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 FOR APPELLANT

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
JUSTIN S. HERRING
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Appellant

QUESTIONS PRESENTED

1. Whether the prohibition on corporate electioneering communications in the Bipartisan Campaign Reform Act of 2002 ("BCRA") can constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video On Demand.

2. Whether BCRA's disclaimer, disclosure, and reporting requirements can constitutionally be applied to advertisements for that documentary film that the Federal Election Commission concedes are beyond its constitutional authority to prohibit.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Citizens United has no parent corporation and no publicly held company owns 10% or more of its stock.

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The opinion of the three-judge district court denying appellant's motions for a preliminary injunction is reported at 530 F. Supp. 2d 274. J.A. 195a. The opinion of the three-judge district court granting appellee's motion for summary judgment is unreported. *Id.* at 261a.

JURISDICTION

The judgment of the three-judge district court was entered on July 18, 2008. The notice of appeal was filed on July 24, 2008. The jurisdictional statement was filed on August 15, 2008, and probable jurisdiction was noted on November 14, 2008. This Court has jurisdiction under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of BCRA and BCRA's implementing regulations are reproduced in the appendix to this brief.

STATEMENT

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This constitutional injunction evidently was not in the forefront of Congress's mind when it enacted BCRA, a statute that imposes sweeping restrictions on core political speech. But, presumably, that statute did not diminish "our profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omit-

ted). As this Court recently reiterated, that commitment requires that a court "ensure that a compelling interest supports *each application* of a statute restricting speech." *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 (2007) ("*WRTL II*") (opinion of Roberts, C.J.). In holding that BCRA can constitutionally be applied to a documentary film presenting a critical biographical assessment of a political candidate and to television advertisements promoting that film, the three-judge district court failed to meet this most basic of First Amendment requirements.

1. BCRA imposed far-reaching restrictions on the right of corporations to fund political speech in the time period preceding a federal election. Most significantly, BCRA § 203 prohibits corporations from using their general treasury funds to finance "electioneering communications" (2 U.S.C. § 441b(b)(2)), which BCRA and its implementing regulations define as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office"; is made 60 days before a general election for the office sought by the candidate or 30 days before a primary election; and, in the case of a presidential candidate, "[c]an be received by 50,000 or more persons anywhere in the United States" (or, in the pre-primary period, in the State where the primary is being held). *Id.* § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(b)(3)(ii).

BCRA's prohibition on corporate electioneering communications does not extend to communications funded through a political action committee ("PAC") that receives donations only from a corporation's stockholders, its executive and administrative personnel, and their families. 2 U.S.C. § 441b(b)(2)(C), (b)(4)(A). The prohibition is also inapplicable to ideological, nonstock, nonprofit corporations that are not

established by for-profit corporations and that do not accept contributions from for-profit entities. 11 C.F.R. § 114.10(d)(2).

BCRA further established extensive reporting, disclosure, and disclaimer requirements for all electioneering communications, whether funded by a corporation, PAC, or individual. Section 201 of BCRA imposes reporting and disclosure requirements on any person who spends more than $10,000 in a calendar year to produce or air an electioneering communication. 2 U.S.C. § 434(f). Within 24 hours of each statutory "disclosure date," the person funding the communication is required to submit a statement to the Federal Election Commission ("FEC") that identifies itself as responsible for funding the communication and, in the case of a corporation or union, that discloses the name and address of all persons who donated $1,000 or more to the corporation or union since the beginning of the preceding calendar year for the purpose of funding electioneering communications. *Id.*; 11 C.F.R. § 104.20. In addition to these reporting and disclosure requirements, § 311 of BCRA requires electioneering communications to include the disclaimer that "_____ is responsible for the content of this advertising." 2 U.S.C. § 441d(d)(2). The disclaimer must be spoken during the advertisement and, for television advertisements, must appear on the screen "in a clearly readable manner" for at least four seconds. *Id.* The advertisement must also include the name, as well as the address, telephone number, or web address, of the person who funded the electioneering communication and state that the communication was not approved by any candidate or candidate's committee. *Id.* § 441d(a)(3).

This Court has already had several occasions to consider the constitutionality of various aspects of BCRA. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court upheld BCRA's prohibition on corporate electioneering communications, as well as its reporting, disclosure, and disclaimer requirements, against a facial First Amendment challenge. The Court made clear, however, in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") (per curiam), that, "[i]n upholding" the prohibition on corporate electioneering communications "against a facial challenge, [*McConnell*] did not purport to resolve future as-applied challenges" to the statute. *Id.* at 411-12. The Court decided such an as-applied challenge in *WRTL II*, and concluded that the prohibition on corporate electioneering communications can only be constitutionally applied to advertisements that are express advocacy or the functional equivalent of express advocacy. 127 S. Ct. at 2667 (opinion of Roberts, C.J.). "[A] court should find that an ad is the functional equivalent of express advocacy," the Court explained, "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*

In response to *WRTL II*, the FEC promulgated regulations that purport to implement the decision's holding. 11 C.F.R. § 114.15. Those regulations establish a safe harbor for several categories of electioneering communications—including advertisements that propose a commercial transaction and do "not mention any election, candidacy, political party, opposing candidate, or voting by the general public" and do "not take a position on any candidate's or officeholder's character, qualifications, or fitness for office" (*id.* § 114.15(b))—and also specify the factors that the FEC will consider when determining

whether an advertisement is susceptible of no reasonable interpretation other than as an appeal to vote. *Id.* § 114.15(c). The regulations explicitly provide that BCRA's reporting, disclosure, and disclaimer requirements remain applicable to electioneering communications that cannot be constitutionally proscribed under *WRTL II*'s appeal-to-vote standard. *Id.* § 114.15(f).

2. Citizens United is a nonprofit membership corporation that has tax-exempt status under 26 U.S.C. § 501(c)(4) as an "organization[ ] not organized for profit but operated exclusively for the promotion of social welfare." J.A. 11a. Through a combination of education, advocacy, and grass-roots programs, Citizens United seeks to promote the traditional American values of limited government, free enterprise, strong families, and national sovereignty and security. *Id.*

Citizens United has an annual budget of approximately $12 million (J.A. 11a), and is funded predominantly by donations from individuals who support Citizens United's ideological message. *Id.* at 244a, 251a-52a. Citizens United also receives a small portion of its funding from corporate donations. *Id.*

One of the principal means through which Citizens United disseminates its political views is the production and distribution of feature-length documentary movies. J.A. 11a. Since 2004, Citizens United has produced movies on the War on Terror, illegal immigration, and the United Nations, among other political topics. *Id.* at 11a-12a. These movies have been shown in theaters across the country and sold on DVD by national retailers. *Id.* at 12a. A number of them have met with critical and popular

success. Citizens United's 2007 documentary film *Rediscovering God in America*, for example, was the top-selling historical documentary on Amazon.com soon after its release. *Id.*

In mid-2007, Citizens United began production of *Hillary: The Movie*, a biographical documentary about Senator Hillary Clinton, who was then a candidate to become the Democratic Party's nominee for President. J.A. 12a-13a. Although Senator Clinton's candidacy was the backdrop for the 90-minute documentary, neither the movie's narrator nor any of the individuals interviewed during the movie expressly advocated her election or defeat as President. *Id.* at 13a. The movie instead presents a critical assessment of Senator Clinton's record as a U.S. Senator and as First Lady in order to educate viewers about her political background. *Id.*

The documentary focuses principally on five aspects of Senator Clinton's political record: the Clinton Administration's firing of the White House Travel Office staff (J.A. 43a); incidents of official retaliation against a woman who accused President Clinton of sexual harassment (*id.* at 57a); Senator Clinton's failure to adhere to campaign finance restrictions while a candidate for U.S. Senate (*id.* at 72a); her record on job-creation, health-care, and national security issues (*id.* at 90a, 95a, 108a); and the Clinton Administration's abuse of the pardon power (*id.* at 130a).

The movie presents a series of interviews with political commentators, including Robert Novak, Dick Morris, and Ann Coulter (J.A. 36a, 39a, 40a), and with individuals who have had firsthand experience with Senator Clinton. For example, the movie presents an in-depth interview with Billy Dale, the

former director of the White House Travel Office, who was fired by the incoming Clinton Administration and later prosecuted for alleged criminal wrongdoing by the Clinton Justice Department. J.A. 44a-54a. The movie explains that Mr. Dale was eventually acquitted of all charges against him and that the Clinton Administration's handling of the Travel Office affair was condemned by an Independent Counsel investigation. *Id.* at 53a.

The movie also recounts President Clinton's decision to pardon a Puerto Rican nationalist who murdered four people and wounded 50 others in a 1975 New York City bombing. J.A. 131a. The movie reports that the U.S. Senate later voted 95-2 to condemn President Clinton's decision to pardon the bomber while his wife was seeking the Puerto Rican community's support for her Senate bid. *Id.* at 142a.

Citizens United's production of *Hillary* and proposed advertising campaign for the movie were financed with its general treasury funds. The more than $1 million in donations it received to fund the movie came almost exclusively from individuals and other noncorporate persons. J.A. 244a, 251a-52a. Of the 25 donations of $1,000 or more made to fund the movie, only two—totaling just $2,000—came from for-profit corporations. *Id.* at 252a.

3. *Hillary* was released in January 2008 and shown in theaters in six cities that month. J.A. 212a-13a. It was simultaneously made available for purchase on DVD through Citizens United's website and commercial retailers. *Id.* at 213a. The movie's release was accompanied by the publication of a companion book, *Hillary: The Politics of Personal Destruction*. *Id.* at 13a.

To promote the movie, Citizens United produced three advertisements—two of ten seconds' duration and one of thirty seconds' duration—that it intended to run on broadcast and cable television. J.A. 15a.[1]

Citizens United also received an offer from NCC, a company owned by three of the Nation's largest cable companies, to make *Hillary* available through Video On Demand to households that subscribe to digital cable television. J.A. 255a. Video On Demand allows digital cable subscribers to choose movies and other entertainment from an extensive list of

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[1] The script for the television advertisement "Wait" reads:

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

The script for "Pants" reads:

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit.
"Now, a movie about everything else."
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

The script for "Questions," the thirty-second advertisement, reads:

"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."
[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.
[Visual Only] www.hillarythemovie.com. J.A. 26a-27a.

programming options that are generally available 24 hours a day and not subject to preset air times. Video On Demand thus enables viewers to watch what they want, when they want, and further enhances viewers' freedom by enabling them to pause, rewind, and restart programming. *See* Wes Simpson, *Video Over IP: A Practical Guide to Technology and Applications* 377-80 (2006).

