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

Brief Opposing Motion to Dismiss or Affirm

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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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Argument

This case involves three substantial questions not answered by *McConnell v. FEC*, 540 U.S. 93 (2003), that are answered by the analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"):

(1) Given the First Amendment's liberty and privacy guarantees and the government's authority to regulate elections, where is the *line* at which the government may compel disclosure as to independent communications touching on elections?

(2) In determining whether a communication may only be "interpret[ed] . . . as an appeal to vote for or against a specific candidate," *WRTL II*, 127 S. Ct. at 2667, can a communication constitute this "appeal to vote" absent a clear *plea for action* that can only be understood as a call *to vote* for or against a candidate?

(3) May a feature-length movie be regulated as a campaign "*ad*," or is it different in kind and protected from regulation by the First Amendment?

I. *McConnell* Did Not Resolve This Case.

While *McConnell* resolved none of these questions, the FEC argues that *McConnell* precludes this as-applied challenge. The *Jurisdictional Statement* notes this Court's unanimous rejection of a near-identical argument when the *WRTL II* case first came before this Court. JS 15.

The FEC argues that as-applied challenges are precluded except for one that Citizens does not assert,

i.e., that it is the sort of socially-disfavored group needing a blanket exemption from otherwise constitutionally permissible disclosure requirements due to the probability of donor harm. Although Citizens does not seek a blanket exemption based on the probability of harm to donors, this Court has recognized that such concerns, along with others, must always be considered when disclosure is compelled, whether or not they warrant blanket exemption. JS 20-21.

Citizens complies with *constitutional* disclosure requirements, but asserts that the Disclosure Requirements at issue herein are *un*constitutional as applied to "electioneering communications" lacking an "electioneering nature," *WRTL II*, 127 S. Ct. at 2667, because they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *Id.* at 2670.

II. Only "Campaign" Speech Is Subject to Disclosure.

Where is the constitutional line dividing expression subject to disclosure from expression retaining full First Amendment privacy protection? There must be a line, and it must be bright and speech-protective, for we deal with "political speech," *id.* at 2670, which is at the core of First Amendment protection.

Only one disclosure line has been drawn by this Court for independent communications by persons who are not political committees or candidates. It is the line where political speech becomes "*unambiguously* related to the *campaign* of a particular federal

candidate." *Buckley*, 424 U.S. at 80 (emphasis added).[1]

This disclosure line was not drawn merely to resolve the vagueness of "the phrase, 'for the purpose of . . . influencing' an election or nomination," *id.* at 79, but also to "insure that the reach of [the disclosure requirement] is not *impermissibly broad*," *id.* at 80 (emphasis added), namely, that "the relation of the information sought to the purposes of the Act may [not] be too remote." *Id.* The overbreadth concern was about reaching beyond the constitutionally permissible disclosure line to regulate communications that were not "unambiguously related to the campaign of a particular federal candidate." *Id.*

The unambiguously-campaign-related requirement was implemented by a test, as this Court has always implemented it, which was the express-advocacy test. *Id.* No disclosure could be required for communica-

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[1]The Fourth Circuit recognizes this line for all campaign-finance regulation:

> "*Buckley* . . . recognized the need to cabin legislative authority over elections . . . . It . . . demarcat[ed] a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley,* campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate."

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008) (*quoting Buckley*, 424 U.S. at 80). *See also Nat'l Right to Work Legal and Educ. Found. v. Herbert*, No. 2:07-CV-809, 2008 WL 4181336, at *5 (D. Utah Sep. 8, 2008) (same).

tions that did not "expressly advocate the election or defeat of a clearly identified candidate." *Id.* (footnote omitted). So *Buckley* drew the disclosure line for non-political committee, non-candidate, independent communications at express-advocacy, but that in turn was based on the unambiguously-campaign-related line.

