No. 08-205

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

RESPONSE TO MOTION OF SENATOR MITCH MCCONNELL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR A DIVIDED ARGUMENT

Appellant Citizens United opposes the motion of Senator Mitch McConnell for leave to participate in oral argument as *amicus curiae* and for a divided argument.[1]

Senator McConnell's motion states that "[t]he Court has asked the parties and *amici* to address two distinct questions." Mot. 4. He faults Citizens United for "submitt[ing] a

[1] Senator McConnell states that "Citizens United consents" to his alternative request for an enlargement of the argument time and division of that enlarged time. This is incorrect. Senator McConnell's mistaken representation is apparently based upon a July 30 conversation Senator McConnell had with Citizens United's President, David Bossie, in which Mr. Bossie stated he would have no objection to Senator McConnell's presenting ten minutes of oral argument if the Court allotted him extra time to do so. Mr. Bossie, who is not a lawyer and not familiar with the procedures of this Court, did not understand that Senator McConnell was proposing to enlarge the Appellee's argument time as well.

brief which focuses almost exclusively on the Court's first question relating to *Austin*" and for taking a position he deems "sparse and tentative at best" with respect to the fate of *McConnell*. Mot. 4. Senator McConnell asserts that his status as "lead Plaintiff and Appellant" in *McConnell* makes him "uniquely qualified" to address the Court's question concerning *McConnell*, and would enable him to "present the Court with a different viewpoint from that of Citizens United." Mot. 2.

Citizens United respectfully submits that Senator McConnell's motion is predicated on three mistaken premises.

First, Senator McConnell incorrectly views the Court as having posed "two distinct questions." Mot. 4. In fact, the Court asked for supplemental briefing on *one* question: "For the proper disposition of this case, should the Court overrule either or both" *Austin* and that part of *McConnell* addressing the facial validity of Section 203 of BCRA. Citizens United has answered that single question as follows: For the proper disposition of this case, the Court should reject *Austin*'s anti-distortion rationale and overrule *Austin*, and because the relevant portion of *McConnell* is justified solely by *Austin*'s anti-distortion rationale, overrule that portion of *McConnell* as well, unless the government identifies some other compelling governmental interest that can justify its suppression of political speech. It is understandable that Senator McConnell wishes that Citizens United had urged the overruling of *McConnell* without regard to whether doing so is appropriate for the disposition of this case, but his dissatisfaction is neither a basis to enlarge oral argument nor to divide it.

Second, Senator McConnell apparently believes that the September 9, 2009 argument will consider only whether *Austin* or the pertinent portion of *McConnell* should be overruled. But as the order of June 29, 2009 itself makes clear, it is "the case" that has been set for reargument, not simply the question posed for supplemental briefing. While Senator McConnell doubtless has familiarity with the record of the case bearing his name, he does not have any special familiarity with the record of *this* case.

Third, while Senator McConnell's experience "in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform" is indisputably great, his "interest and knowledge" in the Court's supplemental question is not remotely "unique[]." Senator McConnell was not the only "principal participant" in the consolidated *McConnell* action; there were many other plaintiffs, including Citizens United. *See Paul v. FEC*, No. 02-1747, J.S. iii. Though it is true that Citizens United did not participate in the oral argument before this Court in *McConnell*, Senator McConnell could not fault Citizens United for that. Senator McConnell opposed Citizens United's motion to participate in that oral argument stating that "oral argument is not necessary on [Citizens United's] claims" because they "may readily be resolved on the briefs." *McConnell v. FEC*, No. 02-1674, Response to Mots. for Divided Argument at 3 (July 18, 2003). That statement could as readily be made concerning the various arguments of the many *amici curiae* who have, belatedly, shown an interest in this case.

Citizens United respectfully submits that there is no compelling circumstance that warrants the division of either Citizens United's or the government's argument. BCRA's congressional sponsors have no interest in this case not adequately represented by the

government. And the positions urged by Senator McConnell are adequately represented by Citizens United. Presumably because it perceives a tactical benefit in doing so, the government has consented to the participation of BCRA's congressional sponsors in oral argument. But that itself should not mandate the equally duplicative, unnecessary, and dilutive diminution of Citizens United's argument.

For the foregoing reasons, and because Senator McConnell's central contention that the "appeal to vote" standard set forth in *WRTL II* is unconstitutionally vague (McConnell Br. 15) may readily be resolved on the basis of the arguments set forth in his brief, Senator McConnell's motion for leave to participate in oral argument and for divided argument should be denied.

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