A digital cable subscriber can review the available programming options by selecting the Video On Demand feature on his cable converter box or remote control. When the subscriber orders a movie, a compressed data signal is transmitted from the cable company's digital server to the subscriber's set-top converter box, which decompresses the data signal, enabling the movie to be viewed on the television connected to the subscriber's converter box. That electronic signal is sent only to the subscriber who requests the Video On Demand program. The requested programming therefore can only be viewed by the subscriber who ordered it, and not by any other cable-system subscriber. If multiple subscribers order the same movie, then the cable company must transmit a separate electronic signal to each subscriber who placed an order. *See* Simpson, *supra*, at 377-80.

NCC proposed to include *Hillary* as one of the programs in its *Elections '08* Video On Demand feature, which made political programming available free of charge to digital cable subscribers interested in using their television "(i) to educate themselves on the candidates and the issues, and (ii) to make their voting decisions." J.A. 258a. NCC proposed a fee of $1.2 million, or one cent per Video-On-Demand-enabled household per week, to make *Hillary* available through Video On Demand. *Id.* at 256a.

4. Because Senator Clinton was a candidate in the presidential primaries that the Democratic Party was holding between January and June 2008, and because the movie and advertisements mentioned Senator Clinton's name, they potentially constituted "electioneering communications" within the meaning of BCRA.

Citizens United filed suit against the FEC in the United States District Court for the District of Columbia challenging BCRA's constitutionality as applied to the movie and advertisements. In its amended complaint, Citizens United explained that, in the absence of judicial relief, it would be unable to finalize its deal to distribute the movie through Video On Demand because the FEC considered the movie to be a prohibited electioneering communication under *WRTL II*. J.A. 19a-20a. Citizens United further explained that, even though the FEC had conceded that its television advertisements for *Hillary* were not the functional equivalent of express advocacy and thus could not be prohibited under *WRTL II*, it was unable to run those advertisements because complying with BCRA's reporting and disclosure requirements would require Citizens United to reveal the identity of its donors—thereby subjecting them to potential retaliation and chilling further donations—and because BCRA's disclaimer requirements would significantly impair the effectiveness of its 10- and 30-second advertisements. *Id.* at 18a-19a.

Pursuant to BCRA § 403(a)(1), a three-judge district court was empaneled. Citizens United sought a preliminary injunction from that court prohibiting the FEC from applying BCRA's restrictions on electioneering communications to the movie or the advertisements. Citizens United argued that, under *WRTL II*, the FEC could not constitutionally bar dis-

tribution of the movie through Video On Demand because the movie could reasonably be interpreted as a biographical documentary about Senator Clinton, rather than as an "appeal to vote" for or against her. Citizens United further argued that BCRA's reporting, disclosure, and disclaimer requirements cannot be constitutionally applied to any electioneering communication that does not constitute express advocacy or its functional equivalent under *WRTL II*, and that these requirements therefore could not be applied either to the advertisements or to the movie.

The three-judge district court concluded that Citizens United lacked a likelihood of success on the merits and denied its motion for a preliminary injunction. J.A. 209a-10a. The district court held that a Video On Demand broadcast of the movie "was within the definition of 'electioneering communication'" set forth in BCRA and its implementing regulations (*id.* at 199a n.6), and that, under *WRTL II*, the FEC could constitutionally proscribe the movie's broadcast. *Id.* at 206a. Relying on a "selection of excerpts from the movie," the district court concluded that the "film's message as a whole" was the "functional equivalent of express advocacy" because it "references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office." *Id.* at 203a, 204a n.12, 206a. According to the district court, the movie is "susceptible of no other interpretation than to inform the electorate that Senate Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 204a.

The district court also held that application of BCRA's reporting, disclosure, and disclaimer requirements to Citizens United's advertisements does

not violate the First Amendment. J.A. 209a. The district court reasoned that, when *McConnell* sustained the reporting and disclosure requirements of BCRA § 201 and the disclaimer requirements of BCRA § 311, "it did so for the 'entire range of electioneering communications' set forth in the statute" and that "Citizens's advertisements obviously are within that range." *Id.* at 208a (quoting *McConnell*, 540 U.S. at 196). In so concluding, the district court declined to give any weight to the undisputed fact that, under *WRTL II*, Citizens United's advertisements cannot be constitutionally proscribed by the FEC, and expressed skepticism that this Court would "adopt[ ] that line as a ground for holding the disclosure and disclaimer provisions unconstitutional." *Id.* at 208a.

The district court thereafter granted summary judgment to the FEC for the same reasons that it denied Citizens United's motion for a preliminary injunction. J.A. 261a. This Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The decision of the three-judge district court should be reversed. BCRA's prohibition on corporate electioneering communications cannot be constitutionally applied to Citizens United's documentary film, *Hillary: The Movie*, and its disclaimer, disclosure, and reporting requirements cannot be constitutionally applied to advertisements promoting that film.

I. BCRA § 203 is unconstitutional as applied to *Hillary: The Movie*.

A. This Court has identified only one compelling interest that is even conceivably sufficient to justify governmental restrictions on political speech: pre-

venting *quid pro quo* corruption and the appearance of such corruption in the electoral process. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

B.1. Although that compelling anti-corruption interest may be served by government restrictions on 30- or 60-second broadcast advertisements that constitute express advocacy or its functional equivalent, that interest is categorically inapplicable to restrictions on feature-length movies distributed through Video On Demand. In contrast to short broadcast advertisements—which generally target unwilling recipients—feature-length movies are directed at a self-selected audience willing to invest 90 minutes of their time to watch a movie. And where that movie is offered through Video On Demand, the viewers must affirmatively request the movie from their cable provider. *Hillary* and other feature-length political movies distributed through Video On Demand are therefore far less likely than broadcast advertisements to reach and persuade undecided voters and thereby influence the outcome of an election.

2. Moreover, any anti-corruption interest that the government might have in regulating some feature-length political movies distributed through Video On Demand would not reach movies that, like *Hillary*, are funded primarily through individual donations. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)—which held for the first time that the government has a compelling interest in forestalling the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" (*id.* at 660)—was wrongly decided and should be overruled because it is flatly at odds with the well-established principle that First Amendment protection does not

depend upon the identity of the speaker. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

In any event, *Austin*'s reasoning does not justify suppression of *Hillary*, which was funded overwhelmingly by donations from individuals. Thus, unlike in *Austin*, it cannot even conceivably be argued that Citizens United's funding bore "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660.

C. Even if the government did have a compelling interest in prohibiting the Video On Demand distribution of some movies funded overwhelmingly with individual donations, that interest would be inapplicable to *Hillary* because it is not express advocacy or the functional equivalent of express advocacy.

Hillary presents a critical biographical assessment of Senator Clinton's public record. The documentary film does not urge viewers to vote for or against Senator Clinton in the Democratic Presidential primaries, but instead recounts significant events during her time as a U.S. Senator and First Lady in order to inform viewers about her political background. The possibility that, after "voters hear the information" *Hillary* conveys, they may "choose—uninvited by the [movie]—to factor it into their voting decisions" cannot transform this biographical documentary into an appeal to vote. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.).

To be sure, *Hillary* is a highly critical assessment of Senator Clinton's record and several political commentators featured in the movie express concerns about her fitness for office. But the fact that *Hillary* offers a conservative critique of Senator Clinton's record simply reinforces the absence of a *quid pro quo* corruption interest here: None of Senator

Clinton's Democratic presidential rivals would ever have viewed *Hillary* as a contribution to his primary campaign in need of repayment.

II. The application of BCRA's disclosure, disclaimer, and reporting requirements to Citizens United's movie and advertisements is also unconstitutional.

A. Any content-based restriction on political speech must survive strict scrutiny. Because the government has conceded that Citizens United's advertisements promoting *Hillary* are not express advocacy or its functional equivalent, and because the district court erred when it concluded that the movie itself is the functional equivalent of express advocacy, the government lacks a compelling interest in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United in this case.

B. These requirements are also unconstitutional under the government's version of "exacting scrutiny."

Neither the government's interest in providing information to the electorate nor its interest in enforcing substantive campaign-finance restrictions is sufficient to sustain application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United. The informational interest is inapplicable to the advertisements because they promote a documentary movie—encouraging viewers to see *Hillary* in the theater, purchase it on DVD, or download it through Video On Demand. A requirement that Citizens United identify itself as responsible for those advertisements and disclose the names of its donors might assist the public in their movie-viewing decisions but would not provide them with information relevant to the electoral process. Such a

requirement would be equally uninformative as applied to the movie because the movie already includes extensive credits that provide much of the same information to viewers.

The government's interest in enforcing campaign-finance laws is also insufficient to sustain the application of BCRA's disclaimer, disclosure, and reporting requirements in this case because the government concedes that the only substantive campaign finance restriction at issue—BCRA § 203's prohibition on corporate electioneering communications—is inapplicable to Citizens United's advertising. And because the district court erred in concluding that BCRA § 203 could be applied to *Hillary*, the enforcement interest also is inapplicable to the movie.

In any event, any marginal informational or enforcement interest that the government may have in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United is manifestly outweighed by the burdens that those requirements would impose upon Citizens United's constitutionally protected speech, including a dramatic reduction in the effectiveness of its 10- and 30-second advertisements, a significant increase in its compliance costs, and the deterrence of future donations.

ARGUMENT

I. BCRA § 203 Is Unconstitutional As Applied To The Distribution Of Citizens United's Documentary Film Through Video On Demand.

The district court upheld the application of BCRA's prohibition on corporate electioneering communications to *Hillary: The Movie* because it

concluded that the government had a compelling anti-corruption interest in prohibiting Citizens United from distributing its documentary film. That decision is incorrect because whatever anti-corruption interest the government may have when regulating 30-second political advertisements financed with funds from for-profit corporations is categorically inapplicable to feature-length documentary films distributed through Video On Demand and financed almost exclusively with individual donations. In any event, even if the government could proscribe some such films, it would be unconstitutional for the government to prohibit the distribution of *Hillary* because that film is a critical biographical documentary that does not constitute express advocacy or the functional equivalent of express advocacy under the standard articulated in *WRTL II*.

