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 OF *AMICI CURIAE* SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, FORMER REPRESENTATIVE CHRISTOPHER SHAYS, and FORMER REPRESENTATIVE MARTIN MEEHAN IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Senators John McCain and Russell Feingold and former Representatives Christopher Shays and Martin Meehan, were the principal sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA). Working together over the course of their public careers, they have devoted enormous time and energy to ensuring that our federal campaign finance laws are meaningful and not subject to wholesale evasion. *Amici* worked for seven years to enact BCRA to close loopholes in the then-existing system. They participated as intervening defendants in *McConnell v. FEC*, 540 U.S. 93 (2003), to defend the constitutionality of those loophole-closing measures. Senator McCain and former representatives Shays and Meehan also participated as *amici curiae* and, later, intervenors in the litigation commenced as *Wisconsin Right to Life, Inc. v. FEC*, which led to two decisions of this Court.[2] Messrs. Shays and Meehan have also been plaintiffs in a series of lawsuits in the federal courts of the District of Columbia seeking to compel the FEC to carry out its duty to promulgate regulations properly implementing BCRA.

Amici McCain, Feingold, Shays, and Meehan submit this brief because the arguments advanced by Citizens United threaten to undo much of what they accomplished in achieving the enactment of BCRA, to roll back long-

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Senator Feingold did not participate in that case because he was the subject of the ads at issue.

standing provisions of the Federal Election Campaign Act (FECA) that predate BCRA, and even to jeopardize statutes requiring disclosure of corporate and union political and lobbying expenditures outside the field of candidate elections. *Amici* urge the Court to reject Citizens United's far-reaching positions and instead apply settled principles establishing that restrictions on the use of corporate and union funds for express candidate advocacy and its functional equivalents are constitutionally permitted, and that the interest in informing voters of the moneyed interests behind candidate-related election-season advertising is sufficient to sustain application of BCRA's disclosure provisions to the entire range of electioneering communications defined in BCRA, as eight members of this Court held in *McConnell*.

SUMMARY OF ARGUMENT

Beyond the dispute over whether the contents of *Hillary: The Movie* are the functional equivalent of express advocacy—a factbound question that was thoroughly considered by the district court, with whose decision we agree for the reasons stated by the FEC and the court itself, and that we do not address further—this case presents several issues of great importance for the ongoing enforcement and administration of federal campaign finance laws. Acceptance of Citizens United's positions would open the door to essentially unlimited corporate- and union-funded election advocacy and would eviscerate disclosure provisions designed to alert the electorate to the interests that finance election-related messages.

Citizens United contends that even assuming that *Hillary: The Movie* contains the functional equivalent of express advocacy, it should have been permitted to finance cable transmissions of the movie outside the constraints of BCRA. To support this position, it advocates

that the Court either overrule its decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), significantly expand the scope of its holding in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), or hold that regulation of the financing of "on-demand" cable transmissions of video programming containing candidate advocacy falls outside the justifications this Court has previously accepted for restrictions on funding of electioneering communications by business corporations and labor unions.

None of these submissions has merit. Merely overruling *Austin* would not avail Citizens United because the application of BCRA to corporate- and union-financed communications that are the functional equivalent of express advocacy is supported not only by *Austin*, but also, much more directly, by this Court's more recent decisions in *McConnell* and *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL II*), neither of which the Court has been asked to overrule. Nor, in any event, does Citizens United offer the special justification necessary to support the overruling of this Court's precedents. As for *MCFL*, Citizens United's arguments would tear it from its moorings as a narrow ruling allowing advocacy by nonprofit corporations that do not accept donations from business corporations and unions, turning it into a loophole that would allow substantial use of corporate and union funds to support express advocacy and its equivalent. And Citizens United's argument that candidate advocacy via on-demand video is so different from traditional advertising that it should be open to no-holds-barred corporate and union financing of electioneering messages overlooks that such advocacy poses the same threats to the electoral system as does corporate funding of more traditional forms of election advocacy.

With respect to the advertisements for *Hillary: The Movie*, Citizens United's arguments are just as unfounded and would be equally destructive of settled principles of campaign finance jurisprudence. With near unanimity, this Court has approved requirements for disclosure of the sources of funding of election-related messages because disclosure serves the electorate's significant informational interests. Citizens United's assertion that those interests are only present when the messages in question involve express advocacy or its equivalent are unsupported by any of this Court's precedents. Rather, those interests are implicated by the full range of electioneering communications under BCRA, specifically including Citizens United's ads bearing derogatory messages about a presidential candidate, targeted at voters in states in which she was competing in primary elections. And Citizens United's hollow claims that it would be burdened by the disclosure and disclaimer requirements applicable to its ads under BCRA are flatly contradicted by this Court's precedents.

ARGUMENT

I. The First Amendment Does Not Protect Citizens United's Use of Corporate Funds to Finance the Functional Equivalent of Express Advocacy.

