
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

**Supplemental Brief *Amicus Curiae* of The
Reporters Committee for Freedom of the Press
in Support of Appellant**

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
John Rory Eastburg
Hannah Bergman
Samantha Fredrickson
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209
(703) 807-2100

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STATEMENT OF INTEREST¹

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

As stated in the initial brief filed by the Reporters Committee in this case, the Reporters Committee has an interest in ensuring that the Bipartisan Campaign Reform Act of 2002 (“BCRA”), 2 U.S.C. § 431 *et seq.*, is not used to suppress this feature-length political documentary, as it would be an “obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

¹ Pursuant to Sup. Ct. R. 37, counsel for the Reporters Committee declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amicus curiae* has previously been filed with the Clerk.

SUMMARY OF ARGUMENT

Amicus curiae The Reporters Committee for Freedom of the Press (the “Reporters Committee”) urges the Court to clarify its precedent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) to hold that these rulings are constitutional only if they allow the news media to engage in what would otherwise be regulated as “express advocacy” by a corporation.

The Bipartisan Campaign Reform Act of 2002 can survive constitutional scrutiny if this Court recognizes a broadly defined exemption for the news media consistent with the First Amendment’s protection of the press.

The government’s reading of *Austin* and *McConnell*, as articulated during the initial oral argument in this case, suggest those rulings do not stand for this proposition. However, this Court’s precedent, prior to *Austin*, supports such an interpretation.

Moreover, the broadly defined exemption for the news media must be based on the intent of the news organization to disseminate news to the public, rather than a definition directed at protecting only at the traditional, or “institutional,” press.

The original, laudable intent of Congress presumably was to limit speech by corporations that seek to promote their own interests by influencing elections, while continuing to allow all other commentary (either non-corporate entities or by the news

media) on political issues. But by crafting campaign finance reform legislation with such attention to corporate form in a world in which so much public communication is conducted through such means, far too much speech is either barred, chilled, or subject to government approval through regulation by the FEC.

ARGUMENT

I. The government has interpreted the Constitution as allowing for expansive regulation of corporate and union spending on express advocacy, without regard for First Amendment protections of the press.

This Court directed supplemental briefing on whether its precedent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the portion of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b, should be overruled.

The cases should be clarified, given the government's assertions at oral argument that under these two decisions, Congress has broad power to restrict corporate and union spending on the "functional equivalent of express advocacy" via a wide variety of media, including books and the Internet, without a required exemption for the news media.

During a lengthy exchange over the breadth of Congress' power to regulate speech in this area, Jus-

tice Alito asked whether the Constitution required Congress to limit its regulation to electioneering communications on broadcast and cable rather than extending the statute to books, DVDs, or the Internet. The government’s counsel replied, “The Constitution would have permitted Congress to apply the electioneering communication restrictions. . . . Those could have applied to additional media as well.” Tr. Oral Argument at 27:6, *Citizens United v. Federal Election Comm’n*, No. 08-205. The government continued to state that Congress could stop the use of corporate treasury funds to publish a book that was express advocacy. *Id.* at 28:1, *Id.* at 29:10 (“It – it can’t be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and could be required to use – to raise funds to publish the book using its PAC.”).²

The government conceded only that there is a “potential argument” that the “institutional press” would have some First Amendment rights in this situation. *Id.* at 28:7. It was also the government’s contention that the Court had not addressed whether “restrictions on the use of corporate treasury funds for electioneering can constitutionally be applied to media corporations.” *Id.* at 34:14.

² While the government seems content with requiring corporate speakers to create FEC-registered political action committees, Tr. Oral Argument at 27:19, such a restriction is nothing short of a licensure requirement on the news media of a type that has long been held repugnant to the principles underlying the First Amendment. See *Grosjean v. American Press Co., Inc.* 297 U.S. 233 (1936).

These statements indicate both confusion and a misunderstanding of this Court’s precedent with regard to campaign finance regulations and the media.

On re-argument, these statements must be taken by the Court as the passing of the fears Justice Thomas warned against in *McConnell*. 540 U.S. at 284 (Thomas, J., concurring in part and dissenting in part) (“What is to stop a future Congress from determining that the press is ‘too influential,’ and that the ‘appearance of corruption’ is significant when media organizations endorse candidates or run ‘slanted’ or ‘biased’ news stories in favor of candidates or parties?”).