A. The Government May Not Suppress Political Speech Except When Necessary To Prevent Corruption Or The Appearance Of Corruption.

No less than other content-based restrictions on speech, any effort by the government to suppress political speech is subject to strict scrutiny, under which "the *Government* must prove that [the restriction] furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.). "[T]he only legitimate and compelling government interests thus far identified for restricting campaign finances" are "preventing corruption or the appearance of corruption." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). The "hallmark" of this brand of corruption of elected officials "is the financial *quid pro quo*: dollars for political favors." *Id.*

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court reviewed an extensive and "deeply disturbing" legislative record detailing the phenomenon of "large contributions . . . given to secure a political *quid pro quo* from current and potential office holders." *Id.* at 26-27. Recognizing that such *quid pro quo* corruption undermined "the integrity of our system of representative democracy," the Court upheld certain campaign contribution limits established by the Federal Election Campaign Act ("FECA") as a "precisely" "focuse[d]" means of stamping out the corrupting influence of large contributions. *Id.* at 26-27, 28.

Buckley, however, took a very different approach with respect to the regulation of independent expenditures. Even after narrowing FECA's definition of "expenditures" to include only express advocacy—*i.e.*, speech employing the so-called "magic words" advocating the election or defeat of a particular candidate (*Buckley*, 424 U.S. at 44)—the Court still invalidated FECA's restriction on independent expenditures. The Court concluded that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. Such expenditures, the Court reasoned, "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive," thus "alleviat[ing] the danger that expenditures will be given as *quid pro quo* for improper commitments from the candidate." *Id.* at 47.

After striking down a federal restriction on independent expenditures as applied to express advocacy funded primarily by individual donors (*see FEC v. Mass. Citizens for Life*, 479 U.S. 238, 256-65 (1986) ("*MCFL*")), the Court broke sharply from the teach-

ings of *Buckley* in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). To sustain a state ban on independent expenditures as applied to express advocacy funded primarily by for-profit corporate members, the Court uncovered another form of "corruption"—beyond that of *quid pro quo* exchanges of campaign support for official actions—that warranted regulation: "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." *Id.* at 660. And, although *Buckley* had found that independent expenditures did not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions" (424 U.S. at 46), in *Austin* the Court reasoned that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." 494 U.S. at 660. The Court thus upheld Michigan's ban on corporations' expenditures of general treasury funds for express advocacy of the election or defeat of state candidates.

Subsequent election cycles witnessed a "spectacular rise" in broadcast advertisements by corporations and labor unions that avoided the use of "magic words" but nevertheless were "candidate-centered." *McConnell v. FEC*, 251 F. Supp. 2d 176, 527 (D.D.C. 2003) (Kollar-Kotelly, J.). "[T]o stanch" that "virtual torrent of televised election-related ads during the periods immediately preceding federal elections" (*McConnell*, 540 U.S. at 207), Congress enacted BCRA in 2002, § 203 of which prohibited corporations and unions from using general treasury funds

to finance "electioneering communications." 2 U.S.C. § 441b(b)(2).

To defend Congress's effort "[t]o stanch" this political speech (*McConnell*, 540 U.S. at 207), lawyers defending BCRA amassed an "elephantine" litigation record (*McConnell*, 251 F. Supp. 2d at 209 n.40) that purported to establish that: (1) "*Buckley*'s magic words requirement is functionally meaningless" because "advertisers [can] easily evade the line by eschewing the use of magic words" and because "they would seldom choose to use such words even if permitted" (*McConnell*, 540 U.S. at 193); (2) television and radio advertisements are the "most prevalent," "most visible," "most powerful," and "most effective" form of campaign communications and that, accordingly, "broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections" (*McConnell*, 251 F. Supp. 2d at 569-71, 573 (Kollar-Kotelly, J.)); (3) "candidates are acutely aware of third-party interest groups who run candidate-centered issue advertisements on [their] behalf," "candidates appreciate the support of those organizations," and they "feel indebted to those who spend money to help get them elected" (*id.* at 555-56); and (4) the public perceives that elected officials "demonstrate their appreciation" and pay off their "indebtedness" through "favored access, or increased legislative influence, or both." *Id.* at 557; *id.* at 800 (Leon, J.).

"[G]round[ing]" its analysis "in the evidentiary record before the Court" (*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.)), the *McConnell* majority rejected a facial challenge to BCRA's prohibition on corporations' expenditure of general treasury funds to finance electioneering communications. Based on

the litigation record before it, the Court concluded that the government had a compelling anti-corruption interest in suppressing not just corporate expenditures for express advocacy, but also corporate expenditures for "issue ads broadcast" immediately before an election that "are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206.

Addressing an as-applied challenge to BCRA's restriction on electioneering communications in *WRTL II*, the Court held that "a court should find 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 (opinion of Roberts, C.J.). The Court explained that advertisements that are susceptible of other interpretations—including "advocacy [that] conveys information and educates"—"are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 2667, 2672. Because the government's suppression of Wisconsin Right to Life's political speech was not narrowly tailored to combat "*quid pro quo* corruption" of elected officials, it could not be sustained. *Id.* at 2671.

B. No Compelling Interest Supports The Government's Effort To Prohibit Video On Demand Distribution Of Citizens United's Documentary Film.

The district court assumed that, if *Hillary: The Movie* was susceptible of no interpretation other than an appeal to vote against Hillary Clinton in the Democratic presidential primaries, then the government had a compelling interest in suppressing it.

The assumption might have been warranted if *Hillary: The Movie* were of a piece with the "virtual torrent of televised election-related ads" at issue in *McConnell*. 540 U.S. at 207. But as the film's title suggests, it is not: It is a feature-length documentary film that Citizens United sought to distribute (but was barred from distributing) through Video On Demand technology and that was funded almost exclusively by individuals. Strict scrutiny requires a reviewing court to "ensure that a compelling interest supports *each application* of a statute restricting speech." *WRTL II*, 127 S. Ct. at 2671 (opinion of Roberts, C.J.). This, the district court failed to do.

1. The Government Has Failed To Demonstrate Any Anti-Corruption Rationale For Prohibiting Video On Demand Distribution Of Feature-Length Films.

a. *McConnell*'s holding that the government may prohibit corporate general treasury expenditures for broadcast advertisements that "are the functional equivalent of express advocacy" (540 U.S. at 206) is predicated on the *McConnell* district court's finding that, of all forms of political speech, "broadcast advertising is the most effective form of communicating an electioneering message" and therefore poses the most acute risk of corruption. *McConnell*, 251 F. Supp. 2d at 647 (Kollar-Kotelly, J.); *see also id.* at 569-73. Other forms of communication, such as the Internet, direct mail, and newspaper advertising are not "nearly as effective as broadcast advertising" and therefore are not "as problematic." *Id.* at 572. BCRA's restriction on electioneering communications was narrowly tailored, the district court concluded, because, as limited to "Radio & Television Adver-

tisements," it reached "only the media that were found by Congress to be problematic." *Id.* at 569; *see also id.* at 573 ("The primary definition of electioneering communication is narrowly tailored to only the communication media that was problematic . . . broadcast advertisements . . . .").

Broadcast advertising is more effective at influencing elections—"problematic" in Judge Kollar-Kotelly's view—than other modes of communication because of the audience that broadcast advertising can reach. Because they are interspersed among segments of a program a viewer or listener has selected, broadcast advertisements are able to reach individuals who would not otherwise choose to receive the message conveyed in the advertisement. And because most advertisements are short in duration, many unwilling recipients will endure the brief interruption in programming and receive a message they otherwise would not choose to hear. To avoid the unwanted message, a viewer or listener must change the broadcast channel and thereby risk missing some portion of the program he was viewing or listening to before the advertising interruption. For better or worse, evading broadcast advertisements is not as easy as hanging up the phone, turning the page of the newspaper, or discarding unwanted direct mail. *See* E.D. Dover, *Images, Issues, and Attacks* 7 (2006) ("Television ads are different [than print ads] . . . in that passive viewers essentially have an ad thrust in front of them and frequently respond by watching it.").

It is the fact that broadcast advertisements can reach the vast number of voters who are not sufficiently engaged in the political process or otherwise motivated to seek information about candidates that makes broadcast advertisements so effective at in-

fluencing the outcome of elections. Marion Just et al., *Thirty Seconds or Thirty Minutes: What Viewers Learn from Spot Advertisements and Candidate Debates*, 40 J. Comm. 120, 122 (1990) ("The most important effects of political commercials occur not among politically attentive people but among moderately or less interested voters, who view them as they watch regular programming."). Broadcast advertisements, far more often than other forms of campaign communication, are able to persuade viewers or listeners to vote for a candidate for whom they otherwise would not.

b. There is no evidence in the record of this case—or *McConnell*—to support the notion that feature-length films distributed through Video On Demand are anywhere near as effective as broadcast advertisements at influencing the outcome of elections. To the contrary, as Judge Kollar-Kotelly recognized, forms of communication that require individuals to "opt-in"—to "make a choice to . . . watch the program"—are likely to attract viewers that are "more predisposed to the [speaker's] views about political candidates than the undecided voter watching a sitcom on a Thursday evening and viewing a thirty-second issue advertisement critical of [a candidate]." *McConnell*, 251 F. Supp. 2d at 571, 646 (Kollar-Kotelly, J.). Because the sitcom advertisement is "aired throughout programming without any viewer choice," it is more likely to reach the "undecided voter" and thereby influence the outcome of the election; the broadcast advertisement thus poses a "much more powerful" "risk of corrupting the political process" than a communication that requires its recipients to "opt-in." *Id.* at 571, 646. At least for Judge Kollar-Kotelly, the element of "viewer choice" was a "critical distinction" that separated media that

posed "powerful" risks of corruption from those that did not. *Id.* at 571, 646.