A. This Court Should Reject Citizens United's Suggestion That It Overrule *Austin v. Michigan Chamber of Commerce*.

In its merits brief, Citizens United suggests for the first time that this Court resolve this case by overruling *Austin v. Michigan Chamber of Commerce*, in which the Court upheld a Michigan statute requiring for-profit corporations and unions to use segregated funds rather than treasury funds to finance express advocacy. Citizens United makes this request despite the failure of its

Jurisdictional Statement in this case to present any such issue. Indeed, the Jurisdictional Statement did not even cite *Austin*, and it limited the questions Citizens United wished to present to as-applied challenges to BRCA's restriction on Citizens United's use of its funds to transmit *Hillary: The Movie* by cable or satellite, and as-applied challenges to BCRA's reporting and disclosure requirements (the same as-applied challenges Citizens United advanced in the district court).

Even overlooking this omission, Citizens United's current suggestion that repudiating *Austin*—the only decision its brief asks this Court to overrule—would be sufficient to decide this case in its favor is incorrect. Citizens United contends that even as to communications that are the functional equivalent of express advocacy—indeed, even as to express advocacy itself—BCRA's restriction on the use of corporate or union treasury funds to finance electioneering communications is unconstitutional. That is not, as Citizens United would have it, a conclusion the Court could reach by overruling *Austin* alone. Rather, to arrive at that holding, the Court would have to overrule its more recent decision in *McConnell v. FEC*, because it was *McConnell* (not *Austin*) that held that the funding restrictions imposed by BCRA are facially constitutional, and the thrust of Citizens United's argument is that those restrictions have *no* constitutional application to the use of corporate or union treasury funds to finance electioneering communications. Notably, overruling *McConnell* is a step that Citizens United does *not* ask the Court to take, despite extensively discussing various aspects of *McConnell*'s holdings. And it is a well-settled principle that this Court generally declines to overrule one of its decisions when no party has asked it to do so. *See, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005).

Moreover, the *McConnell* majority's holding that BCRA's restrictions on the use of corporate and union treasury funds to finance electioneering communications are facially constitutional did not rest only, or even principally, on *Austin*. Rather, the majority invoked the Court's campaign finance jurisprudence from *Buckley v. Valeo*, 424 U.S. 1 (1976), onward, with special emphasis on *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), and *FEC v. Beaumont*, 539 U.S. 146 (2003). *See McConnell*, 540 U.S. at 203-06. The Court based its holding that there is a compelling interest supporting application of funding restrictions to express advocacy, and hence to its functional equivalent, on "our precedents," *id.* at 205, not just on *Austin*. In light of *McConnell*'s reasoning as well as its holding, it is untenable to suggest that a surgical overruling of *Austin*, as opposed to a wholesale overruling of *McConnell* and the line of precedents on which it relied, would suffice to resolve this case.

Citizens United's suggested disposition of the case would also make a mockery of the controlling opinion in *WRTL II*. That opinion went to great pains to explicate a test for distinguishing electioneering communications that are not the functional equivalent of express advocacy (and hence, it held, may not be subjected to the funding restrictions of BCRA Title II), from those that are the functional equivalent of express advocacy, and hence fall within *McConnell*'s undisturbed holding that the funding restrictions are constitutional "to the extent that … ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206; *see WRTL II*, 127 S. Ct. at 2670 (opinion of Roberts, C.J.).

The controlling opinion in *WRTL II* explicitly described its holding as "draw[ing] … a line" between impermissible applications of the funding restrictions and permissible ones, *id.* at 2659, and establishing a "test to distinguish constitutionally protected political speech from *speech that BCRA may proscribe*." *Id.* at 2665 (emphasis added). Moreover, the opinion defended the line it drew not only against arguments that it was insufficient to serve BCRA's goals of preventing actual and apparent corruption, but also against the contention of the concurring Justices that it was *too restrictive* of speech. *Id.* at 2669 n.7. The controlling opinion roundly rejected the latter view, insisting that a test that "affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate" is adequate to protect First Amendment interests. *Id.* (emphasis in original). To erase that line only two years later with a holding that unlimited corporate and union funds may be used even for communications that are express advocacy or its functional equivalent would be, in the words of *WRTL II*, "a constitutional 'bait and switch.'" *Id.* at 2673.

In any event, Citizens United's argument for overruling *Austin* fails to identify the "special justification" required for this Court to overrule one of its precedents. *Harris v. United States*, 536 U.S. 545, 557 (2002). Citizens United's brief argument for overruling *Austin* rests principally on its alleged inconsistency with the principles of *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Such claimed doctrinal inconsistency is hardly a "special justification," *see Harris*, 536 U.S. at 557, especially when the supposedly inconsistent decisions preceded and were thoroughly considered in the decision at issue. *See Austin*, 494 U.S. at 657-58 (extensively discussing *Buckley* and *Bellotti*).

That the Court in *McConnell* (in an opinion coauthored by one of the *Austin* dissenters) reaffirmed the principle that the use of corporate funds for express candidate advocacy may be restricted and again specifically addressed both *Buckley* and *Bellotti* underscores that those decisions offer no special justification for overruling precedents of this Court. *See McConnell*, 540 U.S. at 206 n. 88.

