No. 08-_____

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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Questions Presented

1. Whether all as-applied challenges to the disclosure requirements (reporting and disclaimers) imposed on "electioneering communications" by the Bipartisan Campaign Reform Act of 2002 ("BCRA") were resolved by *McConnell*'s statement that it was upholding the disclosure requirements against facial challenge "'for the entire range of electioneering communications' set forth in the statute." Mem. Op. I, App. 15a (*quoting McConnell v. FEC*, 540 U.S. 93, 196 (2003)).

2. Whether BCRA's disclosure requirements impose an unconstitutional burden when applied to electioneering communications protected from prohibition by the appeal-to-vote test, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), because such communications are protected "political speech," not regulable "campaign speech," *id.* at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), or because the disclosure requirements fail strict scrutiny when so applied.

3. Whether *WRTL II*'s appeal-to-vote test requires a clear plea for action to vote for or against a candidate, so that a communication lacking such a clear plea for action is not subject to the electioneering communication prohibition. 2 U.S.C. § 441b.

4. Whether a broadcast feature-length documentary movie that is sold on DVD, shown in theaters, and accompanied by a compendium book is to be treated as the broadcast "ads" at issue in *McConnell*, 540 U.S. at 126, or whether the movie is not subject to regulation as an electioneering communication.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly-held company owns ten percent or more of its stock. Rule 29.6.

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*The *Memorandum Opinion* (Doc. 39) was amended by the *Errata* (Doc. 40).

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Introduction

Citizens United ("Citizens") is a nonprofit, ideological corporation that makes feature-length, documentary movies. Some have won awards. Citizens released *Hillary: The Movie* ("Movie") in January 2008, a time of high public interest in Senator Clinton. Citizens created a website at www.hillarythemovie.com to show the trailer, generate interest, list theater showings, and sell DVDs of the movie. The Movie was sold on DVD by prominent retailers. A compendium book was published. Broadcast ads were prepared. Theaters were booked for screenings. An offer was made to broadcast the Movie on television. Citizens wanted to do a full rollout of its Movie, with broadcast ads ("Ads") to generate the sort of interest that would facilitate the booking and filling of movie theaters, the sale of DVDs, and the communication of information to the public about a prominent public figure.

This was typical activity for Citizens and the release of all such movies. But there was a problem. The Ads would be "electioneering communications," under BCRA, because they mentioned a federal presidential candidate and would be broadcast on national television programs during the 30-day periods before the primaries, caucuses and conventions rolling across the nation in 2008 and during the sixty days before the general election. The Movie would also be an electioneering communication, if broadcast during these periods.

The district court noted, App. 13a, that the Federal Election Commission ("FEC") agreed that the Ads may not be prohibited because they (in *WRTL II*'s words)

"may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2670.[1] But the district court held that the Movie is a prohibited corporate electioneering communication because it does not meet this test. App. 11a-13a.

Both the Ads and Movie (if permitted to be broadcast) would be subject to the electioneering communication disclaimer, reporting, and donor disclosure requirements (collectively "Disclosure Requirements"). Disclosure burdens privacy rights per se, as this Court reaffirmed in *Davis v. FEC*. 128 S. Ct. 2759, 2774-75 (2008). And there are other burdens, too, one of them being that the required disclaimer takes four seconds out of the two 10-second and one 30-second ads, eliminating the ability to use the 10-second ads and substantially burdening the 30-second ad.

These disclosure requirements impose unconstitutional burdens when applied to electioneering communications that are protected by *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667, because such communications are protected "political speech," not regulable "campaign speech," *id.* at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), and because they are subject to and fail strict scrutiny when so applied.

The district court held that the Movie was subject

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[1]The principal opinion in *WRTL II* is by Chief Justice Roberts (Justice Alito joining) and states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding is position taken by those concurring on narrowest grounds).

to prohibition, even though the Movie contains no clear plea for action that urges a vote for or against a candidate, i.e., no language that could be interpreted only "as an *appeal to vote* for or against a specific candidate." *WRTL II,* 127 S. Ct. at 2667 (emphasis added). Furthermore, this is a movie, not one of the broadcast "ads," *McConnell*, 540 U.S. at 126, that gave rise to BCRA's electioneering communication prohibition and were put in evidence, and were at issue, in *McConnell*. While feature-length movies, and ads promoting them, have traditionally enjoyed the full First-Amendment protection traditionally afforded to books and their promotions, that is not the case here.