A feature-length film distributed through Video On Demand requires viewers to "opt-in" at two separate levels. First, the viewer must choose to invest the time to watch the entire film. *Hillary* is 90 minutes in length—180 times as long as the typical campaign advertisement. Given the investment of time required, the only persons likely to watch the film are those who are interested enough in the subject matter to want to learn what Citizens United has to say about Hillary Clinton. That self-selecting audience bears little resemblance to that of any broadcast political advertisement.

Once an individual has decided to invest the time to view the feature-length film, he still must find a theater in which to view it, obtain a DVD copy of it, or order it through a Video On Demand service provider. In the case of Video On Demand—the only method of distribution at issue in this case—the viewer must locate the film he wishes to watch among the numerous Video On Demand offerings, and then send an electronic signal to the Video On Demand provider that directs the provider's digital server to send a digital data signal containing a scrambled and compressed version of that film to the viewer's converter box. *See* Simpson, *supra*, at 377-80. The converter box, in turn, unscrambles and decompresses the data signal, and allows the film to be watched on the television connected to the viewer's converter box. *Id.* Thus, to view a film through Video On Demand, the viewer must not only choose to invest the time to watch a feature-length film, but also to instruct the Video On Demand service provider to transmit the film to his converter box.

This type of Video On Demand service, which was not widely available in 2003 when the district court and this Court first considered the constitutionality of BCRA's prohibition on corporate electioneering communications, is analogous in every relevant respect to an Internet user's download of video content—a "form[ ] of media" Judge Kollar-Kotelly found to be "completely different" from "television and radio advertising." *McConnell*, 251 F. Supp. 2d at 571. Indeed, the *only* difference is that in the Video On Demand context the viewer receives the requested video content via cable or satellite, whereas in the Internet context, the viewer receives the video content via the Internet (which, depending on the viewer's Internet service provider, may or may not include the facilities of a cable or satellite company). As if to prove the point, numerous *Internet* companies—such as Amazon.com—are now offering "video-on-demand" delivery of video content.

Whether offered through a cable service provider or an Internet service provider, it is the Video On Demand *viewer* who requests the content from a digital server, which then routes a data signal to the viewer (and only to that viewer). The fact that the viewer chooses the content, rather than the content choosing the viewer, fundamentally alters the composition of the audience and is a "crucial distinction" that separates speech that could not possibly corrupt elected officials from speech found in the past to present a risk of such corruption.[2]

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[2] While the element of viewer choice in Video On Demand transactions means that BCRA's restrictions on electioneering communications cannot be constitutionally applied to films distributed through Video On Demand, the fact that each Video On Demand transmission is directed only to the requester's con-

c. Moreover, the fact that the government sought to suppress only the Video On Demand distribution of *Hillary*, while leaving Citizens United free to distribute the film during the pre-election window in theaters and on DVD, betrays its asserted anti-corruption rationale as a pretext for simple suppression of speech. It cannot seriously be maintained that the Video On Demand distribution of *Hillary* is any more corrupting either of Senator Clinton's Democratic primary opponents or the political process generally than if Citizens United sent a free DVD to every person who ordered the film through Video On Demand (or to every registered voter in a primary

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[Footnote continued from previous page]

verter box means that the Video On Demand transmissions are not electioneering communications at all. To be an electioneering communication, a communication must be able to be received by 50,000 persons. *See* 2 U.S.C. § 434(f)(3)(C); 11 C.F.R. § 100.29(b)(3)(ii). Because, unlike a broadcast, it is sent only to the requesting converter box (as opposed to a geographic area), a Video On Demand transmission will generally be viewed only by the members of the household who requested the Video On Demand program. Unless the recipient converter box is located in a sold-out football stadium, the transmission will not be able to be viewed by 50,000 people. Although Citizens United did not present this argument to the district court, the district court appeared to pass upon it (*see* J.A. 199a n.6), and the canon of constitutional avoidance suggests that this Court should consider it even if the district court had not. *See*, *e.g.*, *United States v. Grace*, 461 U.S. 171, 175-76 (1983) ("Appellees did not make a statutory construction argument before the lower courts, but at oral argument, the question was raised whether § 13k reached the types of conduct in which appellees engaged, and we should answer it."). Here, the inescapable fact is that, in Video On Demand technology, each communication from the content provider's digital server is directed to a single converter box. That fact is an appropriate and nonconstitutional basis for resolving this aspect of the case.

State). Yet, the government demands the suppression of the former, and not the latter.

As applied to feature-length films, the government's restriction is even more "woefully underinclusive" than the speech restriction this Court struck down in *Republican Party v. White*, 536 U.S. 765 (2002). In *White*, the Court concluded that the State's asserted "objective of open-mindedness" was a mere fiction because the speech restriction prohibited judges from announcing their "views on disputed legal or political issues" only when the judge was a candidate and otherwise permitted such speech both before and after the judge was elected. *Id.* at 768, 780. At least in *White*, however, the State prohibited the targeted speech at certain times and not others. Here, while the government claims that extirpation of corruption from our political process demands that it prevent individuals from using a Video On Demand service to view *Hillary* or similar films in their homes in the run-up to elections, it is perfectly willing to let the *same* individuals view the *same* films in their *same* homes during the *same* period of time, as long as they use a DVD player to do so.

To be sure, the government is entitled to regulate "one step at a time," but where the First Amendment is concerned, this Court has approved such incremental regulation only where it addresses the "phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207-08. Nothing in this record, the *McConnell* record, or common sense supports the contention that one digital data transmission and storage format (Video On Demand) is more acutely corrupting of the political process—"more problematic" one might say—than another (DVDs). And in the absence of any factual or logical basis for the line the government has drawn between

the Video On Demand and DVD formats, the fact that the government seeks to prohibit only the Video On Demand distribution of *Hillary* and other feature-length films profoundly "undermines the likelihood of a genuine state interest" supporting BCRA's application to such films. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978).

It is the government's burden to "prove" that "a compelling interest justifies *each application* of a statute restricting speech." *WRTL II*, 127 S. Ct. at 2664, 2671 (opinion of Roberts, C.J.). With respect to feature-length films distributed through Video On Demand, the government has failed to carry that burden. It has made no showing that restricting Video On Demand distribution of *Hillary* and similar films will further its asserted anti-corruption rationales, much less the required showing that the restriction is necessary to achieve those ends.

2. No Compelling Interest Supports The Government's Effort To Suppress Political Speech That Is Funded Overwhelmingly By Individuals.

If there existed a substantial governmental anti-corruption interest in prohibiting the Video On Demand distribution of biographical documentary films, it would not extend to films, like *Hillary*, that are funded overwhelmingly by individuals.

The FEC's claim of authority to prohibit Video On Demand distribution of *Hillary*—and other speech of nonprofit advocacy corporations—rests on this Court's decision in *Austin*, which held that a State could prohibit an advocacy group funded predominantly by for-profit corporations (the Michigan Chamber of Commerce) from using general treasury

funds for express advocacy (494 U.S. at 659), and on *McConnell*'s apparent extension of *Austin* to all nonprofit corporations not falling within the "carefully defined category of entities" directly at issue in *MCFL*. *McConnell*, 540 U.S. at 210. The FEC's longstanding position is that, if a nonprofit advocacy corporation accepts *any* contribution from a for-profit entity or labor union—even a single dollar—the FEC may prohibit that advocacy group from using its general treasury funds for electioneering communications. *See* 11 C.F.R. § 114.10 (exempting from the electioneering communication prohibition only ideological, nonstock, nonprofit corporations that receive no funding from for-profit corporations or from business activities).

Austin was wrongly decided and should be overruled. *Austin*'s assertion that the government has a compelling interest in forestalling "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" (494 U.S. at 660) is sharply at odds with the more venerated principle, articulated in *Buckley* and recently reaffirmed in *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008), that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 49. Nor can it be reconciled with *Bellotti*'s recognition that political speech is no less valuable "because the speech comes from a corporation rather than an individual." 435 U.S. at 776-77; *see also id.* ("[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual"). In-

deed, *Austin*'s assertion that the government must police the "distorting effects" of corporate wealth on the marketplace of ideas (494 U.S. at 660) was rejected almost verbatim in *Bellotti*, which held that the fear that "corporations are wealthy and powerful and their views may drown out other points of view" could not justify suppression of corporations' political speech. 435 U.S. at 789.

Moreover, the "immense aggregations of wealth" of which *Austin* complained are accumulated as often by individuals as by corporations. And there is absolutely no reason to think that an advocacy group funded predominantly by one or two individuals—such as George Soros's Fund for America or the Wyly brothers' Republicans for Clean Air—is any more reflective of the public's support for the group's ideals than a group funded exclusively by for-profit corporations. The for-profit corporations, at least, must respond to their shareholders through their boards of directors.

But whatever the continuing vitality of *Austin*, its rationales clearly do not support a ban on speech that, like *Hillary*, is funded predominantly by individuals. *MCFL* held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form. Although the "resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas," nonprofit advocacy groups that take the corporate form "do not pose that danger of corruption" because they are "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 258-59 (emphasis added). Their "resources . . . are not a function of [their] success in the economic mar-

ketplace, but [their] popularity in the political marketplace." *Id*.

None of the rationales marshaled in support of the result in *Austin* can justify suppression of speech that is funded overwhelmingly by individuals who know their money will be put to use for advocacy. This is far from a scenario where, as the Court said of the Michigan Chamber of Commerce in *Austin*, the entity's power in the marketplace of ideas has "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. Nor is it a case where donors are funding "varied purposes, several of which are not inherently political," and therefore "many of its members may be . . . reluctant to withdraw as members even if they disagree with the [advocacy group's] political expression"—creating a hypothetical asymmetry between the political speech and the views of the donors financing it. *Id*. at 662, 663 (citation omitted).

The question here is whether Citizens United's documentary is more like the speech in *MCFL*—funded entirely by individuals—or the speech in *Austin*—funded by a membership that was "more than three-quarters" for-profit corporations. *Austin*, 494 U.S. at 664. The answer is clear: More than *ninety-nine percent* of the funding for *Hillary* came from individuals. J.A. 244a, 251a-52a. Because nearly all of its support came from individuals who share in its ideological vision, Citizens United's ability to disseminate its ideas through its documentary film reflects precisely its individual members' support for that speech.

