" believes 26 U.S.C. § 501(c)(3), which prohibits electioneering activity, does not prohibit the distribution of this "electioneering communication").

[10] The government, unlike the district court, does not cite the *Delaware Strong Families* case.

suggests that we must weigh that injury when applying exacting scrutiny.") (emphasis in original).

In *NAACP v. Alabama*, 357 U.S. at 460, and its progeny, including *Buckley*, this Court determined that privacy of association and belief is central to effective exercise of the freedom of speech, and that the government must pass exacting judicial review before it may violate that privacy. *Buckley*, 424 U.S. at 64 ("We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest."). Whatever "subordinating," *Buckley*, 424 U.S. at 64, or "extra-constitutional," *Van Hollen v. Federal Election Commission*, 811 F.3d 486, 501 (D.C. Cir. 2016), interests the government may have at stake, those interests have, until recently, been considered inferior to the Constitution's protection of associational privacy. *Talley v. Calif.*, 362 U.S. 60 (1960) (striking down disclosure statute regulating genuine issue speech); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down disclosure statute regulating small-scale issue advocacy); *see also Buckley*, 424 U.S. at 14 ("Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution.").

Accordingly, the collection of cases the Commission cites instead counsel in favor of noting probable

jurisdiction.[11] Mot. at 12. Absent a course correction, governments will continue to rely upon a fundamental misreading of *Citizens United* to regulate far more speech than that case, or *Buckley*'s careful work, can support.[12] This Court's intervention is necessary to again protect the privacy of "groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (en banc) (per curiam); *McIntyre*, 514 U.S. at 343 n.6 (noting the "respected tradition of anonymity in the advocacy of political causes . . . most famously embodied in the Federalist Papers").

[11] Last Term, the Court declined to issue a writ of *certiorari* in the *Delaware Strong Families* case discussed *supra*. Dissenting from denial, Justice Thomas observed that "if the Court is determined to stand by its 'exacting scrutiny' test, then this case is its proving ground." *Del. Strong Families*, 136 S. Ct. at 2378 (Thomas, J., dissenting). That denial did, as Justice Thomas warned, "send[] a strong message that 'exacting scrutiny' means no scrutiny at all." *Id*.

[12] *See* J.S. at 33 n.7 (citing state laws that have functionally eliminated any requirement that speech be made close in time to an election before triggering disclosure).

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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