And just as happened to Wisconsin Right to Life with its grassroots lobbying ads, *see Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") (per curiam), the FEC is again arguing, and the district court is again agreeing, App. 17a, that the facial-holding language in *McConnell*, 540 U.S. at 196, has already resolved the present as-applied challenge to the disclosure provisions.

Until December 14, 2007, it seemed possible that the FEC would not impose BCRA's disclosure requirements on electioneering communications that are protected under *WRTL II*'s appeal-to-vote test. The FEC was conducting a rulemaking to implement this Court's *WRTL II* decision, and the rulemaking petition had urged the FEC not to compel disclosure of communications protected by *WRTL II's* appeal-to-vote test.[2] On

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[2] *See* James Bopp, Jr. & Richard E. Coleson, *Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communica-*

December 14, however, the FEC rejected this request and has now boldly asserted that "the government's interest in providing information to the public extends beyond speech about candidate elections and encompasses *activity that attempts to sway public opinion on issues* . . . ." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 19 (emphasis added); *see also* FEC's SJ Mem. (Doc. 55) at 22.

Probable jurisdiction should be noted, so that this Court can determine the proper application of *WRTL II's* appeal-to-vote test and its impact on BCRA's disclosure requirements. Furthermore, pursuant to BCRA § 403(a)(4), this Court should "advance on the docket and . . . expedite to the greatest possible extent the disposition of the . . . appeal." 116 Stat. at 114.

Opinions Below

The district court's final order and opinion on summary judgment, as well as its memorandum opinion denying Citizens' request for a preliminary injunction to which the summary judgment opinion referred, are reprinted in the Appendix ("App.") at 1a, 2a and 4a, respectively.

Jurisdiction

Summary judgment was granted to the FEC on July 18, 2008. Citizens noticed appeal on July 24, 2008. App. at 22a. This Court has appellate jurisdiction under BCRA § 403(a)(3). Pub. L. No. 107-155, 116 Stat. 81, 113-14.

Constitutional & Statutory Provisions

The following constitutional amendment, statutes,

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tions) (Sep. 29, 2007) *(*available at www.fec.gov).

and regulations are appended (page numbers in brackets): U.S. Constitution, First Amendment [23a]; 2 U.S.C. § 434(f)(1)-(3) [24a]; 2 U.S.C. § 441b(a)-(c) [28a] 2 U.S.C. § 441d [30a]; BCRA § 403 [32a]; 11 C.F.R. § 100.29 [33a]; 11 C.F.R. § 110.11(a)-(c) [40a].

Statement of the Case

This is an as-applied challenge to the constitutionality of **(a)** BCRA **§ 201**, 116 Stat. 88 (titled "Disclosure of Electioneering Communications"), which added a new subsection "(f)" to § 304 of the Federal Election Campaign Act ("FECA") that requires reporting of electioneering communications, **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers," *see* 11 C.F.R. § 110.11, and **(c)** BCRA **§ 203**, 116 Stat. 91, prohibiting corporations from funding electioneering communications. BCRA **§ 201** is called herein the "**Reporting Requirement**," BCRA **§ 311** is called the "**Disclaimer Requirement**," and the requirements together are called the "**Disclosure Requirements**" for ease of identification. BCRA **§ 203** is called herein the "**Prohibition**." The Reporting Requirement is codified at 2 U.S.C. § 434(f). App. 24a. The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a). App. 30a. The Prohibition is codified at 2 U.S.C. § 441b. App 28a.

Plaintiff Citizens is a nonstock, nonprofit, membership, Virginia corporation, tax exempt under 26 U.S.C. § 501(c)(4), with its principal office in Washington, District of Columbia. Defendant FEC is the government agency with enforcement authority over FECA.

Citizens was founded in 1988. Its purpose is to promote the social welfare through informing and edu-

cating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. Its current annual budget is about $12 million. Citizens has a related § 501(c)(3) entity called Citizens United Foundation ("CUF").

Citizens is not a "qualified nonprofit corporation" because it receives corporate donations and engages in business activities. *See* 11 C.F.R. § 114.10 (exempting certain ideological, nonstock, nonprofit corporations from the electioneering communication Prohibition).

One of the principal means by which Citizens fulfills its purposes is through the production and distribution of documentary films. Its first major documentary film, in 2004, was titled *Celsius 41.11: The Temperature at Which the Brain Begins to Die*. The film was a conservative response to Michael Moore's documentary *Fahrenheit 9/11* and was shown in over 100 theaters in 2004. It continues to be sold in DVD format. In 2005, Citizens and CUF co-produced *Broken Promises: The United Nations at 60*, which was an exposé on the United Nations narrated by noted actor Ron Silver. This film was released in DVD format. In 2006, Citizens and CUF co-produced two films: *Border War: The Battle Over Illegal Immigration* and *ACLU: At War With America. Border War* had a limited theatrical release and was sold on DVD. *ACLU* was released only in DVD format.