In light of the 60-year history of the prohibition on use of corporate or union treasury funds for express advocacy and the string of this Court's precedents that were either premised on or explicitly affirmed the constitutionality of this restriction—including *Buckley*, *National Right to Work Committee*, *MCFL*, *Austin*, *Beaumont*, *McConnell*, and *WRTL II*—it can hardly be suggested that the "evolution of legal principle" has "implicitly or explicitly left [*Austin* or *McConnell*] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

Indeed, when this Court first considered BCRA in *McConnell*, Citizens United's current counsel, who was then defending BCRA, repeatedly endorsed *Austin*'s holding and argued that it was "clear that the Constitution permits source-of-funding limits on corporate expenditures in connection with candidate elections." Brief for the FEC, at 78, *McConnell* (No. 02-1674). Indeed, counsel told the Court that the record developed in *McConnell*, far from indicating some change in circumstances that undermined *Austin*, provided support for restrictions on corporate and union election expenditures that "dwarfed" the showing accepted in *Austin*, *id.* at 85-86, and rejected the suggestion that *Austin* should be overturned even in part. *Id.* at 116.

Little more than five years later, the holding of *McConnell* and the reasoning of such cases as *Austin* and *Beaumont* that supported it remain fully valid. There is no basis for suggesting that concerns about the potentially overwhelming, distorting, and corrupting influence of unleashing massive corporate and union war chests for use in unfettered express candidate advocacy are no longer compelling. That our electoral process would soon be dominated by corporate and union spending if the Court were to use this case as the occasion to roll back the longstanding prohibition on express advocacy by business corporations and unions is beyond serious question.

B. Citizens United's Communications Are Not Protected by the Principles of *MCFL*.

Beyond its frontal assault on the proposition that the use of corporate funds for express advocacy or its equivalent may be restricted, Citizens United asks the Court to rewrite its precedents to permit Citizens United to engage in such advocacy as long as the corporate funds used for that purpose are outweighed by funds contributed by individuals. According to Citizens United, this Court's holding in *MCFL* that ideological nonprofit organizations that accept *no* money from for-profit corporations may use their treasury funds for express advocacy should also protect Citizens United's use of funds contributed by business corporations, as long as its communications are "funded predominantly by individuals." Citizens United Br. 31.

Citizens United made no such argument in this case before its merits brief in this Court. Nowhere in its papers in the district court or in its Jurisdictional Statement did it contend that the sources of funding on which it relied brought its speech within the protection of

MCFL. Indeed, Citizens United expressly informed the district court that it is "not a 'qualified nonprofit corporation' because it receives corporate donations and engages in business activities." Plaintiff's Statement of Undisputed Material Facts at 1, *Citizens United v. FEC*, No. 07-2240, D.E. 52 (D.D.C. filed May 16, 2008).[3] It made no effort to establish that, despite its acknowledged failure to meet the regulatory criteria for the exception embodying the *MCFL* principle, it nonetheless should receive the benefit of *MCFL*'s holding. Having failed to make the argument in the district court or in its Jurisdictional Statement, Citizens United has waived it. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 207-08 (1997); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 33-34 (2001).[4]

Even if entertained, Citizens United's belated reliance on *MCFL* should be rejected because it would transform a narrowly limited doctrine designed to protect groups that are truly independent of the interests of for-profit corporations and unions into an avenue for

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[3] "Qualified nonprofit corporation" is the FEC's regulatory nomenclature for an *MCFL* corporation. *See* 11 C.F.R. § 114.10.

[4] Citizens United's failure to advance this argument in the district court inhibited the creation of a complete record that would have unearthed the full extent to which it has relied on corporate funds. Citizens United's brief cites the organization's interrogatory responses, which purport to establish that only two business corporations made contributions of $1000 toward *Hillary: The Movie* (*see* Citizens United Br. 7), but those responses not only are apparently limited to earmarked contributions, but also reveal that significant contributions came from some "other noncorporate persons" who were not individuals. *Id.* Presumably those "noncorporate persons" were other organizations, which may in turn have been passing through funds donated by business corporations.

wholesale circumvention of restrictions on corporate electioneering expenditures and contributions.

This Court's decision in *MCFL* did not, as Citizens United suggests, establish the principle that funding of candidate advocacy by for-profit corporations is constitutionally protected as long as it is combined with a larger quantity of dollars contributed by individuals. Rather, the Court in *MCFL* identified "three features *essential* to our holding that [MCFL] may not constitutionally be bound by [2 U.S.C.] § 441b's restriction on independent spending." *MCFL*, 479 U.S. at 263-64 (emphasis added). The third of those essential features was:

> MCFL was not established by a business corporation or a labor union, *and it is its policy not to accept contributions from such entities*. This *prevents* such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id. at 264 (emphasis added). In other words, what the Court considered essential in *MCFL* was not that the organization received *only a little* corporate money or that its funding was *mostly* from individuals, but that it accepted *no* contributions from business corporations or labor unions, as a matter of policy.

