No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant*
v.
FEDERAL ELECTION COMMISSION, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Brief Amici Curiae of Seven Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Appellant on Supplemental Question

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Statement of Interest[1]

These Amici Curiae are eight former commissioners of the Federal Election Commission ("FEC"), with FEC years and current affiliation indicated: **Joan Aikens** (1975-1998, retired); **Lee Ann Elliott** (1982-2000, retired); **Thomas Josefiak** (1985-1991, Partner, HoltzmanVogel); **David Mason** (1998-2008, Visiting Senior Fellow, Heritage Foundation); **Bradley Smith** (2000-2005, Blackmore/Nault Designated Professor of Law, Capital University); **Michael Toner** (2002-2007, head of Election Law and Government Ethics Practice Group, Bryan Cave); **Hans von Spakovsky** (2006-2007, Visiting Legal Scholar, Heritage Foundation); **Darryl Wold** (1998-2002, private law practice emphasizing election and political law). All chaired the FEC during their tenure except for Commissioner von Spakovsky.

As former FEC commissioners with many years of experience in interpreting the Federal Election Campaign Act ("FECA"), implementing regulations, devising enforcement policy, and investigating violations, Amici have an interest in advising the Court of the complexities and difficulties of the practical application of federal campaign finance laws and the First Amendment to political speech and activity.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than amici or their counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

Summary of Argument

"[T]he proper disposition" of this case does not *require* overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), or the facial upholding of the electioneering-communication Prohibition[2] in *McConnell v. FEC*, 540 U.S. 93 (2003), because this case may be decided for Appellant on other grounds. The application of this Court's unambiguously-campaign-related ("UCR") principle would resolve the challenges to both the Prohibition and Disclosure Requirements.

However, it would be appropriate, and in fact desirable, for the Court to overrule these troublesome precedents because (1) both are properly implicated for reconsideration, (2) "Congress shall make no law . . . abridging the freedom of speech" has special force in protecting political speech, (3) *Austin* and *McConnell* have proven to be unworkable, having spawned many complex, multi-factor tests, and (4) the FEC and lower courts have made the appeal-to-vote test in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007),[3] unworkable. *Austin* and its progeny *should* be overruled.

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[2] Amici follow the *Jurisdictional Statement* terminology for BCRA **§§ 201** and **311** ("Disclosure Requirements") and **§ 203** ("Prohibition"). *See id.* at 5.

[3] The opinion by Chief Justice Roberts joined by Justice Alito ("*WRTL-II*") states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Argument

I. "Proper Disposition" Does Not *Require* Overruling *Austin* or *McConnell*.

Overruling *Austin* and/or *McConnell*'s facial upholding of the Prohibition is not *required* but *should* be done. The UCR principle would resolve the challenges to both the Prohibition and Disclosure Requirements and would require striking the Disclosure Requirements, if the Disclosure Requirements do not automatically fall with the Prohibition.[4] *See Brief for Amicus Curiae Committee for Truth in Politics, Inc. Supporting Appellant* (herein) ("*CTP Brief*"). Amici make five more arguments regarding the UCR principle.

First, Intervenors Senator McCain et al. expressly argued *Buckley*'s UCR analysis in *McConnell*, insisting that the electioneering-communication definition was a constitutional "adjustment of the definition of which advertising expenditures are campaign related." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93. They argued that the "[d]isclosure rules . . . 'shed the light of publicity on spending that is *unambiguously campaign related* but would otherwise not be reported.'" *Id.* at 58 (*quoting Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (emphasis added).[5] They urged *Buckley*'s UCR analysis:

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[4] This would be similar to the analysis in *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2007) (striking disclosure provision implementing level-the-playing field provision).

[5] They argued that their "standards for defining which ads will be treated as *campaign-related* squarely serve a compelling interest in using clear and objective lines to

> Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not "dissolve in practical application," 424 U.S. at 42; and they should be "directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*," *id.* at 80; *see id.* at 76-82. Those are *precisely the precepts to which Congress adhered in framing Title II.*

Id. at 62 (*quoting Buckley*) (emphasis added). So the Intervenors, the reform community (the Intervenors' lawyers), and Congress itself recognized that the UCR analysis identifies regulable communications based on avoiding vagueness and overbreadth, which *McConnell* adopted. 540 U.S. at 191-92.

Second, since *McConnell*'s upholding of electioneering communication regulation was based on the UCR "precept," it would be a bait and switch not to apply the precept herein.[6]

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frame any rule that affects speech." *Id.* (emphasis added).

