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

REPLY BRIEF FOR APPELLANT

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

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REPLY BRIEF FOR APPELLANT

The government defends its effort to criminalize Citizens United's political documentary by repeatedly invoking its authority, purportedly exercised "[s]ince 1907," to suppress political expression that might influence federal elections by individuals who have organized themselves into corporations or labor unions. FEC Br. 2; *see also id.* at 15.

If the government had started instead with the First Amendment's imperative that "Congress shall make *no* law . . . abridging the freedom of speech" (U.S. Const. amend. I (emphasis added)), it would have been forced to articulate some compelling constitutional justification for prohibiting dissemination of a 90-minute movie by a nonprofit, ideologically motivated group concerning the qualifications, character, and fitness of a candidate for the Nation's highest office. Because Citizens United's documentary engages in precisely the political debate the First Amendment was written to protect, only a narrow restriction carefully crafted to prevent actual or threatened electoral corruption could be used to suppress it.

Yet nowhere in its brief does the government make any effort to advance a remotely plausible theory as to how Video On Demand dissemination of Citizens United's movie could have been a corrupting influence in last year's Democratic Party presidential primaries. The government certainly does not even hint that Senator Clinton's opponents might have been so grateful for Citizens United's documentary movie that they might have been tempted to endow Citizens United or its members with *quid pro quo* benefits.

Instead, the government rests its case on the simple but disturbing proposition that election-related speech by a union or corporation (unless licensed by the government as an "*MCFL*" corporation or defined by the government as "news media") is so inherently evil that it must be prohibited and, if attempted, punished as a felony with a five-year prison term. The government's position is so far-reaching that it would logically extend to corporate or union use of a microphone, printing press, or the Internet to express opinions—or articulate facts—pertinent to a presidential candidate's fitness for office.

Citizens United's documentary movie is condemned by the government as the functional equivalent of express advocacy because it focuses on, and criticizes, Senator Clinton's character, fitness, and qualifications for office. FEC Br. 18. Indeed, it is the government's position that the movie is to be suppressed precisely because it expresses a point of view on *issues* that bear upon a presidential candidate's suitability for the Nation's highest office. That is a perverse basis for pronouncing election-related debate unworthy of First Amendment protection.

It is the government's deep suspicion of election-related debate—not Citizens United's efforts to participate in that debate—that "reflects a jaundiced view of American democracy." FEC Br. 25. That cynicism is flatly incompatible with any reasoned or historically grounded understanding of the First Amendment. As applied to Video On Demand dissemination of *Hillary: The Movie*, BCRA's criminalization of election-related debate plainly exceeds Congress's sharply limited authority to abridge the freedom of speech.

The government's defense of its application of BCRA's message-distorting disclaimer requirements, donor-discouraging disclosure obligations, and resource-consuming reporting mandates is equally indefensible under the First Amendment. Even if, as the government asserts, governmental concerns less compelling than the prevention of *quid pro quo* corruption can sustain the imposition on speech of these burdens, expenses, and intrusions, the government's justification for doing so collapses under its own weight when scrutinized.

Whatever interest the government may have in facilitating the criminal enforcement of BCRA's substantive restrictions on "electioneering communications," that interest cannot be extended to communications that the government concedes do not constitute express advocacy or its functional equivalent and that are therefore beyond the reach of BCRA's prohibitions. Nor is the governmental interest in providing the public "information about participants in the electoral process" meaningfully advanced by application of the disclaimer, disclosure, and reporting requirements to messages that the government acknowledges are "not unambiguously election-related," and, in fact, may "have *nothing* to do with a candidate election." FEC Br. 12, 46. Even the relaxed scrutiny urged by the government is, after all, "*exacting*," and requires a "*substantial relation*" between the specific application of BCRA's commands and an important governmental objective. *Id.* at 37 (emphases added). Applying the full panoply of BCRA's disclaimer, disclosure, and reporting requirements to messages that have "*nothing*" to do with a candidate election cannot conceivably provide the public with "information about participants in the electoral process." On the other hand, that level

of government intrusiveness and regulatory bureaucracy can, and surely will, stifle constitutionally protected speech that the public has a right to receive.

I. THE GOVERNMENT'S SUPPRESSION OF *HILLARY: THE MOVIE* CANNOT BE RECONCILED WITH THE FIRST AMENDMENT.

In its opening brief, Citizens United demonstrated that: (1) nothing in BCRA's legislative record or the litigation record compiled in *McConnell* even remotely suggests that feature-length films that viewers must affirmatively choose to view pose a serious threat of *quid pro quo* corruption; (2) as applied to the speech of nonprofit ideological corporations like Citizens United, the FEC's one-corporate-dollar-and-you're-in-prison rule is far more restrictive than necessary to achieve the government's asserted (and invalid) objective of preventing business corporations from expressing political views in a manner that outstrips the public's support for those views; and (3) *Hillary: The Movie* is open to a reasonable interpretation as a critical assessment of Hillary Clinton's political record and her "'character, qualifications, [and] fitness for office.'" FEC Br. 18 (alteration in original). In response, the government and BCRA's sponsors concede the first and third points, and do not seriously dispute the second. While each is a sufficient basis for reversal of the judgment below, the long-stifled marketplace of political ideas would be well-served if the Court reversed on all three grounds.

