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 FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* ON BEHALF OF NEITHER PARTY

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INTEREST OF AMICI[1]

Amici, Norman Dorsen, Aryeh Neier, John Shattuck, Morton Halperin, and Burt Neuborne, are former officials of the American Civil Liberties Union (ACLU) who have sought to achieve both a robust First Amendment jurisprudence and effective reform of campaign financing.[2] *Amici* appeared before this Court in *McConnell v. FEC*, 540 U.S. 93 (2003), in defense of the facial constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), urging that the unavoidable tension between certain applications of BCRA and the First Amendment should be resolved by narrowly construing provisions of the Act and recognizing "as applied" First Amendment exemptions from its operation.

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[1] This brief is filed with the consent of the parties. Appellant's letter of consent has been lodged with the clerk of the court. Appellee has granted blanket consent. No counsel for a party authored this brief in whole or in part; nor did any person other than *amici* or their counsel make a monetary contribution to the preparation or submission of this brief.

[2] Norman Dorsen, Frederick I. and Grace Stokes Professor of Law at NYU School of Law, served as ACLU General Counsel from 1969-1976, and as President of the ACLU from 1976-1991; Aryeh Neier, President of the Open Society Institute, served as Executive Director of the ACLU from 1970-1978; John Shattuck, newly-appointed President of Central European University in Budapest and former Assistant Secretary of State for Democracy, Human Rights and Labor, served as ACLU National Legislative Director from 1976-1984; Morton Halperin, Senior Advisor, Open Society Institute, served as ACLU National Legal Director from 1984-1992; Burt Neuborne, Inez Milholland Professor of Civil Liberties at NYU School of Law, served as NYCLU staff counsel from 1967-1972, Assistant National Legal Director from 1972-1974, and National Legal Director from 1982-1986.

This brief, filed in response to the Court's order dated June 29, 2009, reiterates *amici*'s belief that the significant First Amendment issues raised by the application of BCRA to the material before the Court can – and should – be resolved by statutory construction informed by respect for congressional purpose and the canon of constitutional avoidance. If constitutional adjudication is deemed necessary, appellant's First Amendment interests may be protected by an "as applied" First Amendment ruling, rendering it unnecessary to reconsider existing precedent.

SUMMARY OF ARGUMENT

1. *Hillary: The Movie* (hereafter "*Hillary*") does not fall within BCRA's statutory ambit. It was not "targeted to the relevant electorate" within the meaning of 2 U.S.C. §§ 434(f)(3)(A)(i)(III), (C); 11 C.F.R. § 100.29(b)(3)(ii)(A). Nor, under the facts of this case, does the presence of a *de minimis* trace of for-profit corporate funding cause *Hillary* to fall within the definition of an electioneering communication paid for in whole or part from for-profit corporate treasury funds.

Six powerful impediments to statutory coverage exist. First, *Hillary* was produced and distributed by Citizens United, a non-profit corporation analogous to the exempt non-profit corporation in *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 263-64 (1986) ("*MCFL*"). Second, while Citizens United reports receiving trace amounts of financial support from for-profit corporations, over 99% of the funding for *Hillary* is said to be derived from private individuals. (Appellant's Br. 32.) Third, no evidence

exists in the record that for-profit corporate donors played any role in producing or editing the material. Fourth, no evidence exists in the record concerning whether Citizens United solicits funds from for-profit corporations. Fifth, the video-on-demand distribution mechanism contemplated by Citizens United required potential hearers to request access to the material affirmatively. Sixth, given such a volitional distribution system, the material was not reasonably likely to be viewed by more than 50,000 persons eligible to vote in the relevant state Democratic presidential primary.

Given the six factors, and guided by Congress's purpose in enacting BCRA and by the well-established canon of constitutional avoidance, the Court should find that *Hillary* does not fall within the statutory coverage of BCRA. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009).

2. Assuming that statutory coverage exists, it is not necessary to revisit settled Supreme Court doctrine in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), to resolve the First Amendment issues raised by this case. Given the indirect, *de minimis* nature of the for-profit corporate funding, and the voluntary nature of the contemplated distribution mechanism, the First Amendment precludes the FEC from prohibiting the material's dissemination.

3. Given the ample statutory and "as applied" avenues open to the Court to protect the First Amendment interests of Citizens United, there is no reason to revisit the Court's refusal in *McConnell v.*

FEC, 540 U.S. 93 (2003) to invalidate an important congressional regulatory scheme on its face.

STATEMENT OF THE CASE

The narrative facts of the case are well stated in the briefs of the parties. It is worth noting, however, that neither party appears interested in seriously considering whether *Hillary* actually falls within the ambit of BCRA. Citizens United appears bent on undermining the constitutional underpinning of campaign finance regulation. The FEC appears bent on stretching its regulatory authority to the breaking point. The result is a case posing unnecessary tension between BCRA and the First Amendment.