Similarly, in *Austin*, the Court rejected the argument that funding restrictions on candidate advocacy could not be applied to a non-profit corporation that received money from business corporations. The Court reiterated that each of the three characteristics identified in *MCFL* was "crucial," 494 U.S. at 662, and it found the organization at issue (the Michigan Chamber of Commerce) ineligible for *MCFL*'s constitutional exemption from restrictions on candidate advocacy expenditures in part "[b]ecause the Chamber accepts money from for-profit

corporations," and therefore "it could … serve as a conduit for corporate political spending" if permitted to use its treasury funds for advocacy. *Id.* at 664. The Court thus found it permissible to relegate the Chamber to advocacy through a segregated fund, which "*cannot* receive contributions from corporations." *Id.* at 664 n.3 (emphasis added).

McConnell, too, emphasized that *MCFL* exempts only a "carefully defined category of entities," 540 U.S. at 210, from the requirement that candidate advocacy by corporations be paid for from segregated funds contributed by individuals. And it repeated that one of the "central" requirements of *MCFL* is that an organization have a policy of not accepting contributions from business corporations or labor unions. *Id.* at 210-11. Similarly, in *WRTL II*, the controlling opinion declined to consider the argument that *MCFL* supported the as-applied challenge in that case "because WRTL's funds for its ads were not derived *solely* from individual contributions." 127 S. Ct. at 2673 n.10 (emphasis added).

Accepting Citizens United's argument that a little corporate funding of candidate advocacy must be permitted—or even a substantial amount, as long as it is not "predominant"—would have serious deleterious effects on federal campaign finance law and allow widespread circumvention of critical provisions previously upheld by this Court. Citizens United's argument would apply equally to express advocacy as well as to electioneering communications that are the functional equivalent of express advocacy. *Cf. McConnell*, 540 U.S. at 210 (noting that *MCFL* necessarily applies both to electioneering communications under BCRA and to traditional express-advocacy expenditures under FECA). Thus, the implication of Citizens United's argument is not only that non-

profit organizations may freely finance candidate advocacy with a mix of funds contributed by business corporations and individuals as long as most of the money comes from the latter, but also that (1) business corporations and unions may pay for express advocacy through accounts to which they have contributed their own treasury funds, as long as contributions from individuals predominate; (2) independent political committees that engage in express advocacy (and possibly multicandidate committees that make contributions to candidate committees) must be free to accept corporate funds as long as individual contributions predominate; and (3) BCRA's prohibitions on the use of "soft money" by political parties for federal election activity (upheld in *McConnell*) must be modified to allow some corporate soft-money contributions toward such activity as long as they do not predominate over individual contributions.

In short, Citizens United's argument would upset both the requirements that election expenditures be funded through truly "segregated" funds and the prohibitions on use of corporate and union funds for expenditures by political committees—provisions that are supported by a long line of this Court's decisions. *See McConnell*, 124 S. Ct. at 204-11; *Beaumont*, 539 U.S. at 162-63; *Austin*, 494 U.S. at 658-65; *Nat'l Right to Work Comm.*, 459 U.S. at 201-202; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981). The effect of accepting Citizens United's view would be to permit the mobilization and unleashing of "political war chests funneled through the corporate form," *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985), as corporations would be free to use essentially unlimited amounts of their treasury funds to back candidate advocacy, as long as those funds were parceled out among nonprofit organizations or political committees in such a way that any par-

ticular piece of advocacy was not paid for "predominantly" with corporate funds. In effect, *MCFL* would be transformed into little more than a "matching" requirement: Every dollar of corporate or union funds supporting express advocacy would have to be matched by something more than a dollar (how much more is unclear) contributed by an individual.

The compelling interest in preventing corruption and the appearance of corruption that is served by "barring corporate earnings from being converted into political 'war chests,'" *Beaumont*, 539 U.S. at 154, as well as the interest in preventing nonprofit organizations from becoming conduits for the evasion of campaign finance law, *id.* at 155, thus demand rejection of Citizens United's proposed expansion of *MCFL*. As in *Beaumont* and *National Right to Work Committee*, the Court should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Beaumont*, 539 U.S. at 157 (quoting *Nat'l Right to Work Comm.*, 459 U.S. at 210).

Respect for Congress's judgment in this respect is counseled not only by the interests served by the funding restriction, but also by the absence of any principled and workable basis on which a court that accepted Citizens United's invitation to allow *some* corporate or union funding could proceed to determine *how much* corporate or union money is too much. Moreover, because both the amount and percentage of corporate or union contributions to any particular organization would vary from year to year—and even from communication to communication—the quest to determine "predominance" would become, at least, an annual event. The Court should therefore adhere to the bright-line constitutional principle established by its precedents: Congress may disallow

any use of funds from business corporations or labor unions to pay for express advocacy and its equivalent.

C. Citizens United's Position That Justifications for Limits on Corporate Electioneering Vanish When Voters Must Choose to Expose Themselves to It Is Incorrect.

