No. 07-_____

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 as-applied challenges to the disclosure requirements (reporting and disclaimers) imposed on electioneering communications by the Bipartisan Campaign Reform Act of 2002 ("BCRA") are foreclosed 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., App. 15a (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003)).

2. Whether the disclosure requirements imposed on electioneering communications by BCRA are unconstitutional as applied to broadcast advertisements protected against prohibition by the appeal-to-vote test of *Wisconsin Right to Life v. FEC*. 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), because such communications are protected "political speech," not regulable "campaign speech," *see, e.g., id.* 2659 (distinguishing the two types of speech), and therefore are not "unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

3. Whether the District Court erred in denying Citizens United a preliminary injunction to protect its broadcast advertisements against application of BCRA's disclosure requirements for electioneering communications.

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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Introduction

This is an appeal of the denial of a preliminary injunction, but that procedural posture does not diminish the importance of this case or the need for this Court to decide the questions presented. In fact, it makes it more urgent because this Court recognized in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, (2007) ("*WRTL II*"), that cases involving electioneering communications will usually be brought in eve-of-election, preliminary-injunction contexts, *id.* at 2665-67 (controlling opinion of Roberts, C.J., joined by Alito, J.), 2705 (Souter, J., joined by Stevens, Ginsburg & Breyer, dissenting), and they will need to be resolved expeditiously in that context if effective protection of core First Amendment rights is to be provided. Otherwise, as happened to Wisconsin Right to Life, rights may be vindicated at some later date when the need to speak that gave rise to the challenge has been irretrievably lost.

Just as happened to Wisconsin Right to Life with its anti-filibuster 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 agreeing, App. 15a, that facial-holding language in *McConnell v. FEC*, 540 U.S. 93 (2003), precludes as-applied challenges to a BCRA electioneering communication provision. This Court needs to quickly reverse this rejection of its unanimous *WRTL I* holding that a *McConnell* facial decision could *not* decide as-applied challenges, which holding applies equally here.

Buckley v. Valeo, 424 U.S. 1 (1976), held that expenditures may not be subject to compelled disclosure unless they are for communications "unambiguously

related to the campaign of a particular federal candidate," *Id.* at 80 (imposing the express advocacy construction to avoid "too remote" and "impermissibly broad" application of disclosure requirements). And *WRTL II* held that communications that are protected under its test ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," 127 S. Ct. at 2667) are protected "political speech" (also described as "issue advocacy"), *not* "campaign speech," *see*, *e.g.*, *id.* at 2673, also described as "electioneering." *Id.* at 2667-69. Yet the FEC insists that speech protected by *WRTL II*'s "appeal to vote" test, so as to be neither "campaign speech" nor "electioneering," must yet be subject to disclosure requirements. The district court has followed the FEC's lead. App. 15a. This is inconsistent with *Buckley*'s "unambiguously campaign related" requirement, 424 U.S. at 81, which has been a guiding constitutional first-principle that this Court has applied in all of its campaign-finance law jurisprudence and which is equally applicable to disclosure requirements as to prohibitions.

Until December 14, 2007, it seemed possible that the FEC would not impose BCRA's disclosure requirements on electioneering communications that are protected "political speech" or "issue advocacy" under *WRTL II*'s appeal-to-vote test. The FEC was conducting rulemaking to implement this Court's *WRTL II* decision, and the rulemaking petition had urged the agency not to compel disclosure as to communications protected by *WRTL II*. *See* James Bopp, Jr. & Richard E. Coleson, *Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16*

(Electioneering Communications) (Sep. 29, 2007), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/2007/james_madison_center_for_free_speech_eccomment16.pdf. But on December 14, the FEC refused and adopted a final rule that applies disclosure requirements on ads protected by *WRTL II*'s appeal-to-vote test. And it 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). This case should be accepted and decided by this Court so that the Court may reject the FEC's expansive assertion of regulatory authority over all issue advocacy—all at a time when the FEC is unable to even give advisory opinions because it lacks enough commissioners to have a quorum.

Opinions Below

The district court's unreported order and opinion denying preliminary injunction are reprinted in the Appendix at 1a and 2a.

Jurisdiction

The preliminary injunction motion was denied January 15, 2008. App. at 1a. Citizens United noticed appeal to this Court on January 16, 2008. App. at 20a. This Court has appellate jurisdiction over the interlocutory order of the three-judge court appointed under BCRA § 403. 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

The following constitutional amendment, statutes, and regulations are appended (page numbers in brack-

ets): U.S. Constitution, First Amendment [21a]; 2 U.S.C. § 434(f)(1)-(3) [22a]; 2 U.S.C. § 441d [26a]; BCRA § 403 [28a]; 11 C.F.R. § 100.29 [29a]; 11 C.F.R. § 114.2(a)-(c) [36a].