Broken Promises and *Border War* have competed for and won a number of awards from the motion picture industry. *Broken Promises* won a Special Jury Remi Award at the 2006 Houston International Film Festi-

val. *Border War* won best feature documentary at the 2006 Liberty Film Festival, a Silver Remi Award at the 2007 Houston International Film Festival, and best feature documentary film honors from the American Film Renaissance in February 2007. *Border War* also qualified for consideration under the Academy of Motion Picture Arts and Sciences' demanding criteria for nomination to the 79th Academy Awards in February 2007.

In 2007, CUF produced *Rediscovering God in America*, which is narrated by Newt and Calista Gingrich. This film premiered in Washington, D.C., and New York City and is now available in DVD format only. As of December 11, 2007, the film was the top selling historical documentary on Amazon.com.

When Citizens produced *Celsius 41.11* in 2004, it ran national broadcast ads promoting the film. The original version of the ads had images and sound bites of President George Bush and Senator John Kerry, but those images and sound bites had to be deleted from the ads due to the electioneering communication Prohibition. Prior to running the ads, Citizens received FEC Advisory Opinion 2004-30, stating that its film ads would qualify as electioneering communications and would not be exempt under the Press Exemption.

In January 2008, Citizens released a feature-length documentary film on Senator Hillary Clinton titled *Hillary: The Movie*. The Movie was shown in theaters and is currently available for sale on DVD. It includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances. It is about 90 minutes in length. It does not expressly advocate Senator Clinton's election or defeat, but it

discusses her Senate record, her White House record during President Bill Clinton's presidency, and her presidential bid. Some interviewees also express opinions on whether she would make a good president. A compendium book was published by Thomas Nelson Publishers, which purchased the book rights to the film and paid Citizens an advance royalty on sales.

Citizens has produced three television ads ("Ads")[3]

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[3]The script for "**Wait**" (10 seconds) follows:

[Image(s) of Senator Clinton on screen]
"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."
[Film Title Card]
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com.

"**Pants**" (10 seconds) is as follows:

[Image(s) of Senator Clinton on screen]
"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."
"Now, a movie about everything else."
[Film Title Card]
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com.

"**Questions**" (30-seconds) is as follows:

[Image(s) of Senator Clinton on screen]
"Who is Hillary Clinton?"
[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."
[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."
[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

to promote the Movie that meet the electioneering communication definition at 2 U.S.C. § 434(f)(3). Citizens has not, and will not, coordinate the production and broadcast of the Ads with any candidate, campaign committee, political committee, or political party. The Ads reference www.hillarythemovie.com, which promotes showings of the Movie in theaters and sales on DVD. The DVD is also available from major national retailers, such as Amazon.com

Citizens planned to broadcast the 30-second ad titled "Questions" on Fox News cable, and on other major television network stations, too. Citizens planned to broadcast the 10-second ads "Wait" and "Pants" on major television network stations, but not on Fox News. The initial media buy by Citizens was intended to be from mid-December 2007 to mid-January 2008. The timing of this rollout advertising blitz with the release of the Movie was thought to be critical to the success of the film.

However, the Ads were electioneering communications, 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29, because the Ads (**a**) would have been broadcast on Fox News cable and major network stations so that they (**b**) would have be receivable by more than 50,000 persons, *see* http://gullfoss2.fcc.gov/ecd (Federal Communications Commission's Electioneering Communications

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"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com.

Database), (**c**) clearly references Senator Clinton, a Democratic presidential candidate, and (**d**) would have been made within the corresponding electioneering communication periods, *see* http://www.fec.gov/info/charts_ec_dates_prez.shtml (electioneering communication periods), and, therefore, the Ads would have been subject to BCRA's electioneering communication Disclosure Requirements.[4]

Furthermore, Citizens received an offer from a company that markets nationwide Video on Demand ("VOD") broadcasting of programs on cable television to broadcast the Movie, for a fee to be paid by Citizens, to cable viewers nationwide. The Movie would have been broadcast under a "Political Movies" component of "Elections '08," a new channel sponsored by the cable industry. The contract offered to broadcast the Movie for four weeks. This broadcasting would have brought the Movie within the electioneering communication definition because the Movie (**a**) would have been broadcast on cable stations so that it (**b**) would have been receivable by more than 50,000 persons, in states where caucuses, conventions, or primary elections were being conducted to select a Democratic Party presidential nominee, (**c**) clearly references Senator Clinton, a Democrat presidential candidate, and (**d**) would have been broadcast within thirty days before these caucuses, conventions, or primaries where she was on the ballot. As a result, the Movie would have been subject

[4]Furthermore, Citizens verified its intent to do substantially-similar ads in the future and stated that there was a high likelihood that Citizens would broadcast them during electioneering communication blackout periods. Doc. 22 at ¶¶ 20, 25.

to BCRA's electioneering communication Prohibition and Disclosure Requirements.