The FEC's one-dollar-and-you're-out rule turns the First Amendment on its head. It *presumes* that even the most miniscule amount of support from a

for-profit corporation either will make an advocacy group's speech unreflective of its individual members' views, or will arrogate to that advocacy group power within the marketplace of ideas beyond that the group has earned based on the "public's support" for its mission. Such a presumption is incompatible with strict scrutiny, which "give[s] the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). It is the government's burden to rebut the presumption in favor of speech through *proof*—not supposition—that the corporate donations to a nonprofit advocacy group unfairly leverage the corporate donors' "success in the economic marketplace" to fund speech that substantially outstrips the advocacy group's "popularity in the political marketplace." *MCFL*, 479 U.S. at 258-59.

Here, more than $1 million was donated to Citizens United to fund the production and distribution of *Hillary*. Twenty-five persons gave more than $1,000 to Citizens United for that purpose. J.A. 251a-52a. Of the more than $200,000 raised from these large donors, only $2,000—less than 1%—was donated by for-profit corporations. *Id.* The percentage of contributions that Citizens United received from for-profit corporations would doubtless be even smaller if the numerous contributions of less than $1,000 were taken into account.

It is inconceivable that these donations gave Citizens United any "unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. Whatever else can be said of the movie, it cannot seriously be contended that its funding bore, as asserted in *Austin*, "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. The individual donors who provided virtually all of

the funding for Citizens United's documentary knew that they were supporting the documentary and donated precisely for that reason.

C. *Hillary: The Movie* Is Not The Functional Equivalent Of Express Advocacy.

Even if one assumes that the First Amendment permits the government to subject the Video On Demand distribution of a feature-length documentary film underwritten almost entirely by individuals to the same regulatory regime as broadcast advertisements of for-profit corporations, the FEC's proscriptive power would extend only to those films that are "equivalent to contributions" and that "pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.). That category would include only films that constitute "express advocacy" or its "functional equivalent." *Id*. A communication "is the functional equivalent of express advocacy only if [it] is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate." *Id.* at 2667 (emphasis added).

The parties agree that *Hillary* is not express advocacy. *See* Def.'s Mot. for Summ. J. 37. Accordingly, even under the FEC's expansive view of its own authority, the government may prohibit Video On Demand distribution of *Hillary* only if the film cannot reasonably be interpreted as anything other than an appeal to Democratic presidential primary voters to vote for someone other than Hillary Clinton in those elections. Because the FEC is seeking to prohibit distribution of the *whole* film and not just what it considers to be its corrupting parts, the FEC

bears the burden of demonstrating that the *entire* 90-minute film is susceptible of no reasonable interpretation other than as an appeal to Democratic primary voters to vote against Senator Clinton. And because "the distinction between discussion of . . . candidates and advocacy of election or defeat of candidates may often dissolve in practical application," if *Hillary* presents a "debatable case," it must be resolved in favor of "the speaker, not the censor." *WRTL II*, 127 S. Ct. at 2669 & n.7 (opinion of Roberts, C.J.) (internal quotation marks omitted). It is Citizens United's "First Amendment freedoms" at stake in this case after all, and those freedoms "need breathing space to survive." *Id.* at 2666 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

But this Court need not rely on "breathing space," because this 90-minute film is not remotely an "appeal to vote." *Hillary* is a documentary film that examines certain historical events—frequently through interviews of persons who participated in those events alongside Senator Clinton—in an effort to educate its viewers about the background, character, and beliefs of Senator Clinton. For example, it tells the story of Billy Dale, who was fired by the Clinton Administration as the Director of the White House Travel Office after more than thirty years of service. J.A. 43a-53a. The documentary also reviews the fundraising practices and alleged violations of the campaign finance laws by Senator Clinton and President Clinton. *Id.* at 65a-87a. Later, the film examines Senator Clinton's involvement as First Lady in the Clinton Administration's efforts to reform healthcare, and uses that as a launching point to explore her views on healthcare reform. *Id.* at 95a-104a. And there is a substantial exposition of her views on the Iraq War, starting with her vote to

authorize the war and tracing her shift to oppose the war by the time she started to campaign for the Presidency. *Id.* at 108a-12a. Throughout, the film presents the views of an array of political commentators, many of them distinguished and well-known, such as Robert Novak, John Fund, Michael Barone, and Newt Gingrich.

The film is therefore best viewed as a rigorously researched critical biography designed to "convey[ ] information and educate[ ]" viewers about a presidential candidate. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). In this regard, it is similar to the numerous critical candidate biographies found in bookstores, such as Bay Buchanan's *The Extreme Makeover of Hillary (Rodham) Clinton*—books that themselves are intended as answers to the ubiquitous and self-serving campaign autobiographies of the candidates. *See*, *e.g.*, Joe Biden, *Promises to Keep: On Life and Politics* (2008). Whether they agree or disagree with the film's underlying critique of Senator Clinton, even well-informed viewers could learn a great deal about her from the film. And to the extent that the film is, as *Publishers Weekly* said of *The Extreme Makeover of Hillary (Rodham) Clinton*, "a sermon for the choir" (The Week of 7/23/07, *at* http://www.publishersweekly.com/article/CA6462022.html), the "choir" likely would find *Hillary* entertaining as well as informative.

To support its conclusion that *Hillary* is "susceptible of no other interpretation than . . . that viewers should vote against her," the district court relied on a "selection of excerpts from the movie" that the court found "indicative of the film's message as a whole." J.A. 204a n.12. Yet *none* of those excerpts suggests that the viewer take any action at all—much less the *specific* act of voting against Senator Clinton in a

Democratic presidential primary. In the absence of such an unambiguous call to action, it is difficult to envision any language or images, or mix of the two, that must invariably be interpreted as an "appeal to vote." The possibility that, after "voters hear the information" conveyed in *Hillary*, they may "choose—uninvited by the [movie]—to factor it into their voting decisions" does not transform this biographical documentary into an appeal to vote against Senator Clinton. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.).

The only portion of *Hillary* that even conceivably could be characterized as an "appeal to vote" comes approximately 83 minutes into the 90-minute film when various political commentators state their views as to Senator Clinton's qualifications to be President. It was in that context that conservative commentator Robert Novak said that "I think Hillary Clinton as a candidate has great defects" (J.A. 145a); Frank Gaffney, founder and president of the Center for Security Policy, said that "I don't think [a Hillary Clinton presidency] is going to be good for the security of the United States" (*id.* at 147a); and Buzz Patterson, former military aide to President Clinton, said that "the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." *Id.* at 149a.

Such a discussion of a candidate's character, qualifications, or fitness for office would have been commonplace on *Meet the Press* or any other of the countless television and radio programs populated by political commentators, and the district court erred in holding that it would have been a felony for Citizens United to broadcast the same political speech. The First Amendment does not admit of a view of the freedom of speech under which only those fortunate

enough to have their speech sanctified by the FEC as a "news story, commentary, or editorial" may say what they wish about a candidate's qualifications and fitness for office (11 C.F.R. § 100.29(c)(2)), while all others must keep their discussion of candidate qualifications so anodyne as not to pique the interest of even the most aggressive FEC regulator, risk felony prosecution, or (as the FEC undoubtedly prefers) remain silent.

The government locates support for the district court's conclusion in the lead opinion of *WRTL II*, which reasoned that certain issue advertisements were *not* appeals to vote because, among other things, they did *not* "take a position on a candidate's character, qualifications, or fitness for office." 127 S. Ct. at 2667 (opinion of Roberts, C.J.). But it does not follow from that line of reasoning that *every* pointed discussion of a candidate's qualifications and fitness for office *must* be interpreted as an appeal to vote for or against that candidate. In many cases, a speaker's expression of his view as to a candidate's qualifications and fitness for office will be just that—the speaker's expression of his own viewpoint. In the absence of words of express advocacy, the expression of a viewpoint as to a candidate's character, qualifications, or fitness for office may be *necessary* to establish that the communication constitutes an appeal to vote for or against that candidate, but it is not itself sufficient.

Whether a speaker's assessment of a candidate's qualifications can and should be interpreted as an appeal to vote for or against that candidate will depend frequently on the context in which it arises. Broadcast as a 10-second advertisement, the unadorned statement, "John McCain is too old to be President," conceivably could be considered by some

as an appeal to vote against Senator McCain because, in the absence of any contextual discussion, many in the audience might not evaluate the advertisement's statement as part of a larger debate over the competing candidates' fitness for office. They may very well view it, like many of the advertisements blanketing the airwaves in the run-up to the recent election, as an appeal to vote against Senator McCain.

On the other hand, if a documentary producer created a program that investigated the question whether Senator McCain was healthy enough to be President, probed his health history, and concluded the program with an interview with a commentator expressing the view that "John McCain is too old to be President," that documentary would be understood as contributing to an important debate about a candidate's medical fitness to hold office. (In fact, numerous "news" programs aired segments on exactly this topic in July 2008 after Senator McCain had a mole removed from his face. *See* CNN, McCain Health Scare (aired July 28, 2008), *transcript at* http://transcripts.cnn.com/TRANSCRIPTS/0807/28/ec.01.html. The context in which the evaluation of the candidate's fitness arose—as part of a detailed factual investigation of the issue—would make clear that the program was not a blunt appeal to vote against Senator McCain. The program instead would be understood by its audience principally as providing information about Senator McCain's health and, possibly, as imparting one commentator's view as to his fitness to hold the office of President.

Hillary is not a broadcast advertisement and, taken as a whole, the 90-minute film plainly is susceptible to interpretations other than as an appeal to vote against Senator Clinton. As noted above, like

any candidate biography, *Hillary* should be understood principally as providing its audience with historical information about the candidate, and, perhaps, some measure of entertainment as well. In this respect, it is analogous to *Fahrenheit 911*, which, though critical of President Bush, could not be viewed solely as an appeal to vote against him because it also provided viewers with extensive information about the 9/11 terrorist attacks and the Nation's (as well as President Bush's) response to them. Similarly, the fact that *Hillary* includes—after approximately 85 minutes of detailed information concerning Senator Clinton's record as First Lady and Senator—various commentators' opinions that Senator Clinton would be a poor choice for President, cannot convert the *entire* film into an appeal to vote. Taken as a whole, the film can still reasonably be interpreted by its audience as conveying information about Senator Clinton's political past in order to educate viewers about her background. Indeed, the film's presentation of these commentators' critical views about Senator Clinton no more converts the entire work into an appeal to vote *against* her than its inclusion of self-laudatory campaign statements by Senator Clinton herself transforms the film into an appeal to vote *for* her. J.A. 32a-33a.