McConnell facially recognized some electioneering communications as "the functional equivalent of express advocacy," 540 U.S. at 206, and facially upheld the Disclosure Requirements, *id.* at 196. But it reserved the question of how to distinguish those ads that were the functional equivalent of express advocacy from those that were not. *Id.* at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads").

WRTL II answered that reserved question, establishing the appeal-to-vote test to determine which electioneering communications were the functional equivalent of express-advocacy communications. The test stated that "an 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. If "ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, . . . they are not the functional equivalent of express advocacy." *Id.* at 2670. "[I]n a debatable case, the tie is resolved in favor of protecting speech." *Id.* at 2669 n.7.

This appeal-to-vote test—by its emphasis on bright-line certitude ("unambiguously") and focus on "vote" and "candidate" ("campaign-related")—is a

clear application of the unambiguously-campaign-related requirement. The FEC agrees. *See* FEC Mot. 21 ("The fact that appellant's advertisements are not *unambiguously* election-related—*i.e.* the fact that they may reasonably be construed as something other than an appeal to vote against Senator Clinton. . . .").

So this Court should now decide whether ads that are *not* unambiguously campaign related may nonetheless be subject to disclosure requirements under BCRA. Communications that are not the functional equivalent of express advocacy under the appeal-to-vote test should no more be subject to compelled disclosure than the non-express-advocacy communications that *Buckley* protected from disclosure. Just as the express-advocacy test marked the disclosure line for independent expenditures, so the appeal-to-vote test marks the disclosure line for electioneering communications because both tests implement the unambiguously-campaign-related requirement beyond which disclosure may not be required.

But the FEC proclaims that it may go beyond this line to require disclosure of communications that have "*nothing* to do with any candidate election." FEC Mot. 20. So the Federal *Election* Commission asserts that, pursuant to the Federal *Election* Campaign Act and the Bipartisan *Campaign* Reform Act, it may compel disclosure of communications that are not unambiguously campaign related.[2] In short, when it comes to

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[2]The FEC argues that though Citizens' Ads are not unambiguously campaign related, they "may influence electoral results." FEC Mot. 21. The appeal-to-vote test rejects intent-and-effect inquiries. *WRTL II*, 127 S. Ct. at 2666.

disclosure, the FEC claims there is no constitutional line.

The FEC points to cases that "postdate *Buckley*" to argue that Congressional authority to compel disclosure of communications is broader than Congressional authority to prohibit certain communications. FEC Mot. 17-19. But the FEC evades the relevant issue, which is not whether disclosure is permitted as to some communications that may not be prohibited. The issue is whether campaign finance regulation—whether prohibition or disclosure—is restricted to expenditures for communications that are "unambiguously related to the campaign of a particular candidate." *Buckley*, 424 U.S. at 80.

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("*MCFL*") embraced the unambiguously-campaign-related requirement, specifically citing the *Buckley* passage establishing it. *Id.* at 248-49. All of the disclosure of non-prohibited activity that *MCFL* referenced fell within the unambiguously-campaign-related requirement. *MCFL* said that even though it eliminated the independent expenditure prohibition for *MCFL*-corporations,

> an *independent expenditure* of as little as $250 . . . will trigger the disclosure provisions . . . . MCFL will be required to identify all *contributors* who annually provide in the aggregate $200 in *funds intended to influence elections*, will have to specify all *recipients of independent spending* amounting to more than $200, and will be bound to identify all persons making contributions over $200 who *request that the*

> *money be used for independent expenditures*. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions.

479 U.S. at 262 (emphasis added).

What did *MCFL* say must be disclosed? First, "independent expenditure[s]," including the "recipients of independent spending" must be disclosed. *Id.* "Independent expenditures" have been express-advocacy communications since *Buckley* imposed the express-advocacy construction on them, 424 U.S. at 44 & n.52, 80-81, based on the unambiguously-campaign-related requirement—which *MCFL* confirmed. 479 U.S. at 248-49. Second, "contributors . . . [of] funds intended to influence elections" must be disclosed. *Id.* at 262. Such contributions meet the unambiguously-campaign-related requirement under *Buckley*'s construction, in the disclosure context, of "'contributions' . . . 'for the purpose of . . . influencing' the nomination or election of candidates for federal office," 424 U.S. at 77, which it construed to be either a donation to a candidate, political party, or campaign committee or "earmarked for political purposes." *Id.* at 78.

