

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*

**SUPPLEMENTAL BRIEF OF THE SUNLIGHT
FOUNDATION, THE NATIONAL INSTITUTE ON
MONEY IN STATE POLITICS AND THE CENTER
FOR CIVIC RESPONSIBILITY AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE**

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INTEREST OF AMICI CURIAE¹

The Sunlight Foundation was founded in 2006 with the non-partisan mission of using the revolutionary power of the Internet to make information about Congress and the federal government more meaningfully accessible to citizens. Through our projects and grant-making, Sunlight serves as a catalyst for greater political transparency, thus making the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since our founding, we have assembled and funded an array of Web-based databases and tools, including OpenCongress.org, FedSpending.org, OpenSecrets.org, and EarmarkWatch.org, that make millions of bits of information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. The Sunlight Foundation has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

The National Institute on Money in State Politics (www.followthemoney.org) is a nonpartisan nonprofit dedicated to compiling state-level campaign finance data and lobbyist information and providing the public open access to that data via the Internet. The Institute's comprehensive and highly credentialed 50-state political-donor data has been used by

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

investigative reporters, scholars, attorneys and the public as they unravel the correlations between political donors and public policies. Incorporated in 1999 in Helena, Montana, the Institute's mission is to promote electoral and governmental transparency as a means to invigorating public debate on important issues of the day and civic engagement. The Institute's interest is in defending robust disclosure of all political expenditures at the state level.

The Center for Civic Responsibility is a non-profit 501(c)(3) corporation whose mission is to increase civic engagement by developing model legislation for use by citizens who wish to improve government integrity and transparency. The Center has a long history and expertise in campaign finance law. In 1999, the Center established an all volunteer Legal Task Force to develop model campaign finance reform laws for state and local adoption. Some of the reforms include a government contracting "pay-to-play" reform law and a law requiring developers to disclose political contributions when applying for major zoning variances. The Center has a particular interest in defending any case that threatens to limit disclosure of campaign expenditures.

SUMMARY OF ARGUMENT

The thrust of the Court's order directing supplemental briefing causes Amici to have justifiable concerns that the Court's ultimate disposition could affect not only the constitutionality of BCRA's disclosure and disclaimer requirements, but also could generate uncertainty about the constitutionality of numerous state statutes that mandate disclosure and reporting of campaign contributions and expenditures,

including expenditures for electioneering communications as defined in BCRA, that may not be constitutionally subject to prohibition or limitation.

Those concerns are underscored by several lower court opinions that reach inconsistent conclusions about the effect of this Court's decision in FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) (WRTL II), on state statutory disclosure and reporting requirements. Compare Human Life of Washington, Inc. v. Brumsickle, No. C08-0590, 2009 WL 62144, at *17-18 (W.D. Wash. Jan. 8, 2009) (upholding State of Washington statute mandating disclosure by political committees of expenditures for advocacy relating to issues underlying ballot proposition, and finding it "unclear whether [WRTL's] logic extends to lesser burdens on non-express advocacy"), appeal docketed, No. 09-35128 (9th Cir. 2009), with Nat'l Right to Work Legal Def. and Educ. Found., Inc. v. Herbert, 581 F. Supp. 2d 1132, 1152 (D. Utah 2008) (relying on Buckley v. Valeo, 424 U.S. 1 (1976) and WRTL II and invalidating Utah statute mandating disclosure by corporations of "political expenditures" and similar disclosure by so-called "political committees" because plaintiffs ads "do not expressly advocate for the enactment or defeat of school vouchers, nor are they otherwise unambiguously campaign related."). Amici believe that a decision by this Court overruling either or both Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and the part of McConnell v. FEC, 540 U.S. 93 (2003), that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (BCRA), although not resolving the disclosure issue, would add to the uncertainty and inconsistency reflected by recent lower court decisions and would create doubt and confusion about the

standards governing enforceability or numerous state disclosure and reporting laws.²

Amici disputes Appellant’s reliance on Buckley’s holding that a prior Federal Election Campaign Act disclosure requirement was confined to spending “unambiguously related to the campaign of a particular federal candidate” (Br. 47 (quoting Buckley, 424 U.S. at 80)). In McConnell, this Court made clear that Buckley’s “express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command.” 540 U.S. at 191-92. This Court’s pre- and post-Buckley jurisprudence has clarified the circumstances in which disclosure of campaign expenditures can be compelled, without regard to whether such expenditures are constitutionally exempt from prohibition or other limitations. See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 262 (1986) (MCFL), Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 n.4, 298-99 (1981); First Nat’l. Bank v. Bellotti, 435 U.S. 765, 792 n.32 (1978) (Bellotti); United States v. Harriss, 347 U.S. 612, 625-26 (1954).