Leaving aside its pleas for overruling *Austin* or dramatically extending *MCFL*, Citizens United's principal argument seems to be that the justifications for restrictions on corporate and union funding of express advocacy or communications that are its functional equivalent vanish when the advocacy takes the form not of broadcast ads that are imposed on television viewers, but "narrowcast" advocacy that members of the public must first choose to view (enticed, at least in this case, by ads that are themselves electioneering communications).[5] Although the principal focus of the congressional deliberations leading to passage of BCRA's electioneering communications provisions was traditional ads, the interests that provide constitutional justification for the funding restriction are fully applicable to communications that recipients must choose to receive.

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[5] Citizens United also questions whether its particular advocacy would threaten to create actual or apparent corruption because Senator Clinton's principal opponent in the primaries, President Obama, likely would not perceive Citizens United's communications as supportive of his own candidacy. *See* Citizens United Br. 41. But this Court has never suggested that the justifications for limits on corporate express advocacy and its equivalent depend on whether one can identify a specific candidate who would likely be corrupted by a particular expenditure. In any event, Citizens United's argument assumes, wrongly, that only Senator Clinton's primary opponents, and not potential Republican opponents in the general election, would be favorably influenced by Citizens United's spending to defeat her.

Indeed, that ads are imposed on viewers unwillingly is *not* one of the reasons that this Court has relied on in holding that corporations and unions can be prohibited from using their treasury funds to finance candidate advocacy. The Court has identified two principal justifications for that restriction: that there is a significant potential for corruption or its appearance if candidates benefit from large-scale corporate or union expenditures supporting them or targeting their opponents, and that the electoral process should be protected from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660). Both are equally applicable to means of electoral persuasion that voters must take some initiative to access.

Acceptance of Citizens United's argument would have potentially far-reaching and undesirable consequences. The argument, like the *MCFL* argument, cannot be confined to electioneering communications, but would extend to independent expenditures for express advocacy as well. Thus, Citizens United's reasoning would appear equally applicable, for example, to full-scale express advocacy over the Internet (where access to content is typically user-initiated), and it would thereby open the door to unlimited corporate and union expenditures using the web to explicitly urge votes for and against candidates.[6] The same would be true of any cor-

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[6] As the FEC notes (FEC Br. 26 n.8), the FEC has been cautious in extending FECA's and BCRA's provisions to the Internet, and the electioneering communications provisions do not apply to the web. The regulations cited by the FEC, however, do *not* exempt

(*Footnote continued*)

porate- or union-funded express advocacy in any form—written, audio, or video—where a voter exercised choice before receiving it. Indeed, Citizens United's reasoning would seem to protect corporate-funded telephone banks that called voters, asked if they were interested in hearing a message about Candidate X, and then, if the voter said yes, launched into express advocacy.

The majority in *McConnell* observed that when it comes to elections, "Money, like water, will always find an outlet." 540 U.S. at 224. Congress cannot, of course, always anticipate precisely what that outlet will be. But when, as here, it has enacted legislation principally motivated by one practice (corporate and union funding of broadcasts and cablecasts of ads containing candidate-related advocacy) that is equally applicable by its terms to another practice (corporate and union funding of on-demand cablecasting of programming containing candidate-related advocacy), and when that other practice poses exactly the same threats of potential corruption of the electoral process, there is no reason to limit Congress's enactment to the precise evil that prompted its passage. *Cf. Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[T]he reach of a statute often exceeds the precise evil to be eliminated").

Although its constitutional arguments are unfounded, Citizens United has also raised a question about whether on-demand cable "narrowcasting" of *Hillary: The Movie*

Internet communications from the restriction on the use of treasury funds of business corporations and unions to finance "expenditures" (i.e., express advocacy). Citizens United's reasoning, by contrast, would place any Internet site accessed at the choice of a user constitutionally off-limits from any restrictions on the use of corporate or union funds.

would have met the FEC's regulatory definition of transmission of an electioneering communication. According to Citizens United, each individual on-demand transmission of the program would have been received only by the household that ordered it, but the regulatory definition of an electioneering communication requires that a transmission be capable of receipt by 50,000 persons in the state where the election is imminent. *See* Citizens United Br. 26-27 n.2 (citing 11 C.F.R. § 100.29(b)(3)(ii)). Because this Court's consideration of the constitutionality of a statutory or regulatory restriction may require, as an antecedent, determining what the challenged law actually provides, *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006), Citizens United's failure to raise this point before does not necessarily bar this Court from reaching it.

As the FEC points out, however, if *Hillary: The Movie* had been distributed through an on-demand cable channel, it would have been available to all subscribers of a cable system with access to on-demand programming, and the regulatory definition of what it means for a transmission to be capable of being viewed by the requisite number of persons is based primarily on the number of subscribers of the system. *See* FEC Br. 23-24 n.7; 11 C.F.R. § 100.29(b)(7)(i)-(iii). The FEC's interpretation of its own regulation appears reasonable even though the Commission may not have specifically considered application of the regulations to on-demand programming when promulgating them.

To the extent that there may be some ambiguity in the applicability of the regulations, the Court could possibly conclude that it is sufficiently doubtful that on-demand viewing of *Hillary: The Movie* would have been within the scope of the FEC's current regulations that

the Court should withhold judgment on the constitutional issue until such time as the FEC made a more specific regulatory determination to include such transmissions within the regulatory definition of electioneering communications. In no event, however, should the Court accept Citizens United's broad constitutional arguments that would place even express advocacy beyond the bounds of regulation if it is accessed at the choice of the viewer.