The First Amendment’s protections of the press and speech do not allow Congress to validly pass such far-reaching statutes.³ Yet, there is clearly an interest in Congress in expanding campaign finance regulation. *See McConnell* at 185 (Op. of Scalia, J. citing 148 Cong. Rec. S2101 (Mar. 20, 2002) (statement of Sen. Feingold)) (“This is a modest step, it is a

³ In fact, Congress could broaden the scope of what types of communications are covered by BCRA simply by modifying the definition of “electioneering communication,” 2 U.S.C. 434(f)(3)(A)(i), which presently contains the modifier that limits BCRA to broadcasts only. A change of definition that eliminates this qualifier might seem like a mere “legislative fix” to Congress — after all, communications about elections are not inherently limited to those that are broadcast, but would logically cover communications in print, over the Internet, and even by oral exposition at a public event. Such a change in definition would then leave much political commentary out of the rather narrow media exemption in the statute, which only discusses news programs on broadcasts.

first step, it is an essential step, but it does not even begin to address, in some ways, the fundamental problems that exist with the hard money aspect of the system.”). Before the situation is further complicated, the Court should take this opportunity to clarify the First Amendment protections for news media, broadly defined, as they exist with respect to campaign finance laws. If it does not, there will be nothing to stop Congress, as Justice Thomas pointed out, from regulating campaign endorsements and editorials by the news media.

II. This Court’s jurisprudence must be interpreted as requiring a constitutionally compelled media exemption from campaign finance laws.

The government’s interpretation of this Court’s precedent incorrectly focuses on only its relatively recent holdings in *Austin* and *McConnell*. In fact, regulation of campaign finance has a long history in the United States, one that has always heeded the First Amendment’s protection of a free press. This constitutional protection for the news media has become so ingrained within the consciousness of lawmakers that in the campaign finance legislative debates that led to BCRA, there was little discussion of the need to exempt the press from these statutes. BCRA includes this long-standing exemption. 2 U.S.C. § 434 (f)(3)(B)(i). It excludes from regulation, among other things, speech that, “[a]ppears 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.” *Id.*

This Court first extensively dealt with the question of press activity in conflict with a campaign finance law in *United States v. CIO*, 335 U.S. 106 (1948). There, this Court considered whether the Federal Corrupt Practices Act, a campaign finance law from 1925, prohibited the publication and distribution of a weekly periodical by a labor union that urged union members to vote for a congressional candidate. Debates on the Senate floor over the legislation indicated that the statute had not been intended to reach such activities of the press. *Id.* at 120 (“[I]t is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment.”). Given such history, the Court found that if the statute,

were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

Id. at 121. Such language indicates a requirement arising from the First Amendment’s protection of press freedom that campaign finance laws — tar-

geted at either labor unions or corporations — not constrict the press. This is true regardless of whether it was the print-based press that existed in 1948 or the broadcast and online news media that exist today.

The holding in *CIO* was reiterated by the Court in *Mills v. Alabama*, 384 U.S. 214 (1966) when this Court struck down Alabama’s campaign finance statute. “The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.” *Id.* at 219. The statute prohibited newspaper editorials published on election day urging readers to vote for a candidate. *Id.* at 218.

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to

play an important role in the discussion of public affairs.

Id. (citations omitted).

Thus, it cannot be only by legislative grace that the press is exempted from campaign finance statutes, as the government suggested in the initial oral argument in this case. Tr. at 27. The First Amendment and this Court's jurisprudence compel a press exemption from these laws. Where campaign finance statutes have not clearly exempted the media, this Court's decisions have prohibited their application to the press so that they may be saved. *See CIO*, 335 U.S. at 121. Yet, the government in oral argument said Congress could, by statute, prohibit a book endorsing a candidate from being published by a corporation prior to an election. Tr. at 27. This Court has never tolerated such an infringement on freedom of the press. Indeed, where the press has been the vehicle by which public discourse of items of political importance has occurred, First Amendment protections have been strengthened. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing protections for certain potentially libelous speech); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a "right of access" statute that interfered with the editorial judgment of news editors).

