

Supreme Court, U.S.  
MOTION FILED

JUL 31 2009

William K. Outer,  
Clerk

No. 08-205

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IN THE  
Supreme Court of the United States

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CITIZENS UNITED,

*Appellant,*

— v. —

FEDERAL ELECTION COMMISSION,

*Appellee.*

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

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**MOTION OF SENATOR MITCH MCCONNELL  
FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT  
AS *AMICUS CURIAE* AND FOR A DIVIDED  
ORAL ARGUMENT**

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Pursuant to Rules 21 and 28 of the Rules of this Court, Senator Mitch McConnell respectfully moves this Court for leave to participate in oral argument as *amicus curiae* and for divided oral argument.

The Court has directed the parties and *amici* to submit supplemental briefing in this case addressing the following question: “For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), which addresses the

facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002. 2 U.S.C. §441b.”  
Order, June 29, 2009.

Senator McConnell respectfully submits that he is uniquely qualified to address the latter part of the Court’s question, relating to *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) (“*McConnell*”), in which he served as lead Plaintiff and Appellant in this Court. The Senator, a member of the Congress for more than 25 years, has been a leader in the United States Senate in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. In *McConnell*, Senator McConnell brought suit against the Federal Election Commission, Appellee in the present matter, challenging the constitutionality of the same provisions of the Bipartisan Campaign Reform Act as to which the Court has requested additional briefing. Senator McConnell’s distinct interests as a principal participant in that litigation and his interest and knowledge about the question the Court is considering would present the Court with a different viewpoint from that of Citizens United, a private corporation litigating over a video-on-demand telecast of a single documentary film.

In the *McConnell* case itself, this Court allocated four hours of oral argument time split among a large number of interested parties. *See McConnell v. FEC*, 539 U.S. 974 (2003). Divided argument and additional time for oral argument has been permitted by this Court in many important cases in the federal election area. *See FEC v. Wisconsin Right to Life, Inc.*, 549 U.S. 1320 (2007) (Solicitor General’s motion for divided argument granted); *FEC v. NRA Political Victory Fund*, 512 U.S. 1285 (1994) (motion of Solicitor General for leave to participate in

oral argument as *amicus curiae* and for divided argument granted); *Federal Election Comm'n v. National Conservative Political Action Committee*, 469 U.S. 1015 (U.S. 1984) (motion of Democratic National Committee for divided argument granted); *Common Cause v. Schmitt*, 452 U.S. 913 (1981) (“Motions of appellants for divided argument and for additional time for oral argument granted. A total of one and one-half hours is allotted for oral argument to be divided as follows: 25 minutes for Federal Election Commission; 20 minutes for Common Cause et al.; and 45 minutes for appellees.”)

On July 23, 2009, Senators John McCain and Russell Feingold and former Representatives Christopher Shays and Martin Meehan, together with the Solicitor General on behalf of Appellee, also sought divided argument. With the consent of the Solicitor General, those *amici* have requested 10 minutes of Appellee’s allotted time for oral argument. See Motion for Divided Argument, filed July 23, 2009. Those *amici* argue that their participation in the *McConnell* case and their familiarity with its “elephantine record” would allow them to be of great assistance to the Court. *Id.* The grounds urged by those *amici* in support of their motion apply with equal force to Senator McConnell: (1) he has actively participated in the legislative debate concerning the passage of BCRA, (2) he has been an active participant in numerous legal challenges to the Act,<sup>1</sup> (3) BCRA Section 403 specifically provides for any member of the House or Senate to intervene in a challenge to its constitutionality, and (4) he has “a significant interest in the case and can offer the Court an additional perspective.” *Id.*

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<sup>1</sup> Besides acting as the lead Plaintiff in *McConnell*, Senator McConnell has participated as an *amicus* in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006), *FEC v. Wisconsin Right To*

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The Court has asked the parties and *amici* to address two distinct questions. Citizens United has submitted a brief which focuses almost exclusively on the Court's first question relating to *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). See Supplemental Brief for Appellant, submitted July 24, 2009. As to the issue raised by this Court concerning the *McConnell* case, the position taken by Citizens United is sparse and tentative at best, noting that the holding in *McConnell* would be "undermined, perhaps fatally" if this Court were to overrule *Austin*. Supplemental Brief of Appellant at 21. The Citizens United Brief does not ask this Court to overrule its ruling in *McConnell*. Senator McConnell, while joining in Appellants' arguments concerning *Austin*, has submitted his own brief, *amicus curiae*, which focuses almost exclusively on the continued vitality of the *McConnell* case insofar as it addressed the constitutionality of Section 203 of BCRA and which seeks reversal of the ruling in *McConnell* holding Section 203, on its face, to be constitutional. The brief is grounded in and supported by the record in the *McConnell* case. See Brief *Amicus Curiae* of Senator Mitch McConnell in Support of Appellant, filed July 31, 2009.

Appellant Citizens United has declined Senator McConnell's request to divide its oral argument time. Although it is not Senator McConnell's desire to deprive Citizens United of its full allotment of oral argument time, if that is the only solution consistent with the Court's rules that would permit Senator McConnell's views to be heard, he respectfully requests that his

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*Life, Inc.*, 127 S. Ct. 2652 (2007) and *Randall v. Sorrell*, 548 U.S. 230 (2006).

motion for divided oral argument be granted and his counsel be allocated 10 minutes of Appellant's time.

In the alternative, Senator McConnell respectfully suggests that the Court consider extending the time for oral argument in this important case from 60 to 80 minutes, to permit counsel for the FEC and counsel for Citizens United 30 minutes each, to permit counsel for Senators McCain and Feingold and former Representatives Shays and Meehan to present argument for 10 minutes and to permit Senator McConnell's counsel to present 10 minutes of argument on his behalf. Citizens United consents to this request.

Respectfully submitted,

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with permission*