² A number of states have enacted reporting requirements based on a definition of electioneering communication similar to that contained in BCRA. See Alaska Stat. § 15.13.400(5); Ariz. Rev. Stat. Ann. § 16-901.01(A)(2); Cal. Gov’t. Code § 85310; Colo. Const. Art. XXVIII § 2(7); Conn. Gen. Stat. Ann. § 9-601b(a); Fla. Stat. Ann. § 106.11(18); Haw. Rev. Stat. § 11-207.6; Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. § 5/9-1.14; Me. Rev. Stat. Tit. 21-A § 1019-B; N.C. Gen. Stat. § 163-278.80(2); Ohio Rev. Code Ann. § 3517.1011(7).

Notwithstanding Appellant's reliance on this Court's invalidation of the disclosure provisions at issue in Davis v. FEC, 128 S.Ct. 2759 (2008) (Br. 53 (citing Davis, 128 S.Ct. at 2775)), those disclosure provisions clearly had been adopted for the sole purpose of implementing the so-called "millionaires' amendment," also invalidated in Davis. As the plurality opinion in McConnell makes clear, 540 U.S. at 196, the disclosure provisions of BCRA supplement the blackout provisions of § 203 by providing the public with information about the sponsorship and funding of issue ads whether or not they meet the WRTL II test of express advocacy. Amici contend that any disposition of this appeal that further dilutes or invalidates BCRA's prohibition on certain corporate and union-funded electioneering communications will substantially increase their use and dissemination resulting in an enhanced public interest for disclosure of the source and funding of such communications.

ARGUMENT

I. A DECISION OVERRULING AUSTIN AND/OR THAT ASPECT OF MCCONNELL ADDRESSING BCRA'S FACIAL VALIDITY WOULD INCREASE EXISTING UNCERTAINTY AND CONFUSION AMONG LOWER COURTS ABOUT THE CONSTITUTIONALITY OF STATE CAMPAIGN DISCLOSURE STATUTES.

In McConnell, five members of the Court concluded that BCRA's disclosure requirements applied to the "entire range of 'electioneering communications,'" 540 U.S. at 196, and three additional Justices voted to uphold those requirements (with one exception not

relevant to this appeal) although also voting to invalidate the ban on corporate-funded electioneering communications, *id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part). In WRTL II this Court did not invalidate, nor even consider, the application of BCRA's disclosure requirements to electioneering communications. But recent lower court decisions have reached different conclusions about the constitutionality of state statutory disclosure requirements in the wake of WRTL II.

In this matter, the district court rejected Appellant's contention that because its speech was constitutionally protected, BCRA's disclosure and disclaimer provisions could not constitutionally be applied to Citizens United, observing that "the Supreme Court has not adopted that line * * * and it is not for us to do so today." Citizens United v. FEC, 530 F. Supp. 2d 274, 281 (D.D.C. 2008). Analogously, in Brumsickle, 2009 WL 62144, at *15, a Washington district court rejected a challenge to the application of statutory disclosure provisions to a "political committee" based on the contention that the statute's provisions applied to expenditures for communications that did not expressly support or oppose the ballot initiative at issue. Noting that in the ballot initiative context there is "little, if any, meaningful distinction between issue and express advocacy," the Washington district court held that "the state's compelling interests in informing the electorate and protecting contributors justify requiring * * * [disclosure of] all expenditures made 'in support of, or opposition to * * * a ballot proposition' * * * even when 'expenditure' is defined to include some advocacy as to the 'issue'

underlying the proposition * * *.” 2009 WL 62144 at *18.

Similarly, in Ohio Right to Life Society, Inc. v. Ohio Elections Commission, No. 2:08-cv-00492, 2008 WL 4186312 (S.D. Ohio Sept. 5, 2008), an Ohio district court rejected plaintiff’s as-applied challenge to Ohio’s statutory campaign disclosure requirements, contending that its ads, although mentioning the names of State Senators running for election within the proscribed statutory period, were not the functional equivalent of express advocacy as clarified by WRTL II. Noting that “[t]he WRTL Court did not even mention disclosure requirements, much less consider their constitutionality,” 2008 WL 4186312 at *9, the Ohio district court sustained the disclosure requirements, finding that they were supported by the same public interests identified by this Court in Buckley and McConnell *id.* at *10.