Even more fundamentally, however, the Video On Demand distribution of Citizens United's film cannot possibly be viewed as "equivalent" to the type of campaign "contribution" that raises the specter of *quid pro quo* corruption of elected officials. *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.). But for the threat of FEC enforcement, Citizens United would have distributed *Hillary* through Video On Demand in January 2008, as the first Democratic presidential primaries were getting underway. The

notion that Senator Obama would have viewed the Video On Demand distribution of *Hillary* as a contribution to his amply financed campaign, and that President-Elect Obama, "know[ing] who [his] friends are" (*McConnell*, 540 U.S. at 129), would now feel beholden to Citizens United (and, more specifically, to the two corporations that provided a total of less than one percent of *Hillary*'s production costs), is patently absurd. The self-selecting audience of an overtly conservative documentary like *Hillary* likely would not have included a significant number of Democratic primary voters. Accordingly, none of Senator Clinton's Democratic presidential rivals ever would have viewed the distribution of *Hillary* as a contribution to his primary campaign in need of repayment, "and the *quid-pro-quo* corruption interest" therefore "cannot justify regulating [it]." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.).

The government cannot defend its censoring of *Hillary* by reference to abstractions about the "functional equivalent of express advocacy." Strict scrutiny demands that it prove that suppression of *this film* is necessary to combat real or apparent corruption. Because it cannot adduce any reason to believe—much less any proof—that Video On Demand distribution of *Hillary* posed any danger of actual or apparent corruption of Senator Clinton's rivals in the Democratic presidential primary, the First Amendment should have protected Citizens United's right to distribute its film. More the pity that it could not do so when it mattered most.

II. BCRA § 201 AND BCRA § 311 ARE UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED.

The district court upheld the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United because it construed *McConnell* as foreclosing all as-applied challenges to those requirements, except for challenges by groups whose members would be subject to a "'reasonable probability'" of reprisals if their identities were disclosed. J.A. 209a.

This was error. As this Court made clear in *WRTL I*, *McConnell* rejected a *facial* challenge to BCRA, but did not purport to foreclose any future as-applied challenges. *WRTL I*, 546 U.S. at 411-12. *McConnell*'s facial analysis therefore did not resolve whether BCRA's disclaimer, disclosure, and reporting requirements can constitutionally be applied to advertisements promoting a political documentary about a presidential candidate or to the documentary movie itself where neither the advertisements nor the movie constitutes express advocacy or its functional equivalent. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (where an overbreadth challenge fails, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which" a statute, "assertedly, may not be applied").

As applied in this case, BCRA's disclaimer, disclosure, and reporting requirements violate the First Amendment because the application of those requirements to Citizens United's advertisements and movie does not further a compelling—or even an important—government interest.

A. The Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Strict Scrutiny.

Unlike in *McConnell*, where the plaintiffs faced the "heavy burden" of demonstrating the facial invalidity of BCRA's disclaimer, disclosure, and reporting requirements (540 U.S. at 207), in this as-applied challenge, the *government* bears the burden of establishing that the speech restrictions imposed by these provisions are compatible with the First Amendment. *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.); *Bellotti*, 435 U.S. at 786.

To meet this burden, the government must satisfy the stringent requirements of strict scrutiny because it is defending the constitutionality of content-based restrictions on political speech. *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.); *see also MCFL*, 479 U.S. at 256, 261; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 n.12 (1999). This Court's review of BCRA's oral and written disclaimer requirements should be especially stringent because those requirements compel Citizens United "to utter statements" in its advertisements and political documentary that it "would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). The Court examines such compelled speech requirements with particular skepticism. *See Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 798, 800 (1988) (the government may "not dictate the content of speech absent [a] compelling necessity" that is furthered by "narrowly tailored" means).

The application of BCRA § 201 and BCRA § 311 to Citizens United's movie and advertisements cannot survive strict scrutiny. As the government con-

cedes, the only arguably compelling governmental interest in the campaign-finance setting—the government's interest in preventing corruption and the appearance of corruption—is inapplicable to electioneering communications that are not express advocacy or the functional equivalent of express advocacy. *WRTL II*, 127 S. Ct. at 2671-72 (opinion of Roberts, C.J.); *see also* Def.'s Mot. for Summ. J. 19 n.12. Because it is undisputed that Citizens United's advertisements are not express advocacy or its functional equivalent—and because the district court erred when it concluded that Citizens United's documentary movie was the functional equivalent of express advocacy (*see supra* Part I)—the government does not have a compelling interest in applying BCRA's disclaimer, disclosure, and reporting requirements to the advertisements or the movie. As applied to Citizens United, those requirements are therefore unconstitutional.

B. The Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Exacting Scrutiny.

Perhaps recognizing that it cannot prevail under strict scrutiny, the government contends that so-called "exacting scrutiny" applies to BCRA's disclaimer, disclosure, and reporting requirements. Under exacting scrutiny, there must be a "substantial relation" between a "sufficiently important" "governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64, 66. The application of these requirements to restrictions on political speech is virtually indistinguishable from strict scrutiny. *See*, *e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (requiring narrow

tailoring as part of exacting scrutiny); *Bellotti*, 435 U.S. at 786, 795 (requiring a compelling interest).

Although the better view is that strict scrutiny applies to any content-based restriction on political speech (*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—including BCRA's disclaimer, disclosure, and reporting requirements—the distinction between strict and exacting scrutiny is ultimately irrelevant in this case because the government cannot satisfy either standard. In *McConnell*, the Court identified three "important" governmental interests that could conceivably sustain the application of BCRA's disclaimer, disclosure, and reporting 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; *see also Buckley*, 424 U.S. at 66-68. None of these "important" governmental interests is applicable in this case.

1. BCRA's Disclaimer Requirements Are Unconstitutional As Applied To Citizens United.

The First Amendment generally gives a speaker the right to choose what to say and "what not to say." *Hurley*, 515 U.S. at 573. This includes the choice not to utter "statements of fact the speaker would rather avoid." *Id.*; *see also Riley*, 487 U.S. at 797-98. These First Amendment principles apply with particular force to measures that require a speaker to disclose his identity. *See McIntyre*, 514 U.S. at 348 ("the identity of the speaker is no different from other components of [a] document's content that the author is free to include or exclude"). For that reason, the Court has repeatedly invalidated such requirements.

Id.; *see also Talley v. California*, 362 U.S. 60, 64-65 (1960).

BCRA § 311 would require Citizens United to include oral and written disclaimers in its advertisements for *Hillary* identifying itself as responsible for the content of those advertisements. The government concedes that its interest in deterring actual corruption and avoiding the appearance of corruption cannot sustain the application of BCRA's disclaimer requirements to Citizens United's advertisements because they are not express advocacy or the functional equivalent of express advocacy. Neither of the government's other purportedly "important" interests is sufficient to uphold the application of BCRA's disclaimer requirements to Citizens United.

a. The disclaimer requirements cannot be upheld in this case based on the government's interest in "providing the electorate with information." *McConnell*, 540 U.S. at 196.

Citizens United's advertisements promote its documentary film about a presidential candidate and attempt to persuade viewers to see the movie in a theater, purchase it on DVD, or download it through Video On Demand. It is undisputed that the advertisements neither expressly nor impliedly advocate the election or defeat of that candidate. A disclaimer informing viewers that Citizens United funded these advertisements therefore would not provide viewers with relevant "electora[l] . . . information." At most, it would provide the public with information that may bear upon their decision whether to view the movie. But this Court has never suggested (and the government has not argued) that the Federal *Election* Commission has any business at all—much less an important governmental interest—in providing

viewers with information that may be relevant to their selection of documentary movies. *See Buckley*, 424 U.S. at 80 (narrowing FECA's reporting requirement to "spending that is unambiguously related to the campaign of a particular federal candidate" in order to avoid vagueness and overbreadth problems).

In any event, it is unclear how the information conveyed in BCRA's disclaimer requirements would help viewers evaluate the advertisements' message that they should buy tickets for, purchase, or download *Hillary*. As this Court has recognized, "[p]eople are intelligent enough to evaluate the source of an anonymous writing" and fully capable of "evaluat[ing] its anonymity along with its message." *McIntyre*, 514 U.S. at 348 n.11 (internal quotation marks omitted). If viewers are unclear about who is responsible for the advertisements promoting *Hillary*, then they will presumably discount the advertisements' message and will be less likely to follow their exhortation to view the movie.

Moreover, the underinclusivity of BCRA's disclaimer requirements belies the notion that the government enacted those measures to further some ill-defined interest in providing information to members of the public considering whether to view a political documentary. The fact that the disclaimer requirements apply exclusively to broadcast advertisements—and do not extend to print or Internet advertising—makes it highly unlikely that these requirements were enacted to further the government's purported informational interest. If Congress were truly enacting legislation to advance that interest, it would not have left large swaths of documentary-related advertising unregulated. *See Bellotti*, 435 U.S. at 765 ("singl[ing] out" "a particular kind of" speech for

regulation "undermines the likelihood of a genuine state interest").[3]

b. The government's interest in "gathering the data necessary to enforce more substantive electioneering restrictions" also is insufficient to uphold BCRA's disclaimer requirements in this case. *McConnell*, 540 U.S. at 196.

The government's so-called "enforcement" interest is inapplicable where the substantive campaign-finance restrictions underlying that interest cannot be enforced against the person from whom the government seeks to "gather[ ] . . . data." For that reason, in *Davis*, the Court invalidated the disclosure requirements of BCRA's "Millionaire's Amendment" because the substantive contribution limits that the "disclosure requirements were designed to implement" were unconstitutional. 128 S. Ct. at 2775.