As to the applicability of an informational interest, *MCFL* declared that disclosure of the listed unambiguously-campaign-related information was enough: "These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." 479 U.S. at 262. So *MCFL* embraced *Buckley*'s analysis that campaign-finance disclosure may only extend to contributions, expenditures, and entities that are "un-

ambiguously related to the campaign of a particular candidate." *Buckley*, 424 U.S. at 80.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), although in the ballot measure context, is not contrary. *Bellotti* Court noted that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The law at issue barred corporations "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'" *Id.* at 768 (citation omitted). Since *Buckley* had already found "for the purpose of influencing" unconstitutionally vague and given it the express-advocacy construction to implement the unambiguously-campaign-related requirement, 424 U.S. at 77, 81, it is clear in *Bellotti* that the "disclosure" of the "source" of any "expenditure" for a communication was only for one that expressly advocated passage or defeat of a measure, i.e., was unambiguously campaign related.[3]

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[3]The FEC's citation to *United States v. Harriss*, 347 U.S. 612 (1954), is inapposite. Whatever Congressional power and interests justify lobbying disclosure are not at issue here. At issue here is Congress' regulation of campaign financing under the Federal *Election Campaign* Act and the Bipartisan *Campaign* Reform Act ("BCRA"), which stem from "[t]he constitutional power of Congress to regulate federal *elections*," *Buckley*, 424 U.S. at 13 (emphasis added). Furthermore, *Harriss* construed a lobbyist disclosure act to avoid constitutional difficulties so that it ap-

The FEC argues at length over the meaning of "exacting scrutiny." FEC Mot. 13-17. Citizens asserts that strict scrutiny is applicable because this case deals with core political speech and BCRA's disclosure requirements place a substantial burden on that speech. JS 20-21. However, regardless of the level of scrutiny, disclosure may only be compelled for communications that are "unambiguously campaign related," which Citizens' Ads are not.

Whether the unambiguously-campaign-related requirement limits government ability to compel disclosure in the campaign-finance context is a substantial question that this Court should decide.

III. An "Appeal to Vote" Requires a Clear Plea for Action.

WRTL II requires that only electioneering communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" are "the functional equivalent of express advocacy," 127 S. Ct. at 2667, and thereby subject to BCRA's prohibition on corporate funding. So first, a communication must be interpreted "as an appeal," and second, that required appeal must be "to

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plies only to persons paid to do lobbying that involves direct contact with Congress, and the person, or a contribution to that person, has the "primary purpose" of such lobbying. *Id.* at 619, 622. The "principal purpose" test of *Harriss* in the lobbying context serves to limit regulation to that which is unambiguously lobbying related, much as the "major purpose" test in *Buckley* limits regulation to that which is, "by definition, campaign related," 424 U.S. at 79, i.e., "unambiguously campaign related." *Id.* at 81.

vote for or against a specific candidate." And all doubts and ties must be resolved in favor of free speech, with no forbidden considerations of intent and effect. *Id.* at 2666-67.

Applying this test, Citizens' Movie cannot be deemed the functional equivalent of express advocacy. The Movie is a full-length documentary film about a prominent American politician. It contains no clear call for action to vote against Senator Clinton and can reasonably be interpreted as a documentary film on the public life of a United States Senator.