A. The Government's Brief Confirms That It Has No Compelling Interest In Suppressing Video On Demand Distribution Of Feature-Length Films.

Both the government and BCRA's congressional sponsors concede that neither the Congress that enacted BCRA nor the *McConnell* Court that upheld the statute on its face had before it *any evidence at all* that feature-length films distributed through Video On Demand contributed to the corruption of officeholders or the appearance of such corruption. *See* FEC Br. 27 (acknowledging "the apparent absence of evidence that such films had been the subject of widespread abuse"). Rather, as BCRA's sponsors explain, BCRA was "principally motivated by one practice[,] corporate and union funding of broadcasts and cablecasts of ads containing candidate-related advocacy." McCain Br. 17.[1] In keeping with that legislative record, the "voluminous" *McConnell* litigation record compiled by the government and BCRA's sponsors also focused on "corporate-funded ads" and purported to demonstrate that those same "corporate-funded broadcast attacks" contributed to the appearance of *quid pro quo* corruption of officeholders. FEC Br. 6, 27; *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 555-57, 569-73 (D.D.C. 2003) (per curiam) (describing litigation record).

McConnell's rejection of the plaintiffs' facial challenges "was grounded in the evidentiary record be-

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[1] *See also* 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002) (statement of Senator Snowe) (BCRA's definition of "electioneering communication" would apply to "so-called issue ads run on television and radio only").

fore the Court." *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) ("*WRTL II*") (opinion of Roberts, C.J.). And "elephantine" though that record was (*McConnell*, 251 F. Supp. 2d at 209 n.40), the government can locate within it *not one word* about feature-length documentaries, much less feature-length films distributed through Video On Demand to citizens who request them.

1. In its efforts to apply BCRA § 203 to Video On Demand films, the government seeks to unmoor *McConnell*'s holding from the evidentiary record on which the government and, in turn, the Court had placed such great reliance. The government's argument proceeds in three steps: (1) The First Amendment allows the government to suppress "*all* forms of express advocacy" by corporations and labor unions, including "newspaper advertising or the Internet" (FEC Br. 25, 26); (2) express advocacy is constitutionally indistinguishable from the "functional equivalent" of express advocacy (*id.* at 26); and, therefore, (3) the First Amendment allows the government to suppress *all* functional equivalents of express advocacy. *See* FEC Br. 26 n.8 (claiming that limitations on Internet electioneering are not "constitutionally compelled"). Because the First Amendment permits it to restrict *any* corporate speech that it deems the functional equivalent of express advocacy—from broadcast advertisements to yard signs—"*McConnell*'s holding" should not be viewed as "limited to 30-second advertisements" and can be extended to cover films selected through Video On Demand. *Id.* at 11. Or so says the government.

This is an audacious assertion of governmental power. If accepted, it is only by Congress's grace that BCRA's definition of "electioneering communication" is limited to broadcast communications that

"can be received by 50,000 or more persons" and does not embrace the Internet, the printing press, and the soapbox. 2 U.S.C. § 434(f)(3)(C).[2] But the government's argument is deeply flawed: Even if one were to assume the truth of the government's major premise that it may prohibit any and all corporate express advocacy (a proposition that this Court might have assumed in *McConnell v. FEC*, 540 U.S. 93, 203-05 (2003), but has never actually held), its minor premise founders on its unstated assumption that the "functional equivalent of express advocacy" may be identified solely by reference to the *content* of a message.

What permits Congress to regulate certain classes of election-related speech is not simply its *content*, but rather its supposedly corrupting *effects* on officeholders. And the unmistakable holding of *WRTL II* is that speech may be viewed as the functional equivalent of proscribable express advocacy *only* to the extent that such speech is found to "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.); *see id.* ("Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them.").

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[2] In any event, it is not at all clear what the statutory definition of "electioneering communication" actually encompasses. BCRA defines the term "expenditure" to include a "payment . . . for any . . . electioneering communication" (2 U.S.C. § 441b(b)(2)), but simultaneously excludes from the definition of "electioneering communication" any "communication which constitutes an expenditure." *Id.* § 434(f)(3)(B)(ii). Such hopeless opacity is constitutionally intolerable in a statute that makes it a felony to engage in core First Amendment activity.