Here, the only "substantive electioneering restriction" that BCRA's disclaimer requirements could conceivably be designed to implement—the prohibition on corporate electioneering communications—is unconstitutional as applied to Citizens United's advertisements because those advertisements are not express advocacy or its functional equivalent. Def.'s Mot. for Summ. J. 19 n.12. The government thus has no legitimate interest in using BCRA's disclaimer requirements to "gather[ ] . . . data" about the person responsible for those advertisements because that

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[3] The imposition of BCRA's disclaimer requirements on advertisements for political documentaries is also far removed from Congress's authority under Article I, Section 4 of the Constitution to regulate elections, which is the constitutional authority that presumably underpins Congress's enactment of BCRA.

information cannot be used for enforcement purposes.

c. Even if there were a marginal informational or enforcement benefit attributable to the application of BCRA's disclaimer requirements to Citizens United's advertisements, that benefit would be outweighed by the fact that the disclaimer requirements substantially decrease both the quantity and effectiveness of Citizens United's speech, while substantially increasing its cost.

This Court has often invalidated laws that "interfere[ ] with a speaker's desired message." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006); *see also Riley*, 487 U.S. at 799. These constitutional concerns apply with full force in the campaign-finance context, where the Court has repeatedly expressed reservations about "restriction[s] on the *quantity* of political expression." *Buckley*, 424 U.S. at 55 (emphasis added); *see also Am. Constitutional Law Found.*, 525 U.S. at 194-95.

BCRA's disclaimer requirements impose a substantial burden on Citizens United's speech. It takes approximately four seconds to utter the oral disclaimer that "Citizens United is responsible for the content of this advertising." The oral disclaimer would therefore consume at least 40% of Citizens United's 10-second advertisements and 13% of its 30-second advertisement. The disclaimer—along with contact information for Citizens United—must also appear on the screen for at least four seconds of each advertisement.

Complying with these disclaimer requirements would significantly impair Citizens United's ability to use these advertisements to promote *Hillary*. Citizens United would no longer be able to use the 10-

second advertisements to communicate its 10-second promotional message to viewers. It would instead be required either to expend additional funds to pay for a longer advertisement sufficient to convey its 10-second promotional message as well as BCRA's oral disclaimer, or to reduce that promotional message to no more than six seconds' duration. The oral and written disclaimers would also distort the message of Citizens United's advertisements by suggesting to viewers—most of whom are undoubtedly familiar with the disclaimers from the ubiquitous campaign advertisements aired preceding every election—that those advertisements convey a campaign-related message, rather than a message promoting a documentary film. Those viewers disinterested in political advertising may interpret BCRA's disclaimers as a signal to tune out Citizens United's advertisements altogether.

The government's informational and enforcement interests—which have, at most, minimal force in this case—are a constitutionally insufficient ground for imposing these serious constraints on Citizens United's ability to promote its political documentary. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243, 258 (1974) (invalidating a right-to-reply statute partly because of the financial and opportunity costs of the speech that the statute compelled).[4]

[4] In any event, even if some burden on Citizens United's speech were constitutionally tolerable, the government-authored disclaimers would not be sufficiently tailored to further its informational and enforcement interests because the government could convey the same information to viewers by shortening the oral disclaimer to "_____ is responsible for this ad" and omitting the redundant written disclaimer that the communication was not approved by any candidate or candidate's committee. This alternative formulation would remove

2. BCRA's Disclosure Requirements Are Unconstitutional As Applied To Citizens United.

For many of the same reasons, neither the government's informational interest nor its enforcement interest is sufficient to uphold the application of BCRA's disclosure requirements to Citizens United.

a. This Court has recognized that, where speech constitutes express advocacy or the functional equivalent of express advocacy, disclosing the identity of the donors who fund that speech may "provide[ ] the electorate with information 'as to where political campaign money comes from' . . . in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67. In facially upholding BCRA § 201's disclosure requirements, *McConnell* similarly concluded that the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace" can be an adequate basis for requiring persons engaged in campaign-related speech to disclose donor information. 540 U.S. at 197 (internal quotation marks omitted).

This informational interest is inapplicable to Citizens United's advertisements because they do not expressly or impliedly advocate a candidate's election or defeat. They instead promote a documentary movie about a political candidate and attempt to persuade viewers to see the movie in a theater, purchase it on DVD, or download it through Video On De-

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approximately two seconds from the oral disclaimer and minimize the oral and written disclaimers' distorting effect on Citizens United's promotional message.

mand. Although providing viewers with information about the source of funding for these advertisements could theoretically help them make informed movie-selection decisions—at least if one indulges the assumption that viewers will examine the FEC's voluminous donor records before deciding whether to view the movie promoted by Citizens United's advertisements—it will not help viewers "make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (internal quotation marks omitted); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282-83 (4th Cir. 2008) ("Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related.").

The government's invocation of its purported informational interest in this case has no logical stopping point. If the government is correct that this interest can sustain the imposition of extensive disclosure requirements on a person that funds a television advertisement promoting a political documentary film, the government could similarly rely on that interest to regulate publishers' and retailers' advertisements for other political works, such as candidate autobiographies. And, if that is the case, then BCRA is fatally underinclusive because it does not reach advertisements in nonbroadcast formats. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (holding that a statute prohibiting the publication of particular information in certain media but not in others was unconstitutionally underinclusive).

b. The government's enforcement interest is similarly insufficient to uphold BCRA's disclosure requirements in this case. Although disclosure requirements may sometimes be a valid means of

gathering data necessary "to detect violations" of "more substantive electioneering restrictions" (*McConnell*, 540 U.S. at 196), the government has conceded that those "more substantive restrictions"—BCRA's prohibition on corporate electioneering communications—cannot be imposed upon Citizens United's advertisements because those advertisements are not express advocacy or its functional equivalent. The government therefore has no enforcement-based interest in mandating the disclosure of Citizens United's donors. *See Davis*, 128 S. Ct. at 2775.

c. Moreover, any informational or enforcement interest that the government has in applying BCRA's disclosure requirements to Citizens United's advertisements is outweighed by the significant burdens that those requirements would impose on the First Amendment rights of Citizens United and its donors.

Compelled donor disclosure can have grave consequences for a political organization's financial supporters. As this Court has recognized, disclosing the identity of an organization's supporters can "expose contributors to harassment or retaliation" by those who disagree with the group's political message. *Buckley*, 424 U.S. at 68. For this reason, disclosure requirements are unconstitutional where the organization challenging the requirements can demonstrate "a reasonable probability that the compelled disclosure of [the organization's] contributors' names will subject them to threats, harassment, or reprisals." *McConnell*, 540 U.S. at 198 (internal quotation marks omitted); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982); *NAACP v. Alabama*, 357 U.S. 449, 451, 462-63 (1958).

Public disclosure of Citizens United's donors would also have adverse consequences for Citizens United itself because it could not file the requisite disclosure statement with the FEC without incurring substantial administrative costs. *See MCFL*, 479 U.S. at 254 (plurality opinion) ("[d]etailed record-keeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear"). Moreover, even if Citizens United were able to absorb these costs, public disclosure would inevitably deter some of its donors from making future contributions—further weakening Citizens United's financial position and impairing its ability to continue communicating its political message to the public. *Buckley*, 424 U.S. at 68.

Deterring future donations would also infringe upon the associational rights of Citizens United's donors, many of whom "contribute to" the organization "in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *MCFL*, 479 U.S. at 261; *see also NAACP*, 357 U.S. at 460, 462. By deterring future contributions, the application of BCRA's disclosure requirements would chill the constitutionally protected political speech of Citizens United's supporters.

d. None of the decisions on which the district court relied is sufficient to sustain the disclosure requirements' application to Citizens United.

The district court's reliance on *MCFL* is misplaced. J.A. 208a. As an initial matter, the Court did not squarely address whether donor disclosure requirements can constitutionally be applied to *MCFL* corporations, but instead observed that, on their own terms, the disclosure provisions of FECA

would extend to such organizations. 479 U.S. at 262. *MCFL* therefore did not determine the bounds of the government's constitutional authority to mandate donor disclosure. In any event, the donor disclosure provisions at issue in *MCFL* applied only to "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 248-49. But it is undisputed that Citizens United's advertisements are not express advocacy or its functional equivalent. Thus, even if an *MCFL* corporation that engages in express advocacy can be required to disclose its funding sources in order to further the government's informational or enforcement interest, those interests are inapplicable to corporate speech that promotes the sale and download of a documentary film about a political candidate.

The district court also invoked a footnote in *Bellotti*, where the Court hinted that it might view disclosure requirements more favorably than outright prohibitions on corporate political speech. J.A. 208a (citing *Bellotti*, 435 U.S. at 791 n.32). But the Court has already dismissed that footnote as "dicta." *McIntyre*, 514 U.S. at 353-54. Moreover, that dicta "did not necessarily apply to [all] independent communications" but is instead confined to disclosure requirements for coordinated expenditures, which are not at issue in this case. *Id.* at 354; *see also id.* (noting that *Buckley*—on which the *Bellotti* footnote relied—"concerned contributions to the candidate or expenditures authorized by the candidate"). Finally, *Bellotti* referred to the possible disclosure of the "source of advertising," but it apparently did not contemplate the extensive donor disclosure requirements that BCRA imposes on persons who fund electioneering communications. 435 U.S. at 792 n.32.

Nor does *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), support the district court's conclusion. As in *MCFL* and *Bellotti*, the Court did not squarely consider the constitutionality of the municipal disclosure provision referenced in that case. In any event, the disclosure provision in *Citizens Against Rent Control* is readily distinguishable from BCRA's disclosure requirements because it only mandated disclosure of significant contributors "twice during the last seven days of a campaign." *Id.* at 294 n.4. In contrast, BCRA imposes substantially more onerous requirements that mandate the periodic disclosure of donors funding electioneering communications. 2 U.S.C. § 434(f); 11 C.F.R. § 104.20. Moreover, the disclosure requirement in *Citizens Against Rent Control* was a narrowly tailored provision that applied only to committees that were formed to support or oppose ballot measures. *See* 454 U.S. at 291, 294 n.4. The reach of BCRA § 201 extends well beyond the electoral setting, extending to *any* broadcast communication that mentions a candidate for federal office in the period preceding an election. The Court's passing reference to the modest disclosure requirement in *Citizens Against Rent Control* thus has little, if any, bearing on BCRA.