Citizens filed its *Verified Complaint for Declaratory and Injunctive Relief* on December 13, 2007, and moved for a preliminary injunction (Doc. 5), expedition (Doc. 4), and consolidation of the hearing on the preliminary injunction with the hearing on the merits (Doc. 6). Citizens claimed in its preliminary injunction motion that the Ads and the Movie were protected by *WRTL II's* appeal-to-vote test and thus could not be prohibited. Citizens also claimed that the Ads meet the recently-enacted FEC rule recognizing a commercial-transaction, safe-harbor exception to the electioneering communication Prohibition, because each ad (**a**) "[p]roposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event," 11 C.F.R. § 114.15(b) (3)(ii); (**b**) "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public," *id.* at § 114.15(b)(1); and (**c**) "[d]oes not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." *Id.* at § 114.15(b)(2).

Finally, Citizens claimed that because the Ads and the Movie met *WRTL II*'s appeal-to-vote test, they were protected "political speech," not "campaign speech," 127 S. Ct. at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80, and could not constitutionally be subject to the Disclosure Requirements.

One of Citizens' chief concerns with the Reporting Requirement was the compelled disclosure of donors who may then be subject to various forms of retaliation

by political opponents, a concern that *Buckley* recognized as inherent in compelled disclosure, whether or not it rises to the level of harassment proven by certain historically unpopular groups. 424 U.S. at 64.[5]

In addition, Citizens claimed that the reports would (**1**) require it to mislead the public by reporting its speech as if it were campaign speech when it is not; (**2**) deprive Citizens of valuable time and resources in complying with Reporting Requirements; and (**3**) would substantially reduce the number of donors and amount of donations to Citizens.

Furthermore, the required disclaimer takes about four seconds to narrate,[6] making 10-second ads virtually impossible and 30-second ads difficult to do and have significant time left for substantive communication.[7] In addition, the disclaimer would require Citi-

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[5]In *Davis*, this Court reaffirmed that "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" 128 S. Ct. at 2774-75 (*quoting Buckley*, 424 U.S. at 64).

[6]The disclaimer requires (**1**) a spoken statement that "Citizens United is responsible for the content of this advertising," and (**2**) on-screen text providing (**a**) "the name and . . . address, telephone number or World Wide Web address of the person who paid for the communication," (**b**) a statement that the communication is "not authorized by any candidate or candidates committee," and (**c**) a "clearly readable" statement that "Citizens United is responsible for the content of this advertising." 11 C.F.R. § 110.11(a)-(c).

[7]On November 15, 2007, Club for Growth PAC ("CFG-PAC") requested an FEC advisory opinion granting an

zens to mislead the public by identifying its speech as electioneering speech when it is not.

In response, the FEC conceded that the two 10-second ads fit its regulatory commercial-transaction safe harbor, but asserted that the 30-second ad, "Questions," did not fall within that safe harbor. Opp'n to 2d Mot. for Prelim. Inj. (Doc. 33) at 17. However, the FEC did concede that "on balance" the "Questions" ad is protected from prohibition under *WRTL II*'s appeal-to-vote test. *Id.* The FEC argued, however, that passing *WRTL II's* appeal-to-vote test did not relieve Citizens from complying with the Disclosure Requirements that were imposed on the ads as electioneering communications. Furthermore, it argued that the Movie did not meet *WRTL II's* appeal-to-vote test so that its broadcast as an electioneering communication was subject to the Prohibition.

Citizens consolidation motion was denied (Doc. 29) and the preliminary injunction motion was denied on January 15, 2008. App. 4a. The district court held that Citizens was unlikely to succeed on the merits.