As the district court in *McConnell* observed, outside the realm of express advocacy, whether speech fairly can be viewed as the equivalent of an outsized campaign contribution must be determined not only by reference to its *content*, but also by evaluating its *efficacy* in influencing the outcome of an election. This is because the "risk of corrupting the political process" corresponds to the "effectiveness" of the speech in influencing election outcomes. 251 F. Supp. 2d at 646, 647 (Kollar-Kotelly, J.). The Congress that enacted BCRA recognized that the efficacy of campaign speech depends on its timing, its reach, and—critically, for this case—the form and medium in which it is delivered. Thus, "the principal focus of the congressional deliberations . . . was traditional ads" broadcast in the weeks leading up to the election. McCain Br. 15. Broadcast ads were the "most effective form of communicating an electioneering message" (*McConnell*, 251 F. Supp. 2d at 647 (Kollar-Kotelly, J.)), and thus presented the "most acute" "phase of the problem." *McConnell*, 540 U.S. at 208 (internal quotation marks omitted). Other media were not "as effective as television and radio advertising for conveying an electioneering message" and accordingly presented less of a "risk of corrupting the political process." *McConnell*, 251 F. Supp. 2d at 646 (Kollar-Kotelly, J.).[3]

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[3] This was not only the view of both the district court and this Court, but the government as well, which consistently defended BCRA as an appropriately tailored response to the unique threat of corruption posed by broadcast advertisements. *See* Brief for the Federal Election Commission at 93, *McConnell* (No. 02-1674) ("BCRA § 201's definition of 'electioneering communications' is limited to advertisements distributed by broadcast, cable, or satellite (*i.e.*, television or radio) . . . because

To say, as the government now does, that it may restrict corporate electioneering speech without regard to the form or medium in which the speech is delivered, is to say that it may restrict corporate electioneering speech without regard to whether the speech presents a danger of contributing to the *quid pro quo* corruption of officeholders. "This," as the Court said in *WRTL II*, "is not how strict scrutiny works"; "the *Government* must prove" that "a compelling interest supports *each application* of a statute restricting speech." 127 S. Ct. at 2664, 2671 (opinion of Roberts, C.J.). That the government may have a compelling interest in restricting speech that presents the "most acute" risks of corruption cannot itself justify restrictions on speech that presents no similar dangers.

2. The government and its *amici* alternatively contend that, because it harnesses "the power of the visual medium to promote a message," Video On Demand distribution of *Hillary: The Movie* is "[l]ike any other television advertisement"; it "poses exactly the same threats of potential corruption," and, accordingly, should be subjected to "the same financing restrictions as other broadcast advertisements." FEC Br. 11, 26; McCain Br. 17. But that just blinks reality. Except for the fact that it is likely to be viewed on a television, a feature-length film viewed through Video On Demand is nothing like a "television advertisement."

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those media reach the largest audience and are considered to be the most effective means of communicating an electioneering message"); *id.* at 115 ("broadcast advertisements are much more likely than other types of advertisements to cause the fact or appearance of [corruption]").

Neither the government nor BCRA's sponsors dispute that viewers of Video On Demand films must "opt-in" to the communication at two levels: The viewer first must "dec[ide] to select [the film] from an on-screen menu," and then must choose to invest 90 minutes or more to view and listen to the film's message. FEC Br. 25; *see also* McCain Br. 15 (contrasting "advocacy that members of the public must first choose to view" with "broadcast ads that are imposed on television viewers"). Indeed, when BCRA's sponsors complain that Citizens United's arguments are "equally applicable" to "advocacy over the Internet (where access to content is typically user-initiated)," *id.* at 16, they implicitly concede Citizens United's argument that "Video On Demand service . . . is analogous in every relevant respect to an Internet user's download of video content." Citizens Br. 26.

BCRA's sponsors argue that, notwithstanding their self-selecting audiences, opt-in "narrowcasts" such as Video On Demand films pose "exactly the same threats of potential corruption" as the broadcast advertisements that were the "principal focus of the congressional deliberations." McCain Br. 15, 17. But after reviewing the available evidence, the *McConnell* district court explicitly rejected this argument, concluding that communications that require a viewer to "opt-in" do not "influenc[e] federal elections to the same degree as . . . broadcast advertising campaigns" and thus present a lesser "risk of corrupting the political process." 251 F. Supp. 2d at 646. And, at least implicitly, so did this Court when it recognized that "televised election-related ads" were the "most acute" "phase of the problem." *McConnell*, 540 U.S. at 207-08.

Years after embracing it (*see supra* note 3), the government now attacks the *McConnell* district

court's reasoning, arguing that, even though Citizens United's film would have been delivered only to a self-selecting audience, "it would not follow that the film lacked electoral influence." FEC Br. 25. This misconceives Citizens United's (and the *McConnell* district court's) argument. Citizens United does not argue that Video On Demand transmission of *Hillary* (if the FEC had permitted it) would not have had *any* "electoral influence." Citizens United's point is the same as that made by the *McConnell* district court with respect to webcasts: There is "no evidence" that such opt-in communications are "influencing federal elections to the same degree as . . . broadcast advertising campaigns." 251 F. Supp. 2d at 646 (Kollar-Kotelly, J.). When there is "no evidence" of significant "electoral influence," the government cannot presume the existence of a danger of corruption.