II. The Application of BCRA's Disclosure and Disclaimer Requirements to Electioneering Communications That Are Not Functionally Equivalent to Express Candidate Advocacy Is Constitutionally Permissible.

Citizens United's proposed broadcast advertisements for *Hillary: The Movie*, though not containing the functional equivalent of express advocacy within the meaning of *WRTL II*, prominently mentioned Senator Clinton and were intended to be aired shortly before primary elections in which she was a candidate for office and/or the national party convention that would determine the nomination for that office. The ads would thus, without question, have been electioneering communications under BCRA, *see* 2 U.S.C. § 434(f)(3)(A)(i), and the FEC's implementing regulations. Equally unquestionable is that the ads commented negatively on Senator Clinton's character and fitness for office, either explicitly or by insinuation. Nothing in this Court's decisions suggests that measures aimed at disclosing to the public the origin of these broadcast messages and the identity of those who financed them are unconstitutional.

A. The Justifications for Disclosure Requirements That This Court Has Accepted Are Not Limited to Express Advocacy and Its Functional Equivalent.

Citizens United's basic submission is that unless a communication falls within the class as to which Congress may permissibly impose restrictions on corporate funding—that is, express advocacy or its functional equivalent—there is no legitimate justification for disclosure provisions, either. Citizens United's position is flatly at odds with this Court's jurisprudence.

In *McConnell*, eight Justices voted to uphold the facial constitutionality of § 201 of BCRA, the basic provision requiring those who disseminate electioneering communications to disclose contributions made to support them. The five-Justice majority found disclosure to be justified by "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196. The three concurring Justices did not believe that either the enforcement or anti-corruption rationales applied to electioneering communications, but they agreed that the disclosure requirement "does substantially relate to" the interest in providing the electorate with information, and that this substantial relationship "assures its constitutionality." *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part).[7]

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[7] What Citizens United refers to as the "disclaimer" requirement of BCRA § 311—which requires electioneering communica-

(*Footnote continued*)

Notably, the three Justices who concurred on this point did so even though they saw *no* interests sufficient to justify the application of corporate funding restrictions to electioneering communications—a position directly at odds with Citizens United's view that the justifications for disclosure extend only to communications as to which funding restrictions are also justified. Similarly, the majority opinion nowhere suggested that the justification for the disclosure requirements was limited to electioneering communications that are the functional equivalent of express advocacy. In short, eight Justices accepted the disclosure requirements in *McConnell* without intimating any support for Citizens United's position that Congress's power to impose disclosure requirements is coextensive with its power to restrict funding of communications.

Moreover, the majority's treatment of the disclosure requirements was quite different from its analysis of the corporate funding restriction, where it limited its holding that the restriction was facially constitutional by noting that the justifications for the restriction are applicable "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." 540 U.S. at 206. By contrast, the majority identified no such limits on the justifications for the disclosure provisions, and concluded that they were facially constitutional because, absent evidence that their appli-

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tions not authorized by candidate committees to identify who paid for them and state that they were not authorized by a candidate committee—was similarly upheld by eight Justices who found that it "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." 540 U.S. at 231 (opinion for the Court of Rehnquist, C.J.).

cation in a particular case was reasonably likely to lead to threats, harassment, or reprisals against contributors (*id.* at 198-99), the interests served by disclosure "amply suppor[t] application of [the] disclosure requirements to the entire range of 'electioneering communications'"—not just those that are equivalent to express advocacy. *Id.* at 196.

McConnell did not, of course, decide as-applied challenges that were not before it. *See Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006). But the *reasoning* used by the Court in rejecting the facial challenge to BCRA's disclosure provisions is inconsistent with *this particular* as-applied challenge. In contrast, the controlling opinion in *WRTL II* held that *McConnell*'s reasoning in rejecting the facial challenge to BCRA's funding restrictions for electioneering communications was *not* inconsistent with the as-applied challenge in *WRTL II*.

With respect to the funding restrictions, the Court held in *McConnell* that the statute was not facially overbroad because it could be validly applied to communications that were the functional equivalent of express advocacy, and the Court was not convinced that the possible unconstitutional applications outside that realm were substantial in relation to the statute's legitimate sweep. *See* 540 U.S. at 207. In *WRTL II*, the controlling opinion concluded that that holding necessarily left room for an as-applied challenge to application of the restrictions to communications that were asserted not to be functionally equivalent to express advocacy. *See* 127 S. Ct. at 2659-60.

By contrast, with respect to disclosure, the reason that *McConnell* rejected the facial challenge was not simply that there were a substantial number of permissible applications of the disclosure provision, but that the justifications for disclosure applied to the "entire range

of 'electioneering communications,'" *McConnell*, 540 U.S. at 196, except where the result would be harassment, threats or reprisals. That reasoning is inconsistent with the as-applied challenge advanced here, and there is nothing novel in recognizing that the reasoning of a decision finding a statute facially constitutional may determine the outcome of subsequent as-applied challenges. *See, e.g., WRTL II*, 127 S. Ct. at 2664 (recognizing that resolution of an as-applied challenge is "informed by our precedents" and that *McConnell*'s holding would doom an as-applied challenge to the application of BCRA's electioneering communication funding restrictions to "express advocacy or its functional equivalent").