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exemption from disclaimer requirements for 10- and 15-second televised independent expenditure ads. CFG-PAC stated that the disclaimers "severely curtail[]" its speech as 31.6% to 36.9% of 10-second ads would be consumed by the spoken disclaimer. CFG-PAC also noted how such short "TV spots are important in the current media landscape with multiplication of viewing choices, increased competition from the Internet, and ever increasing costs." Club for Growth PAC, *Advisory Opin. Req.*, AO 2007-33, *available at* www.fec.gov (Advisory Opinion Requests). The FEC denied the request to use an abbreviated identifier in place of the mandated disclaimer. AO 2007-33 (July 29, 2008).

It held that the Movie was a prohibited corporate electioneering communication because it "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." App. 13a.

As to the Ads, the court held that they could not be prohibited under *WRTL II*'s appeal-to-vote test, but that disclosure could be required. First, the court rejected Citizens' argument that, as the court put it, "the *WRTL II* decision narrowed the constitutionally permissible scope of what may be considered an electioneering communication." App. 16a. Second, the court said that, while *McConnell* had left open for as-applied challenges the question resolved in *WRTL I*, 546 U.S. 410 (application of the electioneering communications Prohibition), "when . . . *McConnell* . . . sustained the disclosure provision . . . , it did so for the 'entire range of electioneering communications.'" App. 17a (citation omitted). Since, "[the Ads] obviously are within that range," the court concluded that *McConnell* resolved all as-applied challenges. App. 17a.

Citizens appealed the denial of the preliminary injunction directly to this Court, which denied Citizens' appeal for want of jurisdiction. (Doc. 63). Parties then filed cross motions for summary judgment (Doc. 52, 55). The district court denied Citizens' motion and granted summary judgment to the FEC, App. 1a, relying on its previous opinion denying a preliminary injunction. App. 4a. Citizens noticed appeal on July 24, 2008. App. 22a.

The Questions Presented Are Substantial

The substantial questions raised in this appeal address vindication of core political speech rights generally and proper application of this Court's precedents by federal courts and agencies.

I. *McConnell*'s Facial Upholding of the Disclosure Requirements Did Not Resolve This As-Applied Challenge.

Despite this Court's expeditious, unanimous rejection of a nearly-identical argument in *WRTL I*, 546 U.S. 410, the FEC is again arguing, and the district court is again agreeing, App. 17a, that *McConnell*'s facial upholding of the Disclosure Requirements on electioneering communications resolves the present as-applied challenge. Specifically, the district court granted summary judgment to the FEC because it found that this Court's statement in *McConnell* that "*Buckley* amply supports application of FECA § 304's disclosure requirements to the *entire range* of 'electioneering communications,'" 540 U.S. at 196 (emphasis added), resolved this as-applied challenge. App. 17a. *McConnell*'s statement, however, was facial-challenge language, closely akin to the *McConnell* statement at issue in *WRTL I*: "We uphold *all applications* of the primary definition and accordingly have no occasion to discuss the backup definition." *McConnell*, 540 U.S. at 190 n.73. *WRTL I* rejected the district court's notion that such facial-challenge language precluded as-applied challenges, concluding that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *WRTL I*, 546 U.S. at 411-12.

This Court needs to decide whether *McConnell's* facial upholding of the Disclosure Requirements resolves all as-applied challenges to them. This is a substantial issue for this Court to decide.

II. Disclosure Requirements Impose an Unconstitutional Burden When Mandated for Non-"Campaign Speech."

For a burden on First Amendment rights to pass muster in the campaign-finance area, a law must meet a threshold requirement and pass constitutional scrutiny. First, the threshold requirement is that the affected speech or activity be unambiguously campaign related. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) ("after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate'" (*quoting Buckley*, 424 U.S. at 80)). Second, if the law passes this threshold requirement, the law must pass the appropriate level of constitutional scrutiny.

A. Disclosure Requirements May Only Be Imposed on Communications That Are Unambiguously Related to a Candidate's Campaign.

Buckley held that disbursements for political speech may not be subjected to compelled disclosure unless they are for communications "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. To assure that "the relation of the information sought to the purposes of the Act [was not] too remote," *id.*, this Court imposed the express-advocacy requirement on certain communications:

To insure that the reach of § 434(e)[, requiring

> disclosure of expenditures,] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related* to the *campaign* of a particular federal candidate.

Id. (emphasis added; footnote omitted). This Court summed up its analysis of the expenditure disclosure provision, indicating that, as construed, the provision "shed[s] the light of publicity on spending that is *unambiguously campaign related*." *Id.* at 81 (emphasis added).