3. Finally, the government argues that Citizens United waived its right to rely upon the opt-in nature of its proposed speech by failing to argue below that the proposed Video On Demand transmission method made it improbable that the film would contribute to corruption. FEC Br. 23. For two reasons, the government is wrong.

First, Citizens United indisputably raised and preserved its argument that, "[u]nlike 'ads,'" "movies must be selected by a willing viewer." Br. Opp. Mot. to Dismiss or Affirm 12. And the government does not dispute Citizens United's argument (at 25) that a movie's length, separate and apart from its method of transmission, makes it an "opt-in" communication.[4]

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[4] The government observes that the *McConnell* record contained evidence of several 30-minute "infomercials" broadcast

Second, even if Citizens United did not invoke below the opt-in nature of Video On Demand programming, "in cases raising First Amendment issues," this Court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984). As in cases alleging that a communication "is within one of the few classes of 'unprotected' speech," the question whether political speech presents a risk of corruption requires "judicial evaluation of special facts that have . . . constitutional significance." *Id.* at 503, 505. Here, those "facts . . . about the nature of video-on-demand" (FEC Br. 24) are not disputed by the government or its *amici* and are publicly ascertainable in any event. This Court should not—indeed, cannot—conclude that a film distributed through Video On Demand

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by the National Rifle Association and argues that "nothing about the duration of *Hillary* separates it from" those infomercials. FEC Br. 28. The government seems to be implying that this Court decided in *McConnell* that BCRA's restrictions could be constitutionally applied to the NRA's infomercials—but *McConnell* did no such thing. The NRA introduced its issue-advocacy infomercials to demonstrate that BCRA's definition of "electioneering communication" captured a substantial amount of protected issue advocacy. This Court's rejection of the NRA's facial overbreadth challenge would not preclude the NRA from challenging BCRA's application to its infomercials (*Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (per curiam)), and their presence in the *McConnell* record accordingly nets the government nothing.

presents an intolerable risk of corruption without examining the characteristics of that medium.[5]

B. The Government's Brief Identifies No Compelling Basis For Suppressing Corporate Speech That Is Funded Almost Entirely By Individuals.

The government's attempt to prohibit the Video On Demand distribution of *Hillary* also suffers from a second—and even more fundamental—constitutional flaw: Where election-related speech is financed almost entirely by individuals gathered under the banner of a nonprofit advocacy corporation, like Citizens United, that speech presents no cognizable threat of corruption. Corporate speech funded predominantly by individuals does not generate the "corrosive and distorting effects of immense aggregations of wealth" that are purportedly associated with the electoral advocacy of for-profit corporations (*Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)) because the "resources" of Citizens United and similarly funded nonprofits "are not a function of [their] success in the economic market-

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[5] Nor should the Court hold, as the government urges (at 23 n.7), that a Video On Demand transmission to a single household actually "can be received by 50,000 or more persons." 2 U.S.C. § 434(f)(3)(C). When a communication is sent only to a single household—a fact universally true of Video On Demand transmissions, never disputed by the government, and so affirmatively embraced by its *amici* that they refer to such transmissions as "narrowcast[s]" (McCain Br. 15)—it is manifestly unreasonable to determine the number of people who can receive that "narrowcast" communication by reference to "the viewership of the *cable system*." 11 C.F.R. § 100.29(b)(7)(i)(G) (emphasis added).

place, but [their] popularity in the political marketplace." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258-59 (1986) ("*MCFL*").

The government urges the Court not to reach this issue because it supposedly is not presented in this case. FEC Br. 29. But whether the First Amendment prohibits the government from restricting corporate political speech funded predominantly by individuals is a "predicate to intelligent resolution of"—and thus fairly included within—one of the questions on which this Court granted review: Whether *Hillary: The Movie* is "subject to regulation as an electioneering communication." J.S. i; *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (internal quotation marks omitted). If the government lacks the constitutional authority to prohibit electioneering communications funded predominantly by individuals, then the government necessarily is barred from regulating feature-length documentary movies financed in that manner. The Court therefore need not delay resolution of this important First Amendment question, which has been fully briefed by the parties and *amici* in this case. *See*, *e.g.*, NRA Br. 9-28.[6]

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[6] The government also argues that "the evidentiary record is inadequate to determine whether *Hillary* was in fact financed 'overwhelmingly' by individual donations." FEC Br. 30. But it is the *government's* burden to demonstrate that its asserted interest in preventing big corporate money from distorting electoral outcomes was implicated by Citizens United's speech. The record compiled by the government demonstrates that it was not. *See* J.A. 251a-52a (for-profit corporations were responsible for only $2,000 of the more than $200,000 that Citizens United received from donors who gave $1,000 or more to fund *Hillary*). Strict scrutiny does not permit the government to suppress speech on the basis of fanciful speculation that the Video On