The Court should take this opportunity to reiterate the essence of previous holdings in its campaign finance cases dating back more than half a century. If its statements at oral argument are to be believed, the government has lost sight of a fundamental pur-

pose of First Amendment jurisprudence. The press, as a constitutional matter, must be and has always been exempt from campaign finance laws that infringe on the news media's ability to exercise editorial discretion. Publishers cannot be stopped from publishing books endorsing candidates before an election, as the government contended, if Congress so deems. To do so would violate the First Amendment and the spirit of freedom in political discourse through which this country was established.

III. The constitutionally compelled media exemption must be defined based on the intent of the entity to gather and disseminate news.

The media exemption must be defined broadly by this Court in order to prevent future regulation of the media. This Court should craft the press exemption based on the intent of the news organization to gather and disseminate news to the public, rather than a mere description of its mode of transmission.

In *Austin* and *McConnell*, the Court barely touched on the media exemption. In *Austin*, the majority briefly recognized that the institutional press should be exempted from campaign finance restrictions because “a valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public.” *Austin*, 494 U.S. at 669. In *McConnell*, the majority did not touch on the exemption. Thus, in the wake of these cases, the test for what types of media entities may be regulated under the BCRA remains murky and

unclear. See 151 Cong.Rec. H9478-01 (Nov. 2, 2005) (statement of Rep. Miller) (“When Congress passed the Bipartisan Campaign Finance Reform Act in 2002, the law apparently was unclear on what impact it would have on political speech on the Internet.”).

The law is especially unclear because of the constantly evolving world of media. Before *Austin* and *McConnell*, and before many of the latest advancements in technology, it was relatively simple to define the media. Newspapers, magazines, and broadcast and cable newscasts were all considered journalism and were all easily granted an exemption from campaign finance regulation. See generally *The Readers Digest Ass’n. v. Fed. Elections Comm’n.*, 509 F.Supp. 1210 (S.D.N.Y. 1981); *Fed. Elections Comm’n v. Phillips Publ’g.*, 517 F.Supp. 1308 (D.D.C. 1981). But as technological advancements change the mode in which news is transmitted, it is no longer so easy to discern who is a member of the news media and who is not. See generally Brief *Amicus Curiae* of Reporters Committee for Freedom of the Press, *Citizens United v. Federal Election Comm’n*, No. 08-205. And the distinction will be even murkier in the future as the practices, methods and modes of journalism continue to evolve. Thus, the media exemption must be broadened so as to include not only traditional institutional media corporations, but also organizations like Citizens United that are distributing pertinent political news to the public.

As Justice Scalia foreshadowed in his dissent in *Austin*, the majority opinion left the door open for regulation of the press.

Members of the institutional press, despite the Court's approval of their illogical exemption from the Michigan law, will find little reason for comfort in today's decision. The theory of New Corruption it espouses is a dagger at their throats. The Court today holds merely that media corporations may be excluded from the Michigan law, not that they must be.

Austin, 494 U.S. at 691.

Without a clearly enunciated and broad standard announced by this Court, the likelihood of media regulation and censorship is high. As the government stated during oral arguments, *McConnell* and *Austin* allow the FEC to impose campaign finance regulations on a variety of media organizations, including book authors. *Supra* Part I. *Amicus* urges the Court to clarify the standard that has emerged after *Austin* and *McConnell* and to adopt a broadly defined standard that exempts entities that have the intent to gather and disseminate news, commentary and other information.

Broadening the standard would help preserve valuable public debate about elections and campaigns. The news media is exempted from campaign finance regulation in order to preserve its critically important role in covering elections. The exemption exists, not for the journalists themselves, but so that the public has access to and can participate in important political discussions. *See generally Mills*, 384 U.S.

214. Broadening the exemption to include not just traditional press organizations but also non-traditional news organizations and information gatherers furthers the goals of the original intent of the media exemption. As the FEC recognized in response to a complaint that ABC, CBS, NBC, *The New York Times*, *The Washington Post* and the *Los Angeles Times* were making illegal corporate campaign contributions because of their commentary about political candidates, the media exemption allows the press to continue to serve the important role of election coverage.

It is clearly a part of the normal press function to attend to the competing claims of parties, campaigns and interest groups and to choose which to feature, investigate or address in news, editorial and opinion coverage of political campaigns. The question of whether a news organization may have credulously or recklessly accepted and reported the claims of one political party or candidate is the type of inquiry which the courts have held to be foreclosed by the [Federal Election Campaign Act]'s media exemption.