[6] In *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), Chief Justice Roberts identified at oral argument a similar bait-and-switch effort by the reform community: "In McConnell against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you're telling us that it's already been decided. It's a classic bait and switch." Transcript of Oral Argument at 25, *WRTL-I*, 546 U.S. 410. *See also WRTL-II*,127 S. Ct. at 2673 (another bait and switch rejected).

Third, this UCR analysis has been expressly recognized by FEC Commissioners. In a *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (*available at* http://www.fec. gov) ("*SOR*"), Democrat FEC Commissioners Weintraub, Thomas, and McDonald noted that *Buckley* expressed concern about reporting provisions "that might be applied broadly to communications discussing public issues which also happened to be campaign issues," and so imposed the express-advocacy construction. *Id.* at 2. "[T]he *Buckley* Court explained the purpose of the express advocacy standard," they declared, which "was to limit application of the . . . reporting provision to 'spending that is *unambiguously related* to the campaign of a particular federal candidate.'" *Id.*(*quoting Buckley*, 424 U.S. at 80) (emphasis in *SOR*). The Commissioners quoted 424 U.S. at 82: "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *SOR* at 2 (emphasis in *SOR*).

In addition, a January 22, 2009 *Statement of Reasons* in MUR 5541 (November Fund) by current Republican FEC Commissioners Petersen, Hunter and McGahn ("*November-Fund SOR*") emphasized the need to "fully incorporate important principles in recent judicial decisions," including . . . the Fourth Circuit's persuasive decision in . . . [*North Carolina Right to Life v.*] *Leake*[, 525 F.3d 274 (4th Cir. 2008)]," *November-Fund SOR* at 2, and stated that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach 'that spending that is unambiguously re-

lated to the campaign of a particular federal candidate' . . . ." *Id.* at 5.

Fourth, while *WRTL II*'s appeal-to-vote test clearly implements this Court's UCR principle, the FEC and courts have made it unworkable. *See Brief of Amici Curiae the Wyoming Liberty Group and the Goldwater Institute in Support of Appellant* (herein) ("*WLG Brief*") (explaining the flaws of the FEC's implementing rule and delay and disputes in applying test as interpreted). If the test is to have meaning, this Court must hold that a communication may only be interpreted "as an appeal to vote," if it contains an express *appeal* that is *to vote*, i.e., a clear plea for action urging a vote. *See CTP Brief* at 17-24.

Fifth, campaign-finance law is overly complex and confusing.[7] The UCR principle, analytically articulated

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[7] FECA is 244 pages, http://www.fec.gov/law/feca/feca.pdf. The FEC has adopted 568 pages of regulations, http://www.fec.gov/law/cfr/cfr_2009.pdf. There have been 13 "major" court cases interpreting, modifying or striking FECA or regulations, http://www.fec.gov/law/litigationmajor.shtml, 366 other court cases doing the same, http:/ /www.fec.gov/law/litigationalpha.shtml, and 17 court cases yet unresolved, http://www.fec.gov/law/litigationrecent.shtml.

The FEC has adopted 1,278 *Federal Register* pages of explanations and justifications for regulations, http://www.fec.gov/law/cfr/ej_main.shtml, 10 policy statements, http://www.fec.gov/law/policy.shtml#policy, 1 interpretive rule, http://www.fec.gov/law/policy.shtml#interpretative, and 1,771 advisory opinions since 1975, http://saos.nictusa.com/saos/searchao, with 9 more pending.

For lawyers and non-lawyers alike, the FEC has published 17 reporting forms, each with its own instructions, http://www.fec.gov/general/library.shtml#CampaignGuides,

in *Leake*, provides simplicity and clarity on key points: (1) the UCR principle "cabin[s]" legislatures, 525 F.3d at 281-83, (2) this Court has only approved two types of regulable communications (for entities that are not political committees ("PACs")), express-advocacy "independent expenditures" and appeal-to-vote "electioneering communications," *id.*,[8] and (3) the major-purpose test for PAC status requires "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *id.* at 287. Reaf-

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6 campaign guides, http://www.fec.gov/general/library.shtml#CampaignGuides, 24 brochures, http://www.fec.gov/general/library.shtml#CampaignGuides, 1 guide for presidential campaigns taking government money, http://www.fec.gov/law/policy/guidance/2008_guideline_approved_aug092007.pdf, and 163 monthly issues of *The Record,* beginning in 1996, http://www.fec.gov/pages/record.shtml.