On the merits, the government contends that it has a compelling interest in silencing the electoral advocacy of nonprofit corporations, even when that speech is funded overwhelmingly by individuals, because it imagines business corporations could use such nonprofits as "conduits" to circumvent BCRA's restrictions on corporate political speech. FEC Br. 32. The government's far-fetched speculation that a business corporation could exert electoral influence by donating small amounts to numerous advocacy groups is not remotely the type of concrete proof that strict scrutiny requires. If it were, the government would possess the constitutional authority to prohibit *individuals'* electioneering communications simply because a for-profit corporation could conceivably use an individual as a conduit for its own expenditures on electioneering communications. Such a restriction on individuals' independent expenditures would be flatly unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam).

The government's "conduit" speculation also fails because it rests on the false premise that the government has a compelling "interest in preventing the use of . . . corporations' treasury funds for electoral advocacy." FEC Br. 32. This Court rejected the same assertion in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *See id.* at 790 ("To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it."). Subsequent cases

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Demand distribution of *Hillary* (had it been permitted) might have been financed with hundreds of donations of $999.99 or less from for-profit corporations.

have found compelling only the much narrower governmental interest in preventing distortion of the electoral marketplace by corporate speech that "ha[s] little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. *Bellotti* rejected that rationale, too (*see* 435 U.S. at 791 & n.30), but, it could not, in any event, be implicated by speech that is funded predominantly by individuals (*i.e.*, the "public"). When, as here, corporate dollars are outnumbered by "the public's support" 99-to-1, the corporate funding does not disturb—much less distort—the electoral marketplace.[7]

The government also objects to excluding Citizens United and similarly funded nonprofits from BCRA § 203 because doing so would purportedly "abandon [*MCFL*'s] existing bright-line rule for a more amorphous inquiry." FEC Br. 31 (citations omitted). But there is nothing "amorphous" about a judicial inquiry into whether the majority of the funding for a nonprofit corporation's speech is received from individuals. This standard can be applied just as easily as the existing *MCFL* framework, which inquires whether a nonprofit corporation received any funding from a for-profit corporation. And even if there were some marginal administrative benefit to the *MCFL* standard, efficiency alone could never constitute the compelling interest neces-

[7] If *Austin* is construed to stand for the broader proposition that any corporate advocacy in electoral settings is *per se* corrupting, then it should be overruled. The growing prevalence of massive independent expenditures by wealthy individuals (*WRTL II*, 127 S. Ct. at 2686 (opinion of Scalia, J.))—has revealed the flaws in *Austin*'s condemnation of corporate independent expenditures, which are no more likely to be corrupting than expenditures by individuals. *See* Citizens Br. 31. Simply put, *Austin* has failed the test of time.

sary to sustain the government's one-corporate-dollar-and-you're-in-prison funding restriction. *See Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 795 (1988) ("the First Amendment does not permit the State to sacrifice speech for efficiency").

C. The Government's Brief Confirms That *Hillary: The Movie* Is Open To Interpretations Other Than As An Appeal To Vote.

The appeal-to-vote standard articulated in *WRTL II* presents a third constitutional barrier to the government's effort to suppress the distribution of *Hillary*. The movie is not the functional equivalent of express advocacy—and is therefore beyond the government's constitutional authority to proscribe—because it can reasonably be interpreted as a critical biographical assessment of Senator Clinton that provides viewers with information about her public record and political background.

The government's defense of its authority to suppress the movie rests on the proposition that *WRTL II* divided the universe of "electioneering communications" into two mutually exclusive categories: issue advocacy and express advocacy (and its functional equivalent). FEC Br. 20-21. That is a false dichotomy. *WRTL II* did not purport to hold that *all* electioneering communications that do not constitute issue advocacy are necessarily express advocacy or its functional equivalent and are therefore susceptible to prohibition by the government.

Indeed, the government's distorted reading of *WRTL II* would lead to absurd results. Consider, for example, a hotel advertisement that mentions that a presidential candidate recently spent a night there. That advertisement is not issue advocacy—it does

not "focus on a legislative issue" or "urge the public to contact public officials with respect to the matter"—nor is it an "appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). Accordingly, there must be an additional category of candidate-related speech that is neither express advocacy (or its functional equivalent) nor issue advocacy, and that—like issue advocacy—is beyond the government's constitutional authority to proscribe because it does not generate the specter of political corruption.

Whether *Hillary* is properly classified as issue advocacy or some other form of candidate-related speech, the salient fact remains that the movie *cannot* be classified as the functional equivalent of express advocacy because it is susceptible to reasonable interpretations other than as an appeal to vote against Senator Clinton. It is simply not the case, as the government contends (at 18), that every critical examination of a candidate's "'character, qualifications, [or] fitness for office'" constitutes an appeal to vote for or against that candidate. If it were, then the government could ban a documentary movie examining whether Senator McCain—who was born in the Panama Canal Zone—is a natural born citizen qualified under the Constitution to be President, and countless other criticisms (or commendations) of our political leaders, even though those communications plainly would be susceptible to interpretations other than as an appeal to vote. The fact that after "voters hear[d] the information" that such a documentary conveyed, they might "choose—uninvited by the [movie]—to factor it into their voting decisions" does not transform a documentary designed to educate the public about a candidate's qualifications for office into an appeal to vote for or against that candidate.