Buckley applied this unambiguously-campaign-related requirement to (**1**) expenditure limitations, *id.* at 42-44; (**2**) PAC status and disclosure, *id.* at 79; (3) non-PAC *disclosure* of contributions and independent expenditures,[8] *id.* at 79-81; and (**4**) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act[, i.e., regulating elections], for they are connected with a candidate or his campaign."). Because *Buckley* expressly applied this unambiguously-campaign-related requirement to the *disclosure of expenditures*, *id.* at 80, it has direct application here.

Buckley employed two tests to implement this

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[8] "Independent expenditure" is a term of art referring to an express-advocacy communication that is not coordinated with a candidate so as to become a contribution. *See* 2 U.S.C. § 431(17).

unambiguously-campaign-related requirement. First, for determining PAC status, the Court created the major-purpose test for "political committees": "To fulfill the purposes of the Act[, i.e., regulating elections,] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*." *Id.* (emphasis added). Second, to limit the speech subject to FECA to only campaign-related speech, this Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate. *Id.* at 44, 80. This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

WRTL II also limited BCRA's new "electioneering communications" to only "*campaign* speech." 127 S. Ct. at 2672 (emphasis added), when it stated its test for functional equivalence: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. So *WRTL II*'s appeal-to-vote test is the application of the unambiguously-campaign-related requirement to electioneering communications, just as the express-advocacy test was the *Buckley* Court's application of the requirement to reporting independent expenditures and the major-purpose test was the application of the requirement to determination of PAC status.

The purpose of the unambiguously-campaign-related requirement—and the appeal-to-vote test applying it—is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections. *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." (footnote omitted; emphasis added)). Positively, it protects what *WRTL II* called "political speech," 127 S. Ct .at 2659, a term it equated with "'genuine issue ads,'" *id.* at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), 2668 (same), 2673 (same), or "issue advocacy," *id.* at 2667, as distinguished from "campaign speech" or "express advocacy." *Id.* at 2659. *WRTL II* explained that "[i]ssue advocacy conveys information and educates," *id.* at 2667, and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect political speech, or issue advocacy, from being chilled. *Id.* at 2669. And lest there be any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that: "the benefit of any doubt [goes] to protecting rather than stifling speech." *Id.* at 2667 (citation omitted). *See also id.* at 2669 & n.7, 2674.

Yet the FEC has asserted that its interest in compelling disclosure extends "beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues . . . ." FEC SJ Mem. (Doc. 55) at 22. The district court agreed by recognizing the FEC's authority to regulate just such speech in this case. App. 1a.

B. The Disclosure Requirement Is Subject to and Fails Strict Scrutiny.

This Court recently reaffirmed that "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Davis*, 128 S. Ct. at 2774-75 (*quoting Buckley*, 424 U.S. at 64). The level of scrutiny to be applied depends on the extent of the burden imposed. *Id.* at 2775.

Here the scrutiny must be strict. The Disclosure Requirements include the disclosure of donors, which is a severe burden. *Buckley* 424 U.S. at 64-66, 68 (identifying per ser burdens), 237 (Burger, C.J., concurring in part and dissenting in part) (stating examples of burdens).[9] An on-communication disclaimer is also

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[9]Evidence of such burdens was put in the *McConnell* record by the National Rifle Association, the Associated Builders and Contractors, the Associated General Contractors of America, the U.S. Chamber, and the ACLU. *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-29 (D.D.C. 2003) (per curiam). The evidence ranged from large numbers of contributions at just below the disclosure trigger amount, to vandalism after disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes that are not popular everywhere and the results of such disclosure. *Id. See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (recognizing that releasing names of volunteers, employees, and members would make it hard to recruit personnel, applying strict scrutiny, and striking down an FEC rule requiring public release of all investigation materials upon conclusion of an investigation); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of*

required by the Disclosure Requirements, for which this Court required strict scrutiny in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."). The scrutiny must also be strict simply because the Disclosure Requirements burden what *WRTL II* called "political speech." 127 S. Ct. at 2664 ("Because BCRA § 203 burdens political speech, it is subject to strict scrutiny.").

Buckley required "exacting scrutiny" of disclosure provisions, 424 U.S. at 64, which it referred to as the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See WRTL II*, 127 S. Ct. at 2669 n.7 (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny."); *see also McIntyre*, 514 U.S. at 347 (*citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), as equating "exacting" scrutiny with "strict" scrutiny).

In applying strict scrutiny, the FEC has the burden of proving that the Disclosure Requirements are narrowly tailored to a compelling interest. *See WRTL II*, 127 S. Ct at 2664 (stating scrutiny standard).