But the FEC and the District Court came to a different conclusion by applying a different test, confusing *WRTL II*'s application of the "appeal to vote" test with the test itself. The result is a new test with additional "criteria," which criteria may be offset by a "focus on a genuine legislative issue." FEC Mot. 22-23. The FEC is mistaken. As set out in the *Jurisdictional Statement*, *WRTL II*'s appeal-to-vote test is clear and concise. JS 24. This Court's *application* of that test to the specific ads at issue in *WRTL II* is not relevant beyond the context of grassroots lobbying, which Citizens' Movie is not.

The FEC further states that "specific words constituting an appeal to vote" are not required, and instead leans heavily on the "*as*" in *WRTL II*'s appeal-to-vote test. FEC Mot. 24-25. But that *as* has no meaning absent the words that follow it. The communication must be subject to only one interpretation: "as an appeal to vote for or against a specific candidate," *WRTL II*, 127 S. Ct. at 2667. The words are carefully chosen. It is helpful to note what is *not* said. The communication is not to be interpreted *as* "for or against a spe-

cific candidate," or *as* "promoting," "attacking," "supporting," or "opposing" ("PASO") the candidate. Similarly, the question is not whether the communication may only be interpreted *as* "focusing" on a candidate or *as* "criticizing" a candidate. And the question is not whether the communication may be interpreted *as* "the functional equivalent of express advocacy" because *WRTL II* was narrowing the broad *McConnell* language with careful specificity. Rather, the communication must be interpreted "as an *appeal* to *vote* for or against a specific candidate." It is impossible to interpret a communication as an *appeal* unless there is some verb calling for action.

Citizens does not seek to "reintroduce a test akin" to a "magic words" requirement. FEC Mot. 24. On the contrary, Citizens has demonstrated, with the illustration of *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), how an ad might avoid "magic words" but still be subject only to an interpretation "as an appeal to vote for or against a specific candidate" based on a clear plea for action. JS 26.

Finally, that the Movie does not focus on a single legislative "issue" is irrelevant. "[P]olitical speech," or "issue advocacy," *WRTL II*, 127 S. Ct. at 2667, is not defined as being about some particular legislative issue, as the FEC tries to require. FEC Mot. 24. On the contrary, issue advocacy, i.e. political speech, is defined by the absence of *campaign* speech. "Issue advocacy conveys information and educates." *WRTL II*, 127 S. Ct. at 2667. "An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.*

WRTL II's definition of "issue advocacy" plainly encompasses Citizens' Movie. But Citizens was prohibited from broadcasting its Movie simply because it raised issues relevant to an impending election.

Whether the appeal-to-vote test requires a clear plea for action to vote for or against a candidate is a substantial question that this Court should decide.

IV. Movies Are Not "Ads"and Are Not Subject to Regulation.

Feature-length documentary movies are different in kind from "ads." The FEC has not shown that movies pose the same dangers as the ads targeted by Congress in passing BCRA, which ads were subsequently relied upon by this Court in *McConnell*. The FEC argues that "the *McConnell* record included evidence of broadcast advocacy longer than the traditional 30- or 60-second spot, such as paid, 30-minute 'infomercials.'" FEC Mot. 26. In fact, however, the district court pointed out that such infomercials had *not* been included in the studies upon which the court relied. *McConnell v. FEC*, 251 F. Supp. 2d 176, 305-06, 316-17 (D.D.C. 2003) (op. of Henderson, J.). Moreover, even a thirty-minute infomercial is different in kind from a feature-length film that has a compendium book, is shown in theaters, and is sold on DVD.

Unlike "ads," movies are not imposed unawares on a captive audience that has chosen to watch a different program. Rather, movies must be selected by a willing viewer. And unlike the ads in *McConnell*, the FEC has not shown that movies were an "electioneering" problem giving rise to a Congressional remedy, 540 U.S. at 127 n. 20, a showing the FEC is required

to make. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Feature-length movies were nowhere at issue in *McConnell*. Whether they are subject to regulation as "electioneering communications" remains a substantial question that this Court should decide.

Conclusion

The Court should note probable jurisdiction.

Respectfully submitted,

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