WRTL II, 127 S. Ct. at 2667 (opinion of Roberts, C.J.).

For similar reasons, the fact that *Hillary* presents a critical assessment of Senator Clinton's political background, character, and fitness for office does not convert the movie—which is designed to "convey[ ] information and educate[ ]" viewers about the political history of an important public figure—into an appeal to vote against Senator Clinton. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). Indeed, a critical exposition of the political background and policy views of a former First Lady and sitting U.S. Senator is precisely the type of "uninhibited, robust, and wide-open debate and discussion that" the First Amendment protects and encourages. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (internal quotation marks omitted).[8]

Citizens United's argument that a proscribable "appeal to vote" must at a minimum contain an unambiguous call to action is not—as the government misleadingly contends (at 22)—a plea for the return of the "magic words" framework administered by the FEC for nearly three decades after *Buckley*. There are an almost unlimited number of ways that an unambiguous call to electoral action can be communicated. *See*, *e.g.*, *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) ("Don't let him do it" is "susceptible of no other reasonable interpretation but as an exhortation to vote"). That the government is unable to

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[8] And it is precisely the type of inquiry undertaken by the news media, which—unencumbered by campaign finance laws—interviewed many of the same individuals featured in *Hillary*. *See*, *e.g.*, *60 Minutes* (CBS television broadcast Mar. 15, 1998) (interview with Kathleen Willey about alleged misconduct in the Clinton White House).

identify even a single excerpt from *Hillary* that unambiguously exhorts viewers to action with respect to Senator Clinton does not mean that the "call to action" test lacks content. It instead means that *Hillary* very likely would be interpreted by viewers as something other than an appeal to vote.

II. THE BURDENS THE GOVERNMENT WOULD IMPOSE ON ADVERTISEMENTS FOR *HILLARY: THE MOVIE* VIOLATE THE FIRST AMENDMENT.

The government contends that it possesses the constitutional authority to apply BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's advertisements because "their airing during [pre-election] periods would implicate important governmental interests related to the federal electoral process." FEC Br. 36. But even if the interests that the government identifies—disseminating election-related information to the public and enforcing substantive prohibitions on corporate express advocacy and other unambiguous appeals to vote—were sufficient to justify the application of BCRA's disclaimer, disclosure, and reporting requirements to *some* advertisements that are not express advocacy or its functional equivalent, they would be insufficient to justify the application of those requirements to *Citizens United's* advertisements. Those advertisements are not "related to the federal electoral process," but instead encourage viewers to see a movie in the theater, purchase it on DVD, or download it through Video On Demand. The mere fact that Citizens United's movie advertisements mention the name of a candidate for federal office does not provide the government with an interest—"compelling," "impor-

tant," or otherwise—in applying BCRA §§ 201 and 311 to those advertisements.

A. BCRA's Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Strict Scrutiny.

The government argues that BCRA §§ 201 and 311 should be examined under "exacting scrutiny," which requires a "substantial relation" between a "sufficiently important" "governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64, 66; *see also* FEC Br. 37. This Court has repeatedly made clear, however, that *any* content-based restriction on speech must be narrowly tailored to further a compelling government interest. *See WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.); *MCFL*, 479 U.S. at 256, 261. The fact that BCRA's disclaimer, disclosure, and reporting requirements do not, on their face, "'prevent anyone from speaking'" (FEC Br. 37), but instead compel Citizens United to make statements that it "would rather avoid" (*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)), does not exempt these government-imposed speech restrictions from the stringent requirements of strict scrutiny. In the absence of a "compelling necessity" furthered by "narrowly tailored" means, the government may "not dictate the content of speech" (*Riley*, 487 U.S. at 798, 800)—including by requiring Citizens United to run oral and written disclaimers in its advertisements for *Hillary* and disclose the identity of the advertisements' financial backers.

The government does not even attempt to defend the application of these speech restrictions to Citizens United under strict scrutiny. And with good reason. The only compelling government interest

that this Court has recognized in the campaign-finance setting—the interest in preventing corruption and the appearance of corruption (*WRTL II*, 127 S. Ct. at 2671-72 (opinion of Roberts, C.J.))—is demonstrably inapplicable to Citizens United's advertisements, which concededly are not express advocacy or its functional equivalent. FEC Br. 36.

B. BCRA's Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Exacting Scrutiny.

BCRA's disclaimer, disclosure, and reporting requirements fare no better under the government's watered-down "exacting scrutiny" standard. Neither the government's informational interest nor its enforcement interest is sufficient to sustain the application of these speech restrictions to movie advertisements that are wholly unrelated to any federal election.