If you wish to see how the FEC is really enforcing the FECA, there are 25 audit reports for authorized committees for 2006 and more for previous election cycles, http://www.fec.gov/audits/audit_reports_auth.shtml, 6 audit reports for unauthorized committees for 2006 and more for previous election cycles, http://www.fec.gov/audits/audit_reports_unauth.shtml, and 3 Title 26 audit reports so far for 2008, and more for previous election cycles, http://www.fec.gov/audits/audit_reports_pres.shtml. Finally one could consult over 6000 Matters Under Review, http://eqs.nictusa.com/eqs/searcheqs, which involve resolved FEC complaints.

[8] Only these categories "struck [the proper] balance" and "ensured that potential speakers would have clear notice as to what communications could be regulated, ensuring that political expression would not be chilled." *Id.* at 284.

firming this solid framework would bring much order to chaos.

II. *Austin* and *McConnell* Should Be Overruled.

A. Precedent May Be Reconsidered Here.

Where a decision in one case depends on the decision of another, the earlier case is sufficiently implicated for reconsideration. *See* James Bopp, Jr., Richard E. Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade*?*, 1 Seton Hall Const. L.J. 55, 59-67 (1990). This as-applied challenge is premised on this Court's decision in *McConnell*, which was based on this Court's decision in *Austin*. Thus, they may be reconsidered. "It is . . . the . . . duty of the judicial department," after all, "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

B. "Make No Law" Protects "Political Speech."

Returning to first principles is particularly urgent here because "(t)hese cases are about political speech," so the First Amendment's command that "'Congress shall make no law . . . abridging the freedom of speech' . . . put[s] these cases in proper perspective." *WRTL-II*, 127 S. Ct. at 2673-74. "In a republic where the people are sovereign," it is imperative that citizens freely participate in the "'free discussion of governmental affairs'" and that "'debate on public issues . . . be uninhibited, robust, and wide-open,'" *Buckley*, 424 U.S. at 14 (citations omitted). The Republic requires citizens free to speak without chill from government regulation.

C. *Austin* and *McConnell* Are Unworkable.

1. *Austin* Spawned Multi-Factor Entity Tests.

Buckley declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," 424 U.S. at 48-49, but that is in essence the impermissible level-the-playing-field rationale underpinning *Austin*. *See also Davis*, 128 S. Ct. at 2774-75 (leveling rejected). Yet the First Amendment's "no law" mandate has asserted pressure for exemptions, resulting in numerous multi-factor tests.

First, an exemption for media corporations has been carved out from the definition of regulated "expenditures." *See* 2 U.S.C. § 431(9)(B)(i). Who and what qualifies for the media exemption have been the subject of FEC rulemaking, advisory opinions and enforcement actions, resulting in several court decisions. Media corporations must meet numerous criteria, *see*, *e.g.*, 11 C.F.R. § 100.132, and movie maker Citizens United did not qualify, *see* FEC AO 2004-30.

Second, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*") carved out an exemption from the corporate independent-expenditure prohibition, 2 U.S.C. § 441b, for certain non-profit corporations. 479 U.S. at 263-64. FEC rules require that an *MCFL*-corporation receive *no* corporate contributions and have *no* business income, 11 C.F.R. § 114.10, although all federal appellate courts considering the issue have permitted *de minimis* corporate contributions

and business income.[9] *McConnell* applied this exemption to electioneering communications. 540 U.S. at 211.

Third, membership organizations are entitled to an exemption for communication to their members. *See United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948). This exemption has spawned additional multi-factor tests. *See* 11 C.F.R. § 100.134.

Fourth, in carrying out this exempt political activity, the *MCFL*-corporation or membership organization must avoid being deemed a PAC, which would subject it to complex, burdensome, and confusing rules. *See*, *e.g.*, 11 C.F.R. § 100.5, § 100.6, Part 104, Part 109. However, whether an organization is a PAC or not is subject to the FEC's own set of complex factors. *See* "Political Committee Status," 69 Fed. Reg. 68056, and "Political Committee Status," 72 Fed. Reg. 5595.