Ultimately, the district court's reliance on these decisions seems to be premised on the assumption that imposing disclosure requirements is less constitutionally problematic than banning communications outright. The district court's "it could be worse" rationale is a manifestly insufficient basis for upholding the application of BCRA's disclosure requirements to Citizens United.

3. BCRA's Reporting Requirements Are Unconstitutional As Applied To Citizens United.

BCRA § 201 also imposes a reporting requirement that provides that, within 24 hours of each statutory "disclosure date," the person funding the communication must submit a statement to the FEC identifying itself as responsible for funding the communication. 2 U.S.C. § 434(f). The application of that requirement to Citizens United's advertisements is also unconstitutional.

The government's informational interest is inadequate to sustain the application of BCRA's reporting requirements to Citizens United's advertisements because those advertisements promote a documentary movie and reporting their airing to the FEC therefore would not provide the electorate with information relevant to their voting decisions. Moreover, the government's enforcement interest is also insufficient because the government has acknowledged that it cannot constitutionally prohibit Citizens United's advertisements, and there accordingly is no possibility that the government will "detect violations" of "more substantive electioneering restrictions" from Citizens United's reporting. *McConnell*, 540 U.S. at 196; *see also Davis*, 128 S. Ct. at 2775.

Like the disclaimer and disclosure requirements, BCRA's reporting requirements are therefore unconstitutional as applied to Citizens United.[5]

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[5] Although the foregoing analysis is focused on the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's advertisements, those requirements are also unconstitutional as applied to the movie itself. As explained above (*see supra* Part I), the movie is not express advo-

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
JUSTIN S. HERRING
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Appellant

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cacy or its functional equivalent. The application of the disclaimer, disclosure, and reporting requirements to the Video On Demand distribution of the movie therefore would not further the government's anti-corruption interest. Because the government cannot prohibit the movie under BCRA's prohibition on corporate electioneering communications, its enforcement interest also is not implicated. Finally, the government's informational interest is insufficient to sustain this application of the disclaimer, disclosure, and reporting requirements because the movie itself contains extensive credits that identify Citizens United as responsible for the movie and that disclose the names of the individuals who worked on the movie and a number of the persons who funded it. The application of BCRA's disclaimer, disclosure, and reporting requirements to the movie would therefore provide viewers with little information not already included in the movie itself.

APPENDIX

2 U.S.C. § 434 provides in relevant part:

§ 434. Reporting requirements

* * *

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection—

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

* * *

2 U.S.C. § 441b provides:

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment,

or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a

result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall

make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by

individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection—

(A) the term "section 501(c)(4) organization" means—

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Title 26

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.

2 U.S.C. § 441d provides:

§ 441d. Publication and distribution of statements and solicitations

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 434(f)(3) of this title), such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

(c) Specification

Any printed communication described in subsection (a) of this section shall—

(1) be of sufficient type size to be clearly readable by the recipient of the communication;

(2) be contained in a printed box set apart from the other contents of the communication; and

(3) be printed with a reasonable degree of color contrast between the background and the printed statement.

(d) Additional requirements

(1) Communications by candidates or authorized persons

(A) By radio

Any communication described in paragraph (1) or (2) of subsection (a) of this section which is transmitted through radio shall include, in addition to the requirements of that paragraph, an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication.

(B) By television

Any communication described in paragraph (1) or (2) of subsection (a) of this section which is transmitted through television shall include, in addition to the requirements of that paragraph, a statement that identifies the candidate and states that the can-

didate has approved the communication. Such statement—

(i) shall be conveyed by—

(I) an unobscured, full-screen view of the candidate making the statement, or

(II) the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate; and

(ii) shall also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds

(2) Communications by others

Any communication described in paragraph (3) of subsection (a) of this section which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: "_____ is responsible for the content of this advertising." (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

11 C.F.R. § 100.29 provides:

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section—

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated through the fa-

cilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, *publicly distributed* means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A *special election* or a *runoff election* is a primary election if held to nominate a candidate. A *special election* or a *runoff election* is a general election if held to elect a candidate.

(5) *Targeted to the relevant electorate* means the communication can be received by 50,000 or more persons—

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on

the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) *Can be received by 50,000 or more persons* means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) The following communications are exempt from the definition of *electioneering communication*. Any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(5) Is paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate. *See* 11 CFR 300.71 for communications paid for by a candidate for State or local office that promotes, supports, attacks or opposes a Federal candidate.

11 C.F.R. § 104.20 provides:

§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).

(a) *Definitions*.

(1) *Disclosure date* means:

(i) The first date on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

(ii) Any other date during the same calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

(2) *Direct costs of producing or airing electioneering communications* means the following:

(i) Costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; or

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime.

(3) *Persons sharing or exercising direction or control* means officers, directors, executive directors or

their equivalent, partners, and in the case of unincorporated organizations, owners, of the entity or person making the disbursement for the electioneering communication.

(4) *Identification* has the same meaning as in 11 CFR 100.12.

(5) *Publicly distributed* has the same meaning as in 11 CFR 100.29(b)(3).

(b) *Who must report and when*. Every person who has made an electioneering communication, as defined in 11 CFR 100.29, aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date. The statement shall be filed under penalty of perjury, shall contain the information set forth in paragraph (c) of this section, and shall be filed on FEC Form 9. Political committees that make communications that are described in 11 CFR 100.29(a) must report such communications as expenditures or independent expenditures under 11 CFR 104.3 and 104.4, and not under this section.

(c) *Contents of statement*. Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information:

(1) The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and, if the person is not an individual, the person's principal place of business;

(2) The identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement or who executed a contract to make a disbursement;

(3) The identification of the custodian of the books and accounts from which the disbursements were made;

(4) The amount of each disbursement, or amount obligated, of more than $200 during the period covered by the statement, the date the disbursement was made, or the contract was executed, and the identification of the person to whom that disbursement was made;

(5) All clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates;

(6) The disclosure date, as defined in paragraph (a) of this section;

(7)(i) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications not permissible under 11 CFR 114.15, consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by

a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

(d) *Recordkeeping*. All persons who make electioneering communications or who accept donations for the purpose of making electioneering communications must maintain records in accordance with 11 CFR 104.14.

(e) *State waivers*. Statements of electioneering communications that must be filed with the Commission must also be filed with the Secretary of State of the appropriate State if the State has not obtained a waiver under 11 CFR 108.1(b).

11 C.F.R. § 110.11 provides:

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope*. The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee;

and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements*. A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person

who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications.*

(1) *Specifications for all disclaimers*. A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

(2) *Specific requirements for printed communications*. In addition to the general requirement of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on any printed public communication must comply with all of the following:

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer in twelve (12)-point type size satisfies the size requirement of this paragraph (c)(2)(i) when it is used for signs, posters, flyers, newspapers, magazines, or other printed material that measure no more than twenty-four (24) inches by thirty-six (36) inches.

(ii) The disclaimer must be contained in a printed box set apart from the other contents of the communication.

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(2)(iii) if it is printed in black text on a

white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(iv) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(v) A communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(3) *Specific requirements for radio and television communications authorized by candidates*. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication that is authorized or paid for by a candidate or the authorized committee of a candidate (see paragraph (b)(1) or (b)(2) of this section) that is transmitted through radio or television, or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio must include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication; or

(ii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must include a statement that identifies the candidate and states that he or she has approved the communication. The candidate shall convey the statement either:

(A) Through an unobscured, full-screen view of himself or herself making the statement, or

(B) Through a voice-over by himself or herself, accompanied by a clearly identifiable photographic or similar image of the candidate. A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the television communication. To be clearly readable, this statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the text of the statement. A statement satisfies the color contrast requirement of this paragraph (c)(3)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the statement is no less than the color contrast between the background and the largest type size used in the communication.

(iv) The following are examples of acceptable statements that satisfy the spoken statement requirements of paragraph (c)(3) of this section with respect to a radio, television, or other broadcast, cable, or satellite communication, but they are not the only allowable statements:

(A) "I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement."

(B) "My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message."

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate*. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

(d) *Coordinated party expenditures and independent expenditures by political party committees*.

(1)(i) For a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a) of this section must identify the political party committee that makes the expenditure as the person who paid for the communication, regardless of whether the political party committee was acting in its own capacity or as the designated agent of another political party committee.

(ii) A communication made by a political party committee pursuant to 2 U.S.C. 441a(d) and distributed prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(2) For purposes of this section, a communication paid for by a political party committee, other than a communication covered by paragraph (d)(1)(ii) of this section, that is being treated as a coordinated expenditure under 2 U.S.C. 441a(d) and that was made with the approval of a candidate, a candidate's authorized committee, or the agent of either shall identify the political party that paid for the communication and shall state that the communication is authorized by the candidate or candidate's authorized committee.

(3) For a communication paid for by a political party committee that constitutes an independent expenditure under 11 CFR 100.16, the disclaimer required by this section must identify the political party committee that paid for the communication, and must state that the communication is not authorized by any candidate or candidate's authorized committee.

(e) *Exempt activities*. A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149, must comply with the disclaimer requirements of paragraphs (a), (b), (c)(1), and (c)(2) of this section, unless excepted under paragraph (f)(1) of this section, but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate.

(f) *Exceptions.*

(1) The requirements of paragraphs (a) through (e) of this section do not apply to the following:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message.

(2) For purposes of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a type of public communication and need not contain the disclaimer required by paragraphs (a) through (c) of this section.

(g) Comparable rate for campaign purposes.

(1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.

(2) For purposes of this section, comparable rate means the rate charged to a national or general rate advertiser, and shall include discount privileges usually and normally available to a national or general rate advertiser.

11 C.F.R. § 114.15 provides:

§ 114.15 Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) *Permissible electioneering communications*. Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) *Safe harbor*. An electioneering communication is permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes 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.

(c) *Rules of interpretation*. If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

(ii) Proposes 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; or

(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.

(d) *Information permissibly considered*. In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

(e) *Examples of communications*. A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) of this section is available on the Commission's Web site, http://www.fec.gov.

(f) *Reporting requirement*. Corporations and labor organizations that make electioneering communications under paragraph (a) of this section aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.