1. The Government's Informational Interest Is Inapplicable To Citizens United's Advertisements.

The government contends that the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's advertisements promotes an "important" government interest because "'[i]ndividual citizens seeking to make informed choices in the political marketplace' have 'First Amendment interests' in learning how electoral advocacy is funded." FEC Br. 40 (quoting *McConnell*, 540 U.S. at 197). But the government never plausibly explains how the application of these speech-suppressing requirements to Citizens United's ten- and thirty-second movie advertisements is substantially related to its interest in promoting informed political decision-making.

a. BCRA purports to impose its disclaimer, disclosure, and reporting requirements on *any* broadcast, cable, or satellite communication that mentions a federal candidate during pre-election periods. The government apparently concedes, however, that there are at least some "electioneering communications" to which its informational interest is inapplicable, and it confines the application of BCRA §§ 201 and 311 to those advertisements that can "reasonably be construed as electoral advocacy" and that therefore "have an obvious potential to affect voting behavior." FEC Br. 42.

The government's attempt to narrow the scope of BCRA §§ 201 and 311 does not go nearly far enough. The government's contention that these requirements can constitutionally be applied to any advertisement susceptible to being interpreted as electoral advocacy disregards this Court's previous conclusion that reporting requirements can only be applied to "spending that is *unambiguously* related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80 (emphasis added). The government's proposed standard is also hopelessly imprecise. To demand that—on pain of felony prosecution—a speaker guide its conduct based on whether a voter might "perceive a connection between an advertisement and an upcoming election" (FEC Br. 42) effectively requires speakers to comply with BCRA's disclaimer, disclosure, and reporting requirements in every one of the inevitably numerous instances where the government's malleable standard does not yield a clear result.

b. Even if one were to disregard prior precedent on disclosure requirements and overlook the practical shortcomings of the government's proposed standard, BCRA's disclaimer, disclosure, and reporting

requirements still could not be constitutionally applied to Citizens United.

Citizens United's advertisements cannot "reasonably be construed as electoral advocacy." In fact, they are not even a distant cousin of "electoral advocacy." Citizens United's advertisements are not intended to promote the election or defeat of Senator Clinton, but instead to promote the movie *Hillary*—a biographical documentary about a prominent public figure—and encourage viewers to see the movie in a theater, purchase it on DVD, or download it through Video On Demand. While the government may have an important interest in helping citizens "'make informed choices in the *political* marketplace,'" this Court has never suggested that the government has an equally important interest in facilitating "informed choices" in the movie marketplace. Indeed, if Citizens United's movie advertisements can reasonably be construed as electoral advocacy, then *any* advertisement mentioning a candidate's name—even a restaurant advertisement touting the President's recent visit or a college advertisement listing a U.S. Senator as an alumnus—would inevitably be subject to BCRA's disclaimer, disclosure, and reporting requirements, without regard to whether the advertiser actually intended to influence an election. The government's effort to narrow the reach of those statutory requirements is thus virtually meaningless because, according to the government, the mere mention of a candidate's name seems to be sufficient to convert an advertisement into electoral advocacy.

Tellingly, the government makes absolutely no effort to explain how the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's two ten-second advertisements would further its interest in enabling citizens to

"learn[ ] how electoral advocacy is funded." Indeed, the government does not mention the ten-second advertisements anywhere in its six-page defense of its informational interest—a startling omission given that one of the issues before this Court is whether BCRA §§ 201 and 311 can constitutionally be applied to those advertisements.

The government's reluctance to discuss Citizens United's two ten-second advertisements becomes more understandable when the content of those advertisements is examined. One of the advertisements informs viewers that, "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." Citizens Br. 8 n.1. The other humorously presents a "kind word about Hillary Clinton" from conservative commentator Ann Coulter—"[s]he looks good in a pant suit"—and then describes *Hillary* as "a movie about everything else." *Id.* The advertisements do not mention an election, Senator Clinton's candidacy for office, her views on political issues—or anything else remotely related to the electoral process. It thus cannot reasonably be suggested that requiring Citizens United to report these advertisements to the FEC, disclose the advertisements' financial backers, and broadcast disclaimers identifying itself as responsible for the advertisements is substantially related to "the public interest in full information about participants in the electoral process" (FEC Br. 12)—which is probably why the government could not bring itself even to articulate that argument. And while applying BCRA §§ 201 and 311 to Citizens United's ten-second advertisements might provide the public with "full information" about their selection of movies, that, of course, is not an important government interest.