Fifth, if an organization does not fall into one of the exemptions, it may only engage in "political speech" through a PAC. However, the complexity and burdens of operating PACs preclude many small organizations from being able to operate one, *MCFL* ,479 U.S. at 255 n.8 (plurality opinion) (some organizations "may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent polit-

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[9] *See FEC v. NRA*, 254 F.3d 173, 187-93 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705,713-14 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-31, 133 (8th Cir. 1997); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 290-93 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

ical speech"), and some corporations cannot have a PAC at all, silencing them altogether. *See McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting in part) (ACLU could not have a PAC). It is no wonder then that *WRTL-II* declared that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." 127 S. Ct. at 2671 n.9 (*citing MCFL,* 479 U.S. at 253-255 (plurality opinion)).

The complexities and burdens of organizing and maintaining PACs favor large corporations and unions over small entities. The cost of establishing, maintaining, and complying with PAC legal and accounting burdens does not vary substantially with size. Additionally, corporate PACs are limited, with rare and highly-conditioned exceptions, to soliciting managerial personnel and shareholders. 2 U.S.C. § 441(b)(4); 11 C.F.R. §§ 114.5-6. Since these donors are limited in what they can give to the PAC, the result is that small employers with limited shareholders and managers can rarely raise enough money to make having a PAC worthwhile. Thus, contrary to Justice Brennan's concurrence in *Austin*, 494 U.S. at 669, for the vast majority of U.S. corporations, the option to speak through a PAC is no option at all. There are, in fact, fewer than 2000 corporate PACs in America, *see* http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf, but over 5.8 million active corporations. The odd result is that while *Austin* is justified by a need to prevent "distortion" of debate, in fact the ban on corporate expenditures distorts debates by preventing the participation of only small business.

But this is just the tip of the iceberg. There are now unique and complex rules imposed by FECA on 71 dis-

tinct entities, much of it justified by *Austin*: media organizations, *MCFL*-corporations, PACs, business corporations, corporations without capital stock, labor unions, trade associations, membership organizations, unincorporated associations, cooperatives, LLCs, partnerships, sole proprietorships, § 501(c)(4) organizations, § 527 organizations, federal government contractors, federally chartered corporations, national banks, foreign nationals, separate segregated funds, nonmulticandidate committees, multicandidate committees, affiliated committees, connected committees, nonconnected committees, leadership PACs, national party committees (and organizations they establish, finance, maintain, or control), congressional-party committees and separately the Democratic and Republican Senate Campaign Committees, national party officials, major parties, minor parties, new parties, political-committee treasurers, political committees with no treasurer, national nominating conventions, state or local conventions to nominate presidential or vice-presidential candidates, state and local party committees, organizations they establish, finance, maintain, or control, state and local candidates and officeholders, Representative, Delegate or Resident Commissioner candidates and their committees, Senate candidates and their committees, campaign committee for national parties, House and Senate campaign committees for special elections, Presidential candidates, Vice Presidential candidates and their committees, federal candidates and officeholders, Presidential primary election campaign committees, Presidential general election campaign committees, draft committees, principal campaign committees, authorized committees, nonauthorized commit-

tees, affiliated committees, leadership PACs, convention delegate committees, inaugural committees, segregated funds for joint fundraising, segregated funds for compliance costs, segregated funds for "Levin" funds, segregated funds for "electioneering communication" costs, treasurers, vendors, agents, candidates' personal funds, bundlers, collecting agents, fundraising representatives, conduits, individuals, volunteers, and spouses.

This case presents the Court with a glimpse into the burden and unworkability of current campaign finance law. The field has become so complex that citizens cannot understand it and experts find it difficult. The pristine simplicity of the First Amendment's proscription of any law abridging speech yielded first to urgent circumstances, but now is replaced by a flood of complex restrictions. The complexity requires citizens to hire specialists to speak. Specialists cost money. Errors risk penalties. Core political activity is chilled.

2. *Austin* Spawned Multi-Factor Speech Tests.

Austin created the corporate-form "corruption" interest that gave Congress the notion that corporations could be prohibited from making electioneering communications, upon which *McConnell* is based. Thus, the two are inseparable and they have spawned complex multi-factor speech tests.