Statement of the Case

This is an as-applied challenge to the constitutionality of **(a)** BCRA **§ 201**, 116 Stat. 88 (entitled "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 and **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers." *See* 11 C.F.R. § 110.11. 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. The Reporting Requirement is codified at 2 U.S.C. § 434(f). App. 22a. The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a). App. 26a.

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

Citizens United was founded in 1988. Its purpose is to promote the social welfare through informing and educating 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 United has a related § 501(c)(3) entity called Citizens United Foundation ("CUF").

Citizens United 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 United fulfills its purposes is through the production and distribution of documentary films. Its first major documentary film, in 2004, was entitled *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 United 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 United 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 Festival. *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.

In January 2008, Citizens United released a feature length documentary film on Senator Hillary Clinton entitled *Hillary: The Movie*. It is currently being shown in theaters and sold on DVDs. 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 is being published by Thomas Nelson Publishers, which has purchased the book rights to the film and is paying Citizens United an advance royalty on sales.

When Citizens United 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

United 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.

Citizens United intends to fund three television ads ("Ads")[1] to promote *Hillary: The Movie* that will meet

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[1]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 . . ."
"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

the electioneering communication definition at 2 U.S.C. § 434(f)(3). Citizens United 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 will meet the electioneering communication definition at 2 U.S.C. § 434(f)(3) (and 11 C.F.R. § 100.29), because they (**a**) will be broadcast on Fox News cable and major network stations so that they (**b**) will be receivable by more than 50,000 persons, *see* http://gullfoss2.fcc.gov/ecd (Federal Communications Commission's Electioneering Communications Database), in states where caucuses, conventions, or primary elections will be selecting a party nominee, (**c**) will clearly reference Senator Clinton, a Democratic presidential candidate, and (**d**) will be made within 30 days before presidential primary elections in a series of states, depending on when the requested judicial relief is permitted, so the Ads may not be broadcasted without being burdened by the Disclosure Requirements. *See* http://www.fec.gov/info/charts_ec_dates_prez.shtml (electioneering communication periods).

Citizens United will broadcast the 30-second ad entitled "Questions" on Fox News cable, and may broadcast it on major television network stations, too. Citizens United will broadcast the 10-second ads "Wait" and "Pants" on major television network stations, but not on Fox News.

[Film Title Card]

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

[Visual Only] www.hillarythemovie.com.

The disclaimer language mandated by FEC rule, *see* 11 C.F.R. § 110.11, takes about 4 seconds to narrate, making 10-second ads virtually impossible and 30-second ads extremely difficult to do and have any significant time left for substantive communication.[2]

Citizens United's Ads reference www.hillarythemovie.com, which promotes showings of *Hillary: The Movie* in theaters and sales of *Hillary* on DVD. The DVD is also available from major national retailers, such as Amazon.com.

Citizens United wanted to begin running its Ads from mid-December 2007 to mid-January 2008 for its initial media buy. Citizens United now intends to begin broadcasting its ads during electioneering communication periods when it gets the relief requested herein. If Senator Clinton becomes the presidential nominee of her party, Citizens United plan to run the Ads (and possibly materially-similar ads) on Fox News cable (and possibly other broadcast outlets) within 30 days before the Democratic National Committee Convention (the electioneering communication period is July 29 to August 28, 2008) and within 60 days of the November general election (the electioneer-

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[2]The disclaimer requires (**1**) a spoken statement that "Citizens United is responsible for the content of this advertising," and (**2**) a written statement appearing on screen stating (**a**) "the name and permanent street 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).

ing communication period is September 5 to November 4, 2008). At these times, the Ads will also meet the electioneering communication definition. Citizens United believes that these are the times when the public's interest in Senator Clinton will be at its peak, which is the key to maximizing box office and DVD sales for *Hillary*.

Citizens United is in the process of making a documentary film about presidential candidate Senator Barack Obama, which it intends to have ready for release by June 2008.[3] Citizens United will have ads that are substantially similar to the Ads for *Hillary* to promote its Senator Obama documentary, but it cannot offer its ads for judicial review in advance because they are not prepared. They will not be prepared until the movie is completed because they will be based on scenes from the documentary. Nor can Citizens United seek an advisory opinion on these ads because they are neither begun nor completed and because the FEC is, for the foreseeable future, unable to issue advisory opinions due to an insufficient number of commissioners. These ads will also be run during electioneering communication periods and subject to the Disclosure Requirements.