Nor does the Court's holding in *WRTL II* call into doubt the constitutionality of applying the disclosure provisions to electioneering communications that fall short of being the functional equivalent of express advocacy. The controlling opinion in *WRTL II* acknowledged that advertisements that are not the functional equivalent of express advocacy may be intended to influence elections and may have actual effects on elections, and that it may be exceedingly difficult to distinguish ads with that intent and effect from electorally neutral ones. 127 S. Ct. at 2664-69. But because the Court was considering what the controlling opinion regarded as a prohibition on speech by corporate speakers, it adopted a narrow, objective test for determining when a communication constitutes the functional equivalent of express advocacy, premised on the notion that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor," and that "[d]iscussion of issues cannot be *suppressed* because the issues may also be pertinent in an election." *Id.* at 2669 (emphasis added). In short, the controlling opinion in *WRTL II* was determining what justifications would support a "ban" on protected

speech, and its conclusions reflected the view that in deciding such an issue "we give the benefit of the doubt to speech, not censorship." *Id.* at 2674.

The controlling opinion's conclusion that speech must be the functional equivalent of express advocacy before the interests identified as compelling in *McConnell*, *Austin*, and *Buckley* justify a *prohibition* on corporate funding by no means suggests that lesser measures can only be sustained for the same type of speech. Rather, the undoubted electoral effects of advertisements that discuss candidates in proximity to an election, which were described in detail in the majority opinion in *McConnell*, 540 U.S. at 126-30, 193-94, and nowhere denied in the controlling opinion in *WRTL II*, are more than sufficient to support *disclosure* requirements on informational grounds alone. An electorate bombarded with messages about candidates in the run-up to an election has an obvious interest in knowing what moneyed interests lie behind them so that it can evaluate in a more informed manner whether, and to what extent, the messages should influence voting. *See Buckley*, 424 U.S. at 66 (relying on the interest of the voting public in knowing "where political campaign money comes from"). Indeed, that is undoubtedly why eight Justices of this Court saw little difficulty in upholding the disclosure provision (and even less difficulty in sustaining the so-called "disclaimer" provision) in *McConnell*.

In this specific case, the interest in disclosure is evident. The advertisements in question were to be run during the primary season in states where Senator Clinton was on the presidential primary ballot. Each advertisement either contained direct negative statements about Senator Clinton's political views or insinuated that there was negative information that members of the public

could learn more about if they viewed *Hillary: The Movie*, which, as the district court found, is itself a thoroughgoing critique with the theme that Senator Clinton was unfit for the office for which she was running. Moreover, the ads themselves discuss no "issues" other than the "issue" of Senator Clinton herself, a subject pertinent first and foremost to the imminent elections.

Under such circumstances, viewers of the ads would have an obvious and legitimate interest in knowing who was—and was not—behind them. It would be important, for example, to know that the ads were *not* the work of the campaigns of either her Democratic rivals in the primaries or her potential Republican opponents in the general election (hence the disclaimer). Beyond that, there would be an obvious interest in finding out both who paid for the ads (Citizens United) and who supplied the money behind that innocuous-sounding name, so that members of the public could help place Citizens United "in the political spectrum" (*Buckley*, 424 U.S. at 67) and identify the interests it represents—all with the goal of providing themselves more information to assist in evaluating the credibility of its critique of the Senator and determining whether to seek more information from this source. Nothing in this Court's jurisprudence suggests that such interests are insufficient to justify disclosure here.[8]

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[8] The Court's recent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2007), notwithstanding Citizens United's repeated citations, does not suggest that the interests that support disclosure here are insufficient. In *Davis*, the *only* interest served by the disclosure provisions the Court struck down was to make possible implementation of the substantive provisions of the "Millionaire's Amendment," which, the Court held, were themselves unconstitutional. *See id.* at 2775. That implementation of unconstitutional restrictions is not a suffi-

(*Footnote continued*)

Indeed, the Court has long recognized the legitimacy of disclosure requirements much further removed from express candidate advocacy than the ones at issue here. For instance, in *Bellotti*,—the very decision that sustained the right of corporations to engage in issue advocacy and that lies at the core of *WRTL II*'s holding that corporate funding of speech that is not the functional equivalent of express candidate advocacy cannot be prohibited—the Court recognized that where corporate issue advertising is concerned, "[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," and that the government may rely on "the prophylactic effect of requiring that the source of communication be disclosed." *Bellotti*, 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 66-67). Similarly, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (*CARC*), while holding that limits on contributions to a committee formed for ballot measure issue advocacy were unconstitutional, the Court stressed that, even absent those limits, the government could protect the interest in informing voters of the committee's sources of funding by enforcing disclosure provisions. *Id.* at 298-99.