In re ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post, et al. Matter Under Review 4929, 5006, 5090 and 5117 at 4 (Fed. Elections Comm'n Dec. 20, 2000) (*available at* <http://eqs.sdrdc.com/eqsdocs/000011BC.pdf>).

When it is clear that the entity is a traditional media organization, the Court should continue to ap-

ply the media exemption as it historically has. But, when there is a question about whether or not the entity is a news organization, the Court should look to the function of organization and its intent to distribute news to the public. *See generally* Richard Hasen, *Lessons from the clash between campaign finance laws and the blogosphere*, 11 NEXUS 23 (2006).

In a related area of law, federal courts have already adopted an intent-based functional definition in determining what types of entities are news organizations. When determining whether to apply a reporter's privilege to a non-traditional news gatherer, courts have adopted a test that applies a privilege to those entities that can show they had "the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *von Bulow v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987). In *von Bulow*, the court refused to apply a reporter's privilege because a woman who said she was an author did not have the intent to gather news and disseminate it to the public from the beginning. *Id.*

The same test has been adopted in other circuits. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (authors were independent and had the intent to gather and disseminate news to the public and could avail themselves of a reporter's privilege); *In re Madden*, 151 F.3d 125 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

In these cases, the courts have recognized that there is a line between those types of organizations

and individuals who are legitimately acting as the press and those who are not. When there is no question about whether an entity is a news organization, courts do not apply this test. But when it is unclear whether the privilege should apply, this test helps courts to determine if the organization or journalist can invoke the same constitutional protections as the traditional press. Under this test, only those people and organizations who are independent and who have the intent to disseminate news to the public can avail themselves of constitutional protection.

Similarly, the reasoning applied in these cases is appropriate in the campaign finance context. As mentioned above, the intent-based function need only come into play when there is a question whether the entity is a media organization. If the Court applies a similar test, that exempts all organizations which are independent from political parties and which have the intent to disseminate news to the public, the Court can ensure that all legitimate press entities are constitutionally exempt from regulation and censorship.

In the reporter's privilege context, this is a practical and workable test that draws a distinct line. It could serve the same purpose in the campaign finance context as well. It would also serve the government's interest in regulating campaign activities so as to avoid the appearance of corruption, while also preserving the First Amendment right to discuss and debate matters of political concern. It is not a strict standard and will not undermine the important policies and concerns behind campaign finance regulations. By looking at the intent of the organization

to disseminate news, a standard such as this will further important debate and discussion about elections. Also, by exempting organizations which are independent of any political party, this standard will allow the FEC to continue to regulate true campaign speech.

The press plays an important role in covering campaigns and elections, and it has played that role since this country was founded. It is vital that this Court does not step on that constitutionally protected role by censoring the media based on its content or mode of distribution. “It is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media’s choice of formats, hosts, commentators and editorial policies in addressing public policy issues.”⁴ *Amicus* thus urges this court to adopt a broadly-defined intent based test that will exempt press organizations that are disseminating news to the public. A broad test will preserve the media’s ability to provide independent coverage of elections and campaigns.

⁴ *In the Matter of Robert K. Dornan, et. al*, Matter Under Review 4689 at 6 (additional statement of Comm’r Mason, Fed. Elections Comm’n Feb. 14, 2000) (*available at* <http://eqs.sdrdc.com/eqsdocs/000038E2.pdf>) (involving complaints about a congressman serving as a guest host for radio talk shows).

CONCLUSION

The Court should take this opportunity to make clear that the press, broadly defined by its intent to gather and disseminate information, must be exempt from campaign finance regulations if the statutes are to survive a First Amendment review. Such a ruling reinforces the early holdings of this Court with regard to campaign finance regulation and would protect the interests of the press as it existed in 1789, as it existed in the 20th century, and as it exists now. Whatever the aims of campaign finance regulations and statutes, they must be aligned with the protections the First Amendment provides for the press. A free, robust, and invigorated news media — one that is not afraid its speech will fall under the specter of government regulation — furthers the democratic goals of campaign finance reform and should be protected as the Framers intended when the First Amendment was adopted.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
John Rory Eastburg
Hannah Bergman
Samantha Fredrickson
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Ste. 1100
Arlington, VA 22209-2211
(703) 807-2100

July 24, 2009