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[3]Citizens United moved for leave to file an affidavit updating the facts of this case on January 9, 2008 (Doc. 35 (with affidavit attached)), including the details about the Senator Obama documentary, but the district court denied the motion (Doc. 36). *See also* Robert Stacey McCain, *'Hillary' Producer is Ready for Obama, Too*, Wash. Times, Jan. 15, 2008, *available at* www.washingtontimes.com/article/20080115/NATION/513973288 (information re Citizens United's documentary).

In addition to being protected issue advocacy, the Ads meet the requirements of the recently-enacted FEC rule recognizing a commercial-transaction, safe-harbor exception to the electioneering communication prohibition because each (**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).

The FEC concedes that the two 10-second ads fit its regulatory commercial transaction exception, but it asserts that the 30-second ad, "Questions," does not fall within that safe harbor. Opp'n to 2d Mot. for Prelim. Inj. (Doc. 33) at 17. However, the FEC does concede that "on balance" the "Questions" ad is protected from prohibition under *WRTL II*'s appeal-to-vote test (127 S. Ct. at 2667). *Id.* Seven days after this suit was filed, the FEC was unsure whether the "Questions" was a protected ad—under its regulatory test or *WRTL II*'s test—and declared that it needed more time to make up its mind. Opp'n to Mot. for Consol'n (Doc. 19) at 8. Seventeen days later, the FEC finally concluded that the 30-second ad was protected under *WRTL II*.

The Ads, however, are still subject to BCRA's Disclosure Requirements because the FEC has recently refused to exclude from disclosure "electioneering communications" that meet this Court's appeal-to-vote test. *See* http://www.fec.gov/law/law_rulemakings.

shtml#ec07 (rulemaking documents, including requests to eliminate disclosure for ads not subject to electioneering communication prohibition). Notably, two commissioners voted against compelling disclosure for ads protected by *WRTL II*, but they were outvoted by other commissioners who wanted to require disclosure. *See Minutes of FEC Open Mtg.* (Nov. 20, 2007), *available at* http://www.fec.gov/agenda/2007/approve 07-79.pdf.

One of the chief concerns with the Reporting Requirement is 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.

Citizens United will have donors that it will be required to disclose (as to name and address), absent the judicial relief requested here, because it will pay for the Ads "exclusively from a segregated bank established to pay for electioneering communications permissible under 11 C.F.R. § 114.15" (rule implementing *WRTL II* by permitting corporate electioneering communications), to which donors will have "donated an amount aggregating $1,000 or more . . . since the first day of the preceding calendar year." 11 C.F.R. § 104.20.[4]

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[4]The present case is far from moot, but it is important to note that Citizens United's need for judicial relief will be ongoing because it also intends to broadcast materially-similar ads mentioning public figures who are candidates in materially-similar situations during future electioneering communication periods when public interest is at a peak.

Citizens United intends to broadcast its Ads without complying with the Disclosure Requirements, but it will not broadcast its Ads if it does not obtain the judicial relief presently requested. Instead, Citizens United will be forced to include the compelled speech of a disclaimer, which (**a**) requires it to mislead the public by identifying its speech as electioneering speech when it is not because this Court has held that such speech is not sufficiently related to elections to be regulated as electioneering and (**b**) deprives Citizens United of valuable time in its short and expensive broadcast Ads, which deprivation and burden is not justified by any constitutional or congressional authority. Adding the disclaimer will preclude Citizens United from running its 10-second ads[5] and will

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There is a strong likelihood that such similar situations will recur, given the facts that Plaintiff has engaged in similar activity in the past and that such activity is common and regularly recurring for it—as are conflicting electioneering communication periods.

[5]On November 15, 2007, Club for Growth PAC ("CFG-PAC") requested an FEC advisory opinion granting an 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 (Pending Advisory Opinion Requests). The request is still pending and has been placed on the agenda

require it to revise its 30-second ad so as to be much less effective—both as to the issue advocacy contained in it and as a vehicle for promoting *Hillary: The Movie.*

And Citizens United will be compelled to file reports of its activity, which (**1**) requires it to mislead the public by reporting its speech as campaign speech when it is not; (**2**) deprives Citizens United of valuable time and resources in complying with reporting requirements, which deprivation and burden is not justified by any constitutional or congressional authority; and (**3**) will, in Citizens United's belief, based on long experience, substantially reduce the number of donors and amount of donations to Citizens United because many potential donors do not wish to be publicly so identified for a variety of legitimate reasons.