Buckley set out three interests applicable in the disclosure context generally. "First, disclosure provides the electorate with information 'as to where political

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Political Contribution Disclosure, 6 U. Pa. J. Const. L. 1 (2003); Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at http://www.ij.org/publications/other/disclosurecosts.html).

campaign money comes from and how it is spent by the *candidate*' in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67 (emphasis added; footnote omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above." *Id.* at 67-68.

The second and third of these interests deal with preventing corruption. But *Buckley* held that with respect to "independent expenditures," "[t]he absence of prearrangement and coordination . . . with the candidate . . . undermines the value of the expenditure to the candidate . . . [and] alleviates the danger [of] quid pro quo," so that restrictions on independent expenditures do not "prevent[] circumvention of the contribution limitations . . . ." *Id.* at 47. If this is true of independent express advocacy, then *a fortiori* it is true of independent "issue advocacy," *WRTL II*, 127 S. Ct. at 2667. *WRTL II* questioned whether a circumvention interest applies to expenditures, but held that, in any event, it did not apply to speech that is not the functional equivalent of express advocacy: "[T]o justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 2672 (emphasis in original).

WRTL's identification of preventing *quid-pro-quo* corruption as the government's compelling interest in regulating in the campaign-finance area is consistent with *Davis*. 128 S. Ct. 2759. In *Davis*, this Court considered possible compelling interests for burdening (not restricting) a self-funding candidate's ability to make expenditures for his own speech. 128 S. Ct. at 2773. The Court rejected as compelling any interest in equalizing spending and reaffirmed that the only compelling interest in this area is preventing corruption and its appearance. *Id.* So in the present context, where the Disclosure Requirements burden Citizens' political speech, those requirements must be narrowly-tailored to preventing corruption.

Buckley's first interest by its terms deals with "campaign" funds and "candidate" spending, "to aid the voters in evaluating those who seek federal office," 424 U.S. at 66-67, which address the *quid-pro-quo* corruption interest. The Disclosure Requirements here reach independent issue advocacy communications by non-candidates, so the Disclosure Requirements do not address the *quid-pro-quo* corruption interest and do not help the voters evaluate candidates for office. Therefore, the Disclosure Requirements fail strict scrutiny.

The district court, however, did not engage in strict scrutiny, instead relying on its view that (1) the analysis of *WRTL II* does not control beyond the prohibition context to the disclosure context and (2) *McConnell*'s facial analysis resolved as-applied challenges. App. 16a-18a.

So this case presents the purely legal question of whether electioneering communications, that do not contain an "appeal to vote," 127 S. Ct. at 2667, may

constitutionally be subject to the Disclosure Requirements. This presents a substantial issue for this Court to decide.

III. *WRTL II*'s Appeal-to-Vote Test Requires a Clear Plea for Action Urging a Vote.

The district court decided that the Movie failed *WRTL II*'s appeal-to-vote test and so was a prohibited corporate electioneering communication. App. 16a.

WRTL II framed the appeal-to-vote test two ways, and both are freestanding. An "ad" is a regulable electioneering communication "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Conversely, if an ad "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," it is not regulable. *Id.* at 2670. Both of these contain the key "appeal to vote" language. Notably, the test didn't ask whether an ad "supports or opposes," or is "for or against," or "praises or criticizes" a candidate. Rather, it specified that the ad must constitute an "appeal," i.e., a call to act, which appeal is "to vote."

The district court, however, said that the Movie "does not focus on legislative issues," App. 10a, "references the election and Senator Clinton's candidacy," App. 11a, and "takes a position on her character, qualifications, and fitness for office." *Id.* It then recited a statement by "one political commentator featured in *The Movie*," about how the Movie "'g[ave] people the flavor and an understanding of why she should not be president.'" *Id.* (citation omitted). From these, and some excerpts it recited, it concluded that the Movie "is

susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.*

First, it should be noted that *WRTL II* expressly required that in applying the appeal-to-vote test a court must focus on the *language of the communication* itself, i.e., the test "must be objective, focusing on the *substance of the communication* rather than amorphous considerations of intent and effect." *Id.* at 2666 (emphasis added). This focus on the actual words of the communication is also required by *WRTL II*'s rejection of reliance on "contextual factors." *Id.* at 2669. Thus, the district court was wrong to rely on statements not made in the Movie to interpret the Movie.

Second, the district court relied on comments that *WRTL II* made in its *application* of the appeal-to-vote test to the grassroots lobbying context, employing wording from arguments made by the parties. 127 S. Ct. at 2667. But these application statements are not part of the rule itself. *See id.* at 2667, 2670. Thus, whether "political speech," *id.* at 2659, addresses a legislative issue is not part of *WRTL II*'s appeal-to-vote test.