One is the electioneering-communication definition itself. *See* 11 C.F.R. § 100.29. A second is *McConnell*'s inherently vague "functional equivalent" formula, 540 U.S. at 206, which some legislatures, enforcement agencies, and courts have interpreted as a free-floating test for regulable activity beyond the electioneering-

communication context, even after *WRTL-II* defined "functional equivalent," 127 S. Ct. at 2667. *See*, *e.g.*, *National Right to Work Legal Defense and Education Fund v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah, 2008). A third is *WRTL-II*'s appeal-to-vote test along with *WRTL-II*'s instructions for how as-applied challenges to protect issue advocacy should be brought. *See* 127 S. Ct. at 2666-67. A fourth is the FEC's rule implementing the appeal-to-vote test. *See* 11 C.F.R. § 114.15.[10]

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[10] But there's more. The FECA uniquely regulates many forms of *speech,* including: (1) Contributions to authorized committees, nonauthorized committees, candidate committees, presidential candidates, vice presidential candidates, Senate campaigns by the NRSC, DSCC, and national-, state- and local-party committees, (2) contributions by multi-candidate committees and individuals, (3) contributions through conduits, (4) earmarked contributions, (5) contributions solicited by corporations, unions, and their separate segregated funds, (6) contributions by, or solicited by, government contractors, (7) contributions in the name of another, (8) contributions in cash, (9) spending by candidate committees, presidential campaigns, presidential nominating conventions, national-party committees in connection with presidential campaigns, national- state-, and local-party committees in connection with House and Senate campaigns, (10) spending coordinated with a candidate, a candidate's committee, or a candidate's agent, (11) spending coordinated with a party committee, (12) coordinated communications, (13) coordinated party expenditures, (14) party coordinated communications, (15) republished campaign material, (16) spending that is not coordinated, (17) donations to and spending by inaugural committees, (18) donations and spending for state or local conventions to nominate presidential or vice-presidential candidates, (19)

3. *WRTL-II*'s Appeal-to-Vote Test Is Difficult for the FEC and Courts to Apply.

WRTL-II's appeal-to-vote test was intended to fix *McConnell*'s vague "functional equivalent" formula by

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loans received and money spent by candidates, (20) independent expenditures, i.e., communications that expressly advocate a clearly identified candidate, with different requirements for those from 20 days to 1 day before an election and those more than 20 days before an election, (21) federal election activity, which includes certain voter registration, voter identification, get-out-the-vote, generic campaign activity and communications that promote, attack, support or oppose federal candidates, (22) money used to raise money for federal-election activity, (23) "Levin" money, (24) electioneering communications, i.e., broadcast ads that mention federal candidates before federal elections, (25) electioneering communications by 501(c)(4)s and 527s, (26) attribution or disclaimer requirements for communications through broadcasting stations, newspapers, magazines, outdoor-advertising facilities, mailings, or any other general public political advertising, (27) fraudulent misrepresentation of campaign authority by candidates or their agents, (28) nonfederal money, (29) money in connection with elections for office, (31) donations to 501(a)s and 501(c)s, (30) expenses allocated under 11 C.F.R. § 106 between/among/for: candidates, authorized presidential primary committees, campaign and noncampaign travel, polling, federal and nonfederal activities of national party committees, separate segregated funds and nonconnected committees, party committees other than for federal election activity, party-committee phone banks, (31) events at public educational institutions, (32) debates, and (33) office buildings.

limiting the use of that formula, although questions were raised by the Court at the time as to whether it would work.[11] As it has turned out, *McConnell* and *WRTL-II*'s derivative appeal-to-vote test have proven unworkable, as the FEC and courts disregard its teachings, chilling core political speech.

Analytically, the FEC's appeal-to-vote-test rule, 11 C.F.R. § 114.15, demoted the actual test to merely part of a balancing test weighed equally with elements crafted from the *application* of the test in *WRTL-II*'s specific grassroots lobbying context. *See WLG Brief* at 17-27.

Functionally, the test as interpreted has been difficult for the FEC and courts to apply. As three current FEC Commissioners recently declared:

> Although we think the legal standard set forth by Chief Justice Roberts in *WRTL* is clear . . . , it appears that not all share our view . . . . Justice Scalia . . . forewarned of this potential murkiness, and what Justice Alito anticipated could happen—that the standard . . . may not prove to be sufficiently clear and thus could . . . chill political speech—*apparently has happened.*

November-Fund SOR at 6 n.22 (citations omitted) (emphasis added) .

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[11] *See WRTL II*, 127 S. Ct. at 2674 (Roberts, C.J., joined by Alito, J.) ("no occasion to revisit [*McConnell*] today"), 2674, (Alito, J., concurring) ("if implementation . . . chills speech . . . we will . . . be asked . . . to reconsider"), 2675 (Scalia, J., concurring) (urging ambiguity elimination by overruling *McConnell*).