In such an event, Citizens United will be deprived of its constitutional rights under the First Amendment to the United State Constitution by these substantial burdens on its highly-protected, core "political speech," *WRTL II*, 127 S. Ct. at 2659 (twice), 2660, 2664, 2665 (thrice), 2666 (twice), 2669, 2671-74, and will suffer irreparable harm. There is no adequate remedy at law.

The procedural history, as relevant to the present appeal, is that, based on these facts and claims, Citi-

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for the Commission's January 24, 2008 meeting. The draft advisory opinion submitted by the FEC Office of General Counsel argues against the exemption. *See* FEC Office of General Counsel, *Draft AO*, Agenda Doc. No. 08-03, *available at* www. fec.gov (Pending Advisory Opinion Requests). Of course, the FEC lacks sufficient commissioners to issue a formal advisory opinion.

zens United filed its *Verified Complaint for Declaratory and Injunctive Relief* on December 13, 2007, and moved, inter alia, 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). The consolidation motion was denied (Doc. 29) and the preliminary injunction motion, as to broadcasting the Ads without the burdens of the Disclosure Requirements, was denied on January 15, 2008. App. 1a. The district court relied primarily on its assertions that *McConnell* precluded as-applied challenges and *WRTL II* didn't decide the disclosure issue. Mem. Op., App. 15a. On January 16, 2008, a notice of appeal was filed. App. 20a.

The Questions Presented Are Substantial

While Citizens United suffers substantial harm to its First Amendment rights because it was denied injunctive relief, the substantial questions raised in this appeal also include vindication of core political rights generally and proper application of this Court's precedents by federal courts and agencies.

I. Cases of This Sort Must Be Decided and Appealed as Preliminary Injunctions.

This is an appeal of the denial of a preliminary injunction. That does not diminish the importance of this case or the need for this Court to decide the questions presented.

In *WRTL II*, Wisconsin Right to Life originally sought a preliminary injunction in order to broadcast its anti-filibuster, grassroots-lobbying ads at an effective time. The District Court first dismissed that case, deciding that certain facial-challenge language in

McConnell, 540 U.S. 93, precluded as-applied challenges, which this Court reversed. *WRTL I*, 546 U.S. 410. Ultimately, this Court decided in the summer of 2007 that WRTL's ads were constitutionally protected all along, so that WRTL should have been able to broadcast them in the summer of 2004. *WRTL II*, 127 S. Ct. 2652. For that to have happened, WRTL should have gotten a preliminary injunction, expeditiously followed by declaratory and permanent injunctive relief.

WRTL II recognized that, given the eve-of-election definition of electioneering communications, there would be a need for expeditious judicial relief in that context, so the opinion set out standards for speedy resolution of challenges. *Id.* at 2665-67. And the dissent expressly pointed to preliminary injunctions as the remedy for making such challenges workable. *Id.* at 2705 (Souter, J., joined by Stevens, Ginsburg & Breyer, dissenting). The necessary implication is that preliminary injunctions *should* be available in such cases and should not be rejected based on standards that would make it impossible for a preliminary injunction to *ever* be granted.

In the context of electioneering communications, by definition, and core political speech in general, the rejection of a preliminary injunction motion will often deny a group's ability to engage in timely protected political speech—as happened to WRTL as to the timely broadcast of its anti-filibuster ads in the summer of 2004. Protection of core political speech in this context requires that preliminary injunctions be readily available to protect such speech. This is a substantial issue.

II. As-Applied Constitutional Challenges to BCRA Are Permitted.

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 agreeing, that *McConnell*'s facial upholding of the BCRA Disclosure Requirements on electioneering communications precludes future as-applied challenges. The effect of the lower court's ruling is to bar all future as-applied challenges, at least in the District of Columbia.

Specifically, the district court decided, App. 15a, that Citizens United did not have a substantial likelihood of success on the merits because this Court said 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). Of course, this is 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 as-applied challenges to the Disclosure Requirements continue to be available, consistent with *WRTL I*, or whether such challenges are precluded by *McConnell*'s facial deci-

sion. This is a substantial issue.

III. Disclosure May Not Be Compelled for Non-"Campaign Speech."

Buckley held that expenditures 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 construction:

> 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).]