In contrast, a Florida federal district court recently held unconstitutional a Florida statute regulating electioneering communications in its application to a non-profit corporation that intended to disseminate newsletters that mentioned candidates and discussed ballot issues. Broward Coalition of Condominiums, Homeowners Ass’ns and Community Organizations, Inc. v. Browning, No. 4:08cv445, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008) (preliminarily enjoining Florida law), 2009 WL 1457972 (N.D. Fla. May 22, 2009) (permanently enjoining electioneering provisions of Florida law). In Broward, the Florida court concluded that WRTL II’s standard for determining whether a communication was functionally equivalent to express advocacy precluded the application of the reporting and disclosure provisions of the Florida

statute to plaintiff's ballot issue communications. 2009 WL 1457972 at *5. Similarly in National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert, 581 F. Supp. 2d 1132 (D. Utah 2008), a non-profit legal aid corporation challenged the application to its radio and television ads of a Utah statute that regulated and imposed reporting and disclosure requirements on "political" expenditures, defined to include any "payment * * * made for the purpose of influencing the approval or defeat of a ballot proposition." Id. at 1149. The ads in question were intended to inform teachers and school employees that they had no obligation to participate in the teachers' union's efforts to defeat a ballot proposal for school vouchers. Id. at 1137. Relying primarily on Buckley and WRTL II, the court held that because plaintiff's ads were not either express advocacy or its functional equivalent, the Utah statute's regulatory and disclosure provisions could not constitutionally be applied to plaintiff's ads. Id. at 1144, 1149-50.

Analogously, in North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008), the court invalidated a North Carolina statute that regulated and imposed reporting requirements on expenditures or contributions for communications supporting or opposing an identified candidate. The statute authorized consideration of contextual factors to determine whether a communication met the statutory standard. Id. at 280-81. In invalidating the statute, as well as its disclosure and reporting requirements, the Fourth Circuit relied on Buckley and WRTL II in concluding that the power to regulate plaintiff's communications and to impose reporting requirements depended on whether such communications were

either express advocacy or its functional equivalent. Id. at 281-82.

Those federal courts that have addressed the constitutionality of state campaign disclosure requirements since this Court's decision in WRTL II clearly are divided over its effect. A disposition in this appeal that overrules Austin and/or the aspect of McConnell that address BCRA § 203's facial validity would not resolve the disclosure issue and would add to the existing confusion. Amici urges the Court to reaffirm McConnell's clear holding, 540 U.S. at 196, that the vital public interests underlying BCRA's disclosure requirements apply with equal force to "the entire range of 'electioneering communications,'" id., whether or not they satisfy WRTL II's test for the functional equivalence of express advocacy WRTL II, 551 U.S. 449, 127 S.Ct. 2652, 2667.

II. BUCKLEY V. VALEO'S LIMITATION ON CONGRESSIONAL POWER TO MANDATE DISCLOSURE OF INDEPENDENT CAMPAIGN EXPENDITURES WAS NOT CONSTITUTIONALLY IMPOSED AND OTHER DECISIONS HAVE CLARIFIED THE CIRCUMSTANCES IN WHICH SUCH DISCLOSURE CAN BE REQUIRED.

Although Appellant relies on Buckley for the proposition that disclosure requirements can apply only to spending "unambiguously related to the campaign of a particular federal candidate," (Br. 47 (quoting Buckley, 424 U.S. at 80)), this Court in McConnell explained that Buckley's "express advocacy limitation * * * was the product of statutory interpretation rather than a constitutional command."

540 U.S. at 191-92. See also MCFL, 479 U.S. at 248-49 (noting that Buckley's "express advocacy" standard was adopted "to avoid problems of overbreadth.").

Several decisions of this Court have upheld disclosure provisions related to expenditures that could not constitutionally be prohibited. A compelling example is MCFL, in which the Court held that the restriction on independent corporate spending contained in § 316 of the Federal Election Campaign Act (FECA), 2 U.S.C. 441(b), was unconstitutional as applied to MCFL, a non-profit corporation with no shareholders, formed to promote political ideas and not established or funded by business corporations or labor unions. 479 U.S. at 263-64. Nevertheless, the Court noted that:

MCFL will be required to identify all contributors who annually provide in the aggregate \$200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than \$200, and will be bound to identify all persons making contributions over \$200 who request that the money be used for independent expenditures.