These FEC Commissioners cited the votes and discussion surrounding the National Right to Life Committee's ("NRLC") advisory opinion ("AO") request[12] concerning whether two "electioneering communications" it wanted to broadcast[13] were permissible or prohibited electioneering communications or express advocacy. *See* AOR 2008-15 (Sep. 26, 2008) (referenced materials *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_ NO=-1).[14] The Campaign Legal Center and Democracy 21 submitted comments opining that *both* ads failed the appeal-to-vote test and FEC rule and even contained express advocacy under 2 U.S.C. § 100.22(b). The FEC General Counsel opined that the first ad was neither express advocacy nor a prohibited electioneering communication, but the second contained express advocacy under § 100.22(b). Then-FEC Chairman McGahn submitted a revised draft advisory opinion that would have found that neither ad contained express advocacy nor was a prohibited electioneering communication. On November 24,

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[12] *See also WLG Brief* (addressing this advisory opinion and unworkability of the appeal-to-vote test).

[13] They concerned a current public debate over the position of a candidate on the abortion/infanticide issue, in which the candidate had accused NRLC of misrepresenting his position and NRLC was defending itself.

[14] NRLC requested an "immediate response" because the issue was hot in public debate, "or at least . . . within the 20 day period provided for" candidate requests in 11 C.F.R. § 112.4(b)," asserting that "it is inexcusable that this special benefit afforded to politicians should not also be afforded to . . . citizen groups." *Id.* at 4.

long after public interest in the abortion/infanticide issue had faded and NRLC had lost the timely opportunity to advocate its issue, the FEC issued AO 2008-15, stating that NRLC could fund the first ad with corporate funds and that no response would be forthcoming as to the second ad, the requisite four votes being absent to state an opinion.[15] Commissioners disagree on application of the appeal-to-vote test, and the reformers urge an extreme interpretation.

The test's application problem is evident in the present case where the FEC could not promptly tell whether the *Questions* ad contained an appeal to vote. This is recounted in the *Amended Complaint*, which added Count 4 in response. *See* Dkt. 46 at ¶¶ 32, 43-45. It took nineteen days before the FEC conceded that "on balance" the ad was protected under C.F.R. § 114.15(c). This inability to readily classify the ad is set out in *Plaintiff's Memorandum of Law Responding to FEC's Motion to Dismiss Counts 3 & 4*, *see* Dkt. 46 at 2-3, and reveals the unworkability of the FEC's interpretation of the appeal-to-vote test.

The FEC and a federal court have even disagreed about the nature of one ad, with the FEC deciding that it was not a prohibited electioneering communication

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[15] Since the appeal-to-vote test requires that there be "*no reasonable* interpretation other than as an appeal to vote," *WRTL II*, 127 at 2667, where some (presumably reasonable) commissioners view an ad as not reasonably susceptible to such an interpretation, the ad should not be deemed prohibited. But that is not the FEC's approach, even though *WRTL II* also required that ties and the benefit of any doubt go to free speech. *See id.* at 2667, 2669 n.7, 2674.

and the court holding that it contained *express advocacy*. *See Real Truth About Obama v. FEC*, No. 3:08-cv-483, 2008 WL 4416282 at *7 (E.D. Va., Sep. 24, 2008) (order denying preliminary injunction).

Another indicator of the unworkability of current campaign-finance jurisprudence is that the FEC and state agencies continue to press for, and courts continue to impose, burdensome discovery in First Amendment cases attempting to vindicate the right to associate and speak concerning public issues despite *WRTL-II*'s instruction against such discovery and rejection of contextual matters and intent-and-effect tests in interpreting communications, 127 S. Ct. at 2666. Furthermore, preliminary injunctions are still often denied, even though their ready availability is necessary to make the appeal-to-vote test workable. 127 S. Ct. at 2666.

Conclusion

A central problem with complex multi-factor tests is that people are forced to "'hedge and trim,'" *Buckley*, 424 U.S. at 43 (citation omitted). Citizen speech is chilled. Where core political speech is involved, that is intolerable because the Republic relies on free speech, press, and association. Chill is the current situation.

The sources of the chill are *Austin* and *McConnell*. They should be overruled and the Prohibition, which is based on them, should be found unconstitutional on its face. The Disclosure Requirements should fall with the Prohibition or be held unconstitutional as applied to communications protected from the Prohibition because they are not unambiguously campaign related.

Respectfully submitted,

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