The Court returned to this "unambiguously related" language in summing 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,[6] *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 [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 unambiguously-campaign-related requirement. First, to implement the requirement for PAC status, the Court created the major-purpose test for "political committees": "To fulfill the purposes of the Act [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). This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Second, to implement the unambiguously-campaign-related requirement as to expenditures, the Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candi-

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[6]"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).

date. *Id.* at 44, 80.

WRTL II applied the unambiguously-campaign-related requirement to eliminate overbreadth in the regulation of BCRA's new "electioneering communications" 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." 127 S. Ct. at 2667. *WRTL II* reiterated the requirement when it said that the corporate-form corruption interest does not "extend[] beyond *campaign* speech." *Id.* at 2672 (emphasis added). 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 Court's application of the requirement to reporting independent expenditures and the major-purpose test was the application of the requirement to PAC disclosure.

WRTL II also reaffirmed that the purpose of the unambiguously-campaign-related requirement—and its 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 the Court calls "'genuine issue ads,'" *WRTL II*, 127 S. Ct. at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), 2668 (same), 2673 (same), or "issue advocacy." *Id.* at 2667. *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 issue advocacy from being chilled, and any doubt must be resolved in favor of free speech:

> [W]e have acknowledged at least since *Buckley* . . . that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S. at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor. [*Id.* at 2669.]

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 (*citing New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)), "in a debatable case, the tie is resolved in favor of protecting speech," *id.* at 2669 n.7, and "the benefit of the doubt [goes to] speech, not censorship." *Id.* at 2674.

In other words, free speech about public issues, especially political ones, is so central and essential to our system of government that it is better to allow some theoretically-regulable speech to go unrestricted than to chill public debate. Thus, *WRTL II* reaffirmed what the Court held in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002): "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." *WRTL II*, 127 S. Ct. at 2670 (*quoting Ashcroft*, 535 U.S. 234 at 255). To do otherwise would "'turn[] the First Amendment upside down.'" *Id.* (citation omitted).

WRTL II applied the appeal-to-vote test (an unambiguously-campaign-related test) to determine that ads protected under it are protected "political speech," i.e., "issue advocacy," *not* "campaign speech," i.e., "electioneering." *Id.* at 2667-69, 2673. It is inconsistent with the unambiguously-campaign-related requirement to require disclosure of speech that is neither "campaign speech" nor "electioneering." Ads that are, by definition, not "electioneering" must not be treated as "*electioneering* communications" for disclosure purposes. The district court's decision otherwise raises a substantial issue.

IV. Citizens United Should Have Received a Preliminary Injunction.

Just as WRTL should have received a preliminary injunction to protect its political speech in 2004, so Citizens United should receive one now to protect its constitutionally-protected political speech from unwarranted burdens.

Four factors govern preliminary injunctions in the District of Columbia Circuit:

> To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. [*Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citations omitted) (preliminary injunction standards). *See also Apotex Inc. v. U.S. Food and Drug Admin.*, – F. Supp. 2d –, WL 2695006, at *3 (D.D.C. 2007) (applying same standards for temporary restraining order).]

"A district court must 'balance the strengths of the requesting party's arguments in each of the four required areas," and "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *England*, 454 F.3d at 297.[7]

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[7] *England* cited a decision from this Court for the proposition that "'[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," *id.* (citation omitted), but neither *England* nor the case it cited involved First Amendment expression and association rights in the core area of political speech. So the status quo argument has no applicability to the present case, which is rather governed by the holding of *Elrod v. Burns*, 427 U.S. 347, 373 (1976), that "the loss of First Amendment freedoms, for

A. There Is Likely Success on the Merits.

The FEC concedes, and the district court decided, that Citizens United's Ads are protected from the electioneering communication prohibition by *WRTL II*'s appeal-to-vote test. App. 14a.

This leaves the purely legal question of whether "electioneering communications" that do not contain an "appeal to vote," 127 S. Ct. at 2667, may still be subject to compelled disclosure. Since the Ads are not an "appeal to vote," then necessarily under *WRTL II* they are protected "political speech" ("issue advocacy"), not "campaign speech," *id.* at 2673, or "electioneering," *id.* at 2667-69, and are thus not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. As such, they are not subject to either prohibition or disclosure. Therefore, Citizens United has a likelihood of success on the merits, and a preliminary injunction should have been granted.