Id. at 262. Underscoring the recognition that disclosure requirements rest on a different foundation than outright prohibition, the MCFL Court added that "[t]hese reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." Id.

Similarly, in Bellotti, 435 U.S. 765 (1978), in which the Court invalidated a statute prohibiting

corporations from engaging in issue advocacy, the Court nevertheless acknowledged that “[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” Id. at 792 n.32. To the same effect is Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), in which the Court invalidated an ordinance limiting the amount of contributions to committees supporting or opposing ballot measures but observed that the enforcement of the disclosure provisions of the ordinance removes the “risk that Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure * * *” Id. at 298.

Moreover, in United States v. Harriss, 347 U.S. 612 (1954), in upholding the constitutionality of the Federal Regulation of Lobbying Act, the Court aptly noted that Congress had not sought to prohibit the pressures exerted by lobbyists but “has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.” Id. at 625.

In short, this Court’s precedents consistently have recognized that Congress’ power to compel disclosure does not depend on the constitutionality of a prohibition of the activity about which disclosure is mandated.

III. UNLIKE THE DISCLOSURE PROVISIONS INVALIDATED IN DAVIS V. FEC, THE BCRA DISCLOSURE PROVISIONS SUPPLEMENT THE BLACKOUT PROVISIONS OF § 203 BY INFORMING THE PUBLIC ABOUT ISSUE ADS INSULATED FROM PROHIBITION BY WRTL II AND BY FACILITATING FEC REGULATION.

Appellant unpersuasively relies on this Court's decision in Davis (Br. 48) in which the Court invalidated the disclosure provisions of § 319(b) of BCRA on the basis that those provisions were enacted solely "to implement the asymmetrical contribution limits provided for in § 319(a)," which limits the Court held to be violative of the First Amendment. Davis, 128 S.Ct. at 2775. Analytically, the invalidation of the § 319(b) disclosure provisions in Davis provides no basis for appellant's contention that BCRA's disclosure and disclaimer provisions cannot be applied to electioneering communications that fall short of WRTL II's standards for determining the functional equivalent of express advocacy.

If not explicitly embraced by the lead opinion in WRTL II, the opinion implicitly acknowledged, by giving "the benefit of doubt to speech, not censorship," 127 S.Ct. at 2674, what was the major premise of the plurality opinion in McConnell:

[I]ssue and express advocacy * * * proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed

the use of magic words * * * * Indeed, campaign professionals testified that the most effective campaign ads * * * should, and did, avoid the use of the magic words.

McConnell, 540 U.S. at 126-27 (internal quotations removed).

No informed observer of campaign finance regulation would dispute that, post-WRITL II, innumerable electioneering communications will be broadcast and telecast that, although not quite the functional equivalent of express advocacy, nevertheless will be intended by their sponsors and understood by their recipients to constitute express advocacy for the support or defeat of an identified candidate. Notwithstanding WRITL II's bright line rule, the "important state interests" that this Court recognized in McConnell in upholding BCRA's disclosure and disclaimer requirements, 540 U.S. at 196, remain just as vibrant and relevant today, and those interests – especially the interest in public information about the source and funding of electioneering communications – apply with equal weight to express advocacy ads as well as issue ads. Because such information was unavailable to the public prior to BCRA, McConnell, 540 U.S. at 126, the authors of the district court's per curiam opinion in McConnell persuasively documented the rationale for BCRA's disclosure provisions:

The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public.

BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. * * * Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). * * * Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. * * * Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003).

Moreover, the Federal Election Commission has an ongoing regulatory need to monitor electioneering communications and determine for itself whether the WRTL II exemption is applicable. The FEC's enforcement interests depend on the receipt of reports informing it of the impending broadcast, and funding sources, of electioneering communications. Unlike the

disclosure provision invalidated in Davis, the BCRA reporting and disclaimer provisions challenged by Appellant supplement the FEC's regulatory interest in enforcing § 203 of BCRA and further the public interest in knowing the sponsorship and funding sources of issue ads that may just fall short of "the functional equivalent of express advocacy." WRTL II, 551 U.S. 449, 127 S.Ct. 2652, 2667.

CONCLUSION

The judgment of the district court should be affirmed.

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