The government does at least mount a defense of its application of BCRA §§ 201 and 311 to Citizens United's thirty-second advertisement, but it fails in its attempt to transmogrify that advertisement into "electoral advocacy." That advertisement presents three statements about Senator Clinton from public commentators—"[S]he's continually trying to redefine herself and figure out who she is," "Hillary's got an agenda," and "Hillary is the closest thing we have in America to a European socialist"—and then, like one of the ten-second advertisements, declares "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." Citizens Br. 8 n.1. In the context of an advertisement for a critical biographical documentary about Senator Clinton, those statements cannot reasonably be construed as "electoral advocacy" for or against her candidacy. They are instead provocative statements about a controversial public figure that attempt to capture viewers' attention and generate interest in the documentary movie marketed by Citizens United. In another context—in an advertisement urging viewers to "Call Senator Clinton and tell her what you think about her voting record," for example—it may well be reasonable to construe the advertisement's statements as "electoral advocacy." Against the very different backdrop of an advertisement promoting the distribution of a movie, however, it is not plausible to conclude that Citizens United included these statements in its advertising for the purpose of opposing Senator Clinton's candidacy.

2. The Government's Enforcement Interest Is Inapplicable To Citizens United's Advertisements.

The government's "interest in facilitating the enforcement of substantive regulation of contributions and funding sources" provides equally little support for the application of BCRA §§ 201 and 311 to Citizens United. FEC Br. 46.

The government asserts that its "ability to enforce BCRA Section 203's financing restrictions with respect to electioneering communications that *are* the functional equivalent of express advocacy would be impeded" if it could not rely on BCRA's disclaimer, disclosure, and reporting requirements to learn that a corporate-funded advertisement has been aired. FEC Br. 47. But the government has explicitly conceded that Citizens United's advertisements are *not* the functional equivalent of express advocacy (*id.* at 36), and this concession categorically forecloses its reliance on its enforcement interest to regulate those advertisements. *See Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). Where the government is aware of an advertisement—and has concluded that the advertisement cannot be constitutionally prohibited under BCRA § 203—the government's enforcement interest evaporates.

Moreover, the enforcement interest is only applicable, if at all, to BCRA's reporting requirement, which requires the person funding an electioneering communication to submit a statement to the FEC that identifies itself as responsible for the communication. 2 U.S.C. § 434(f)(2). BCRA's disclaimer and disclosure requirements do not provide the FEC with any additional information that could facilitate its enforcement of BCRA § 203's restrictions on corpo-

rate-funded electioneering communications. And, as applied to Citizens United, not even the reporting requirement could further the government's enforcement interest (or its purported informational interest, for that matter) because, as the government concedes, Citizens United "already discloses its identify at the website referred to in the advertisements." FEC Br. 51. In this case, then, the government's supposed enforcement interest is pure fiction.

3. The Burdens Imposed By BCRA §§ 201 And 311 Outweigh Any Government Interest In Applying Those Speech Restrictions To Citizens United.

Even if the government did have an informational or enforcement interest in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United, those interests would be outweighed by the extraordinary burdens that those requirements impose on First Amendment freedoms—including the risk of harassment and retaliation faced by Citizens United's financial supporters, and the substantial compliance costs borne by Citizens United.

The government dismisses the risk of reprisal against Citizens United's supporters because the record does not document previous acts of retaliation. But the risk of reprisal against contributors to Citizens United—and other groups that espouse controversial ideological messages—has vastly increased in recent years as a result of the same "technological advances" that the government touts in BCRA's defense, which "make it possible . . . for the public to review and even search the [contribution] data with ease." FEC Br. 40-41. The widespread economic re-

prisals against financial supporters of California's Proposition 8 dramatically illustrate the unsettling consequences of disseminating contributors' names and addresses to the public through searchable websites (*see*, *e.g.*, CCP Br. 13; IJ Br. 13)—some of which even helpfully provide those intent upon retribution with a map to each donor's residence. *See* Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Is 2-Edged Sword*, N.Y. Times, Feb. 8, 2009.

The chilling effect on First Amendment expression generated by the specter of retribution is substantiated by empirical studies, which have found that "'[e]ven those who strongly support forced disclosure laws will be less likely to contribute'" where their personal information will be disclosed. IJ Br. 10 (quoting Dick Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 8 (2007)). And this chilling effect on First Amendment freedoms is compounded by the extreme administrative burdens generated by BCRA's disclosure requirements, which are notoriously difficult to implement for even the lawyers and accountants who advocacy groups are inevitably required to retain to monitor their disclosure obligations. *See id.* at 19 (discussing an empirical study in which none of the 255 participants was able to comply successfully with campaign disclosure requirements).

The fact that the record does not explicitly document the burdens that BCRA's disclaimer, disclosure, and reporting requirements impose on Citizens United's First Amendment rights is not a sufficient basis for discounting these very real impositions on Citizens United's freedom of expression. In this as-applied challenge, it is the *government* that bears the burden of establishing that BCRA's speech restrictions are compatible with the First Amendment

(*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—and it therefore falls to the government to demonstrate that BCRA does not intolerably restrict Citizens United's First Amendment freedoms. The government has not met that burden.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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