Instead, the district court ignored the constitutional analysis, set forth above, as to the unambiguously-campaign-related requirement and largely ignored the argument that *WRTL II* imposed this requirement on

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even minimal periods of time, unquestionably constitutes irreparable injury." *See England*, 454 F.3d at 299 ("*Elrod* involved political speech and freedom of expression"). Where loss of First Amendment freedoms is occurring, maintaining the status quo is unjust and unjustified. Nor does a presumption of the constitutionality of a statute apply in the face of the First Amendment's strict and intermediate standards of review, which presume unconstitutionality by requiring the government to specially justify burdens on expression and association.

electioneering communications, relying instead on the notions that *McConnell* precludes this as-applied challenge and *WRTL II* didn't decide the issue. App. 15a. This presents a substantial issue for this Court to decide.

B. The Other Injunction Elements Are Met.

The other elements for granting a preliminary injunction rise or fall with the likelihood of success on the merits. If Citizens United's arguments are sound on the merits element, then there is irreparable harm to Citizens United if relief is denied, while others will not be harmed and the public interest will be served, if relief is granted. The district court candidly acknowledged that its analysis turned on its perception of the likelihood of success on the merits: "If Citizens had made more of a showing that it had a chance of prevailing in this Court on the merits, these kinds of harms might have warranted preliminary relief." App. 17a-18a. The other elements of the preliminary injunction standard will be briefly addressed to complete the analysis.

Irreparable Harm. Citizens United will suffer irreparable harm unless it receives the requested injunctive relief. Just as in *WRTL II*, 127 S. Ct. 2652, WRTL forever lost the opportunity to broadcast its fully protected issue ads because it did not receive a preliminary injunction—which was plainly irreparable harm—so, too, will Citizens United be irreparably harmed if it is unable to run its Ads. Citizens United wishes to engage in First Amendment activities that are "'both certain and great . . . actual not theoretical,'" *England*, 454 U.S. at 297 (citation omitted), are "of such imminence that there is a 'clear and present' need

for equitable relief to prevent irreparable harm," *id.* (citation and emphasis omitted), and in which "the injury [is] beyond remediation." *Id.* Plaintiff is barred by criminal penalties from engaging in First Amendment expression and association activities it wishes to do, which "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.

The FEC, however, argued below that Citizens United had not provided "specific evidence" of a "reasonable probability" of threats, harassment and retaliation if it's donors are disclosed, as it claims is required by *McConnell*, 540 U.S. at 198-99. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 32-33. However, this Court held in *Buckley* that compelled disclosure involves inherent harm. 434 U.S. at 64. Furthermore, the FEC argues that, in any event, if a preliminary injunction is not granted, Citizens United would only be subject to an FEC investigation, which it claims does not constitute irreparable harm. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 35. This argument, if accepted, would preclude all preliminary injunctions.

These issues present substantial questions for this Court to decide.

Injury to Others. The questions of harm to others and serving the public interest are, of course, inversely proportional to the likelihood of success on the merits. As the District of Columbia Circuit said in *Delaware & H. Ry. Co. v. United Transp. Union*, 450 F. 3d 603, 620 (D.C. Cir. 1971), in cases where harms are claimed on both sides, the Court should look to the merits.

However, the FEC has argued here that it will be

harmed if it is denied the opportunity to enforce a statute. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 50. But such generalized "harm," if accepted, would always defeat a requested preliminary injunction. First Amendment protections would, therefore, often be meaningless. This presents a substantial question for this Court to decide.

Public Interest. As with harm to others, the question of the public interest follows the likelihood of success on the merits. Clearly, "[t]he First Amendment, in particular, serves significant societal interests." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). It is in the public interest for Americans to be able to associate and express themselves freely where there is no cognizable governmental interest justifying restriction.

The Court below, however, found that the public interest would be served here by denying a preliminary injunction because of the public's interest in disclosure. Mem. Op., App. 18a. As the FEC put it below, "the relief sought by Citizens United would prevent the achievement of Congress's goals of '"shed[ding] the light of publicity" on campaign financing,' *McConnell*, 540 U.S. at 231 (quoting *Buckley*, 424 U.S. at 81)." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 50. But of course whether "*campaign* financing" is at issue in this case is the question before this Court on the merits. This presents a substantial question for this Court to decide.

Thus, whether a preliminary injunction is available in these instances is a substantial question. It is a concrete application of the question of whether preliminary injunctions are going to actually be available to

protect free speech in a timely manner. This question and its answer affect not just Citizens United but also the public at large at a time when rolling primaries, followed by conventions backed up to 60-day pre-general-election electioneering periods are creating extended periods of burden on free expression—expression that this Court in *WRTL II* indicated should not be so burdened.

Conclusion

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

Respectfully submitted,

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