Citizens United characterizes these statements in *Bellotti* and *CARC* as "dicta," Citizens United Br. 55-56, but they were nonetheless important to the Court's explanations of its holdings. Moreover, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), where the Court

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cient justification for *anything* should go without saying, but that does not advance Citizens United's claim that the different interests served by the provisions at issue here are insufficient to meet constitutional demands.

upheld the right of an individual to distribute self-published, anonymous pamphlets on ballot measure issues, the Court was careful to reconcile its holding with the "dicta" from *Bellotti* and took pains not to call into doubt regulations requiring disclosure of corporate campaign expenditures and contributions, whether issue or candidate-related. *See id.* at 353-56. Moreover, "dicta" or not, these statements by the Court are far more persuasive than the authority Citizens United musters for the proposition that disclosure of expenditures and sources of funding for issue advocacy may *not* be required—that is to say, no authority at all.

Indeed, the notion that disclosure requirements applicable to political speech must be limited to express candidate advocacy or its equivalent is directly at odds with the holding in *United States v. Harriss*, 347 U.S. 612 (1954). There, the Court upheld disclosure requirements as to nonelectoral issue advocacy—that is, lobbying—based on the informational interest in disclosing to the public and to members of Congress "who is being hired, who is putting up the money, and how much," information that it found essential to "maintain[ing] the integrity of a basic governmental process." *Id.* at 625.

In each of these cases, the Court asserted the validity of disclosure requirements as to the amount and source of expenditures notwithstanding that (1) the expenditures themselves could not be prohibited, and (2) the expenditures involved issue rather than candidate advocacy. The decisions thus demonstrate the fallacy of Citizens United's two related submissions that disclosure requirements cannot be imposed upon its communications unless they are the type of communications as to which corporate funding may be prohibited and/or they are express candidate advocacy or its equivalent.

Whatever the limits may be to the imposition of disclosure requirements when citizens pool their money to address matters of public interest, the provisions of BCRA at issue here do not approach them. When a corporation such as Citizens United collects and expends funds to broadcast messages about a candidate on the eve of an election, this Court's precedents indicate that the public interest in knowing whose money is behind those messages is more than sufficient to justify reporting and disclosure requirements.

B. Citizens United's "Burdensomeness" Arguments Are Unfounded.

Citizens United's assertion that the disclosure and disclaimer requirements are unduly burdensome is unpersuasive and unsupported by this Court's precedents. As to disclosure, Citizens United's argument is refuted by the very authority on which it relies—*MCFL* (*see* Citizens United Br. 54). *MCFL*, to begin with, expressly stated that even though an ideological nonprofit corporation that accepts no contributions from business corporations cannot be restrained from expending its own funds for express candidate advocacy or forced to bear the burden of establishing a "separate segregated fund" subject to the detailed reporting and disclosure requirements applicable to a "political committee," it must nonetheless report its political expenditures and contributors. *Compare* 479 U.S. at 253-54 (discussing burdens of political committee requirements) *with id.* at 262. Specifically, the Court in *MCFL* stated that, under FECA's provision for disclosure of independent expenditures (2 U.S.C. § 434(c)),

> 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. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

479 U.S. at 262.

MCFL's discussion on this point has twofold significance. First, it provides yet another refutation of Citizens United's position that disclosure obligations cannot be imposed on it if its funding of the speech itself is constitutionally protected, for the *MCFL* Court acknowledged the existence of sufficient justifications for disclosure even in circumstances where it could not find constitutional justification for prohibiting the use of the corporation's funds for the expenditures at issue. Second, it is fatal to Citizens United's undue burden argument. While finding the requirements of political committee status generically too burdensome for *MCFL* corporations, the Court obviously thought that compliance with FECA's standards for disclosure of independent expenditures created no similarly excessive burden. Moreover, as the majority in *McConnell* observed, BCRA's disclosure requirements for electioneering communications are "actually somewhat *less* intrusive than the comparable requirements that have long applied to persons making independent expenditures [under 2 U.S.C. § 434(c)]." *McConnell*, 540 U.S. at 196 n.81 (emphasis added). If, as

MCFL recognized, the requirements of § 434(c) are not too burdensome for a true *MCFL* corporation, it follows that the *less* onerous reporting requirements of BCRA are not excessive for a corporation that does not even qualify under *MCFL*.

As for Citizens United's contention that the four-second disclaimer requirements applicable to its ads under BCRA are excessively burdensome, it, too, is untenable. Four seconds is obviously a minimal requirement for conveying any information, and Citizens United cites no authority for the proposition that its own decision to use ads so abbreviated that the disclaimer cannot fit comfortably with everything else it wants to cram into the short timeframe it has selected renders the disclaimer requirement unduly burdensome. The significant public interest in knowing who is and is not behind such election-eve, candidate-related messages is more than sufficient to justify the minimal burden of a four-second disclaimer and to outweigh Citizens United's interest (if any) in making its messages so short that it has no time for a disclaimer.

CONCLUSION

This Court should affirm the decision of the three-judge district court.

Respectfully submitted,

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