Third, the *WRTL II* test specifically requires that the ad only be capable of being interpreted as an "*appeal to vote*," that "discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election," *id.* at 2669, and that all doubts are to be resolved in favor of the speaker. *See id.* at 2667, 2669 & n.7, 2674. This requires a "call to

action" to distinguish between (1) "discussion of issues and candidates," and (2) "advocacy of election or defeat of candidates." *Buckley*, 424 U.S. at 42. "'The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" 127 S. Ct. at 2670 (citation omitted).

So the correct application of *WRTL II*'s test is whether there are actual words in the Movie that constitute an "appeal to vote." In the Movie, there is no "exhortation to vote," nor a "clear plea for action" urging a vote, nor even a "Don't let him do it!," which was found in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), to have "urged readers to vote against Jimmy Carter." *Id.* at 865. Thus, the Movie "may reasonably be interpreted as *something other* than as an appeal to vote," *WRTL II*, 127 S. Ct. at 2670 (emphasis added). A reasonable interpretation is that it is a full-length, documentary movie about the public life of Senator Hillary Clinton.

The question of the proper scope of *WRTL II*'s appeal-to-vote test, and whether it was correctly applied in this case to prohibit the Movie, is a substantial question that this Court should decide.

IV. A Feature-Length Movie May Not Be Treated as the Broadcast "Ads" at Issue in *McConnell*.

The Movie is categorically different from the broadcast "ads" at issue in *McConnell*, 540 U.S. at 126, that were the subject of the studies relied upon by Congress in passing BCRA and by this Court and the District

Court in *McConnell*. *See infra*. While the FEC has correctly noted that the electioneering communication definition "draws no distinction between ad[s] and movies," FEC SJ Mem. (Doc. 33) at 33, this begs the question of whether the First Amendment mandates such a distinction.

Examination of the *McConnell* record indicates that full-length documentary films were nowhere in the sights of the campaign finance reform lobby or Congress in promoting and passing BCRA, nor were they in the consideration of the district court or the this Court in *McConnell*. *McConnell* specifically identified the focus of BCRA as being "advertisements," "ads," and "commercials," *see McConnell*, 540 U.S. at 126-28, and the opinion nowhere mentioned a book or a movie as the focus of the law. *McConnell* specifically identified the sort of communication that it perceived to be the problem that BCRA addressed, i.e., the Bill Yellowtail "ad," which was a brief commercial. *Id.* at 193 n.78.

In the *McConnell* three-judge district court, the court's per curiam memorandum opinion plainly identified "ads" as being the communications at issue in that facial challenge, actually equating "electioneering communication" and "so-called 'issue *ads*'," *McConnell*, 251 F. Supp. 2d at 184 (emphasis added), and consistently spoke of "ads" and "advertisements," never movies. *See id.* at 229-33.

Similarly, the three separate district court opinions are replete with references to "ads" and "advertisements," but not movies. Judge Leon specifically identified the sham issue ads that BCRA targets: "In an attempt to prevent actual and apparent corruption

arising from the funding of such sham issue *advertisements*, Congress enacted a sweeping set of reforms . . . ." *Id.* at 757 (op. of Leon, J.) (emphasis added). And he cited the government's studies which only examined *advertisements* (both "genuine" and "sham"). *Id.* at 796-97. Judge Kollar-Kotelly likewise confirmed that the government's studies were based on "advertisements," *see*, *e.g.*, *id.* at 719-24 (op. of Kollar-Kotelly, J.), and Judge Henderson specifically pointed out that a 30-minute NRA "infomercial" and two 30-minute "news magazine[s]" were not included in the government's studies. *Id.* at 305-06, 316-17 (op. of Henderson, J.). So when *WRTL II* framed the appeal-to-vote test as applicable to "an *ad*," 127 S. Ct. at 2667, it correctly identified the sort of communication targeted by the electioneering communication restrictions.

A full-length documentary movie, therefore, is not the same as an "ad," even if the movie is broadcast, and the record in *McConnell* provides no justification for treating it as such. Consequently, a full-length movie enjoys the same, full First Amendment protection as a book has historically enjoyed. *See Jenkins v. Georgia*, 418 U.S. 153 (1974) (movies protected); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (books protected). It is not subject to regulation as an "ad."

Thus, whether a feature-length documentary movie is subject to the restrictions imposed on electioneering communications is a substantial question for this Court to decide.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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