IN THE SUPREME COURT OF THE UNITED STATES

No. 08-205

CITIZENS UNITED, *Appellant*

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 28.4 of the Rules of this Court, the Solicitor General, on behalf of the Federal Election Commission, and *amici curiae* Senators John McCain and Russell Feingold and former Representatives Christopher Shays and Martin Meehan, respectfully request that 10 minutes of Appellee's oral argument time be allocated to counsel for the named *amici*.

As appealed to this Court, this case presented the questions (1) whether the three-judge district court properly concluded that appellant's film about then-Senator Clinton was the functional equivalent of express advocacy under the test set forth in *FEC* v. *Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652 (2007), and (2) whether that court correctly held that the reporting, disclosure, and disclaimer requirements of federal campaign finance law may permissibly be applied to advertisements that are not the functional equivalent of express advocacy. Following briefing and oral argument, on June 29, 2009, the Court directed the parties, and invited *amici*, to file supplemental briefs addressing whether, "[f]or the proper disposition of this case, … the Court [should] 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."

The named *amici* were the principal sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA). Section 403(b) confers upon them a statutory right to intervene in "any action in which the constitutionality of any provision of [BCRA] . . . is raised."[1] The named *amici* have participated as intervenors in several challenges to the Act, both in this Court and before three-judge district courts convened under the Act.[2] In both *McConnell* and *Wisconsin Right To Life*, the named *amici* participated actively as intervenor-defendants at all stages of the litigation, including development and presentation of the factual record in the three-judge district court, and briefing and oral argument in this Court.

When this case was initiated, the named *amici* did not intervene, for resource-constraint reasons and in light of the plaintiff's emphasis on fact-specific, as-applied theories; they did, however, file a brief *amici curiae* in this Court. The question now posed by the Court raises profound issues directly implicating the constitutionality of both section 203 of BCRA and section 304 of the Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 159-60 (current version at 2 U.S.C. § 441b), a cornerstone provision of federal campaign-finance legislation for over sixty years.

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[1] Section 403(b) provides: "In any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised . . . any member of the House of Representatives . . . or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment."

[2] *See Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) (three-judge court) (all named *amici* except Sen. Feingold participated as intervenors), *aff'd*, 127 S. Ct. 2652 (2007); *Christian Civic League of Maine v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006) (three-judge court) (all named *amici* participated as intervenors), *vacated*, 127 S. Ct. 3052 (2007) (mem.); *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (three-judge court) (per curiam) (same), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

The named *amici* will file a supplemental brief addressing the question presented in this Court's June 29th Order. Had the question now presented by the Court been raised previously in this case, the named *amici* would certainly have sought to participate as intervenors in all phases of the litigation.

Because the named *amici* have been centrally involved in campaign-finance legislation and litigation for many years, they have a significant interest in the case and can offer the Court an additional perspective. The named *amici* participated in development of both the legislative record supporting BCRA and the "'elephantine'" litigation record supporting the judgment in *McConnell*, 251 F. Supp. 2d at 209 n.40. They have also litigated *against* the FEC on issues regarding the meaning and proper application of BCRA and the Federal Election Campaign Act.[3] We therefore respectfully suggest that the Court would find it helpful to hear oral argument on behalf of both the FEC and the named *amici*.

Respectfully submitted.

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July 23, 2009

[3] *See Shays et al.* v. *FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (invalidating several regulations promulgated by the FEC to implement BCRA), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) (*Shays I*); *Shays et al.* v. *FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006) (challenging the FEC's failure to promulgate regulations governing when Section 527 political organizations must register as political committees); *Shays et al.* v. *FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff'd in part and rev'd in part*, 528 F.3d 914 (D.C. Cir. 2008) (invalidating certain regulations implementing Title I of BCRA as revised in light of *Shays I*).