ARGUMENT

I. *HILLARY: THE MOVIE* DOES NOT FALL WITHIN THE COVERAGE OF BCRA

A. The Communication Was Not "Targeted to the Relevant Electorate"

BCRA prohibits the dissemination of an "electioneering communication" within thirty days of a contested presidential primary if the communication: (1) refers to a clearly identified presidential candidate;[3] (2) is underwritten in whole or part by for-profit corporate treasury funds; and (3) is "targeted to the

[3] A First Amendment gloss requires the reference to the presidential candidate to be the unquestioned functional equivalent of a request to vote for or against the candidate. *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"). *Hillary* appears to satisfy this criterion.

relevant electorate." 2 U.S.C. §§ 434(f)(3)(A)(i)(I)-(III), 441b(a)-(b)[4] In the context of a presidential primary election, a communication is deemed "targeted to the relevant electorate" if it "[c]an be received by 50,000 or more persons in the State where a primary election…is being held within 30 days." 11 C.F.R. § 100.29(b)(3)(ii)(A).[5] A similar 50,000 person targeting requirement exists for House and Senate races, with elaborate statutory rules governing whether a given radio or television communication satisfies the 50,000 person threshold. 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa)-(bb).

The parties appear to assume that *Hillary* was "targeted to the relevant electorate" because the communication was technologically capable of being downloaded on cable television by 50,000 or more viewers in at least one of the states holding Democratic presidential primaries in January, 2008. In fact, the phrase "can be received by 50,000 or more persons" imposes a more demanding jurisdictional threshold. In order for *Hillary* to fall within BCRA's reach, the FEC must demonstrate a plausible likelihood that the communication will be viewed by 50,000 or more potential voters in one of the relevant state Democratic presidential primary elections.

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[4] The relevant statutory definition of an "electioneering communication" falling within the FEC's regulatory authority is set forth in the Statutory Appendix to Appellant's Brief on the Merits at 16a-17a.

[5] This regulation merely represents an application of the 50,000 person threshold statutory provision in BCRA to the presidential context.

The clear purpose of the 50,000 "person" threshold is to assure that a communication will reach a critical mass of voters before subjecting it to federal regulation. Print and Internet communications were exempted from BCRA's coverage because Congress deemed communications on those two exempted media less likely to reach a mass audience capable of affecting the outcome of an election. *Id*. at 2 U.S.C. § 434(f)(3)(A)(i).[6] Similarly, Congress has provided a safe harbor for radio and television communications transmitted on media that cannot reach at least 50,000 persons in the relevant electoral area. *Id*. at 2 U.S.C. § 434(f)(3)(C).

Given such clear statutory structure and purpose, the term "person" must mean a viewer who is eligible to vote in the relevant election. An alleged "electioneering communication" viewed principally by infants, pre-teens, or otherwise electorally ineligible recipients can hardly be described as "targeted to the relevant electorate." Construing the inherently ambiguous term "person" in a congressional statute is a judicial cottage industry.[7] In this case, a combination

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[6] Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money. *McConnell v. FEC*, 251 F. Supp. 2d 176, 569-573 (D.D.C. 2003) (Kollar-Kotelly, J.); *id*., at 799 (Leon, J.); S. Rep. No. 105-167, vol. 3, at 4465, 4474-4481 (1998); 5 *id.* at 7521-7525.

[7] *Rowland v. California Men's Colony*, 506 U.S. 194, 198-211 (1993); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Georgia v. Evans*, 316 U.S. 159, 162-63 (1942); *United States v. Cooper Corp.,* 312 U.S. 600, 604 (1941). See John Noonan, *"Persons" and Masks of the Law: Cardozo, Holmes,*

of the well-established canon of constitutional avoidance[8] and respect for BCRA's structure and purpose should lead this Court to construe the term "person" to mean a viewer who is eligible to vote in the relevant election.

Similarly, the phrase "can be received" must be read as connoting more than a mere technological capacity to reach the target audience. Given Congress's purpose, the phrase requires a reasonable prospect that the communication will, in fact, reach the target audience. In the context of the standard thirty- or sixty- second political communication on the television and radio, it makes good sense for BCRA to ask whether the radio or television signal is technologically capable of reaching 50,000 or more persons, since that is a valid predictive measure of the likely viewing audience. The theoretical reach of a cable television signal is not, however, a reliable predictor of the likely viewing audience of a ninety-minute video-on-demand requiring affirmative action by a prospective viewer. Under such a volitional distribution mechanism, a more searching inquiry is required into the number of "persons" in the relevant electorate who would be plausibly likely to download the communication. Given the content and tenor of *Hillary*, it is doubtful that 50,000 or more voters in a state Democratic presidential primary would

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Jefferson and Wythe as Makers of Masks (1976); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 Tul. L. Rev. 563 (1987).

[8] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Jin Foey Moy,* 241 U.S. 394, 401 (1916).

affirmatively elect to download a ninety-minute political attack on one of the Democratic Party's most popular figures.

Thus, although *Hillary* was targeted to an "electorate," it was not "targeted to the relevant electorate" – voters in an upcoming state Democratic presidential primary.

B. The Statute Contains an Implicit *De Minimis* Exception

Although the factual record is sparse,[9] *Hillary* does not appear to fall within the category of corporate-funded electioneering communications that Congress intended to regulate. First, the movie appears to have been produced and distributed by a non-profit advocacy corporation analogous to the exempt non-profit corporation in *MCFL*, 479 U.S. 238, 263-64 (1986). Second, Citizens United reports that it receives only a *de minimis* amount of financial support from for-profit corporations, asserting that over 99% of the funding for *Hillary* came from private individuals who share its political beliefs. (Appellant's Br. 32.) Third, no evidence exists in the record that for-profit corporate donors played a role in conceiving, producing or editing the material. Finally, no evidence exists in

[9] To the extent it is necessary to make factual findings needed to determine whether the targeting threshold was met in this case, or whether a *de minimis* exception is warranted, a remand to the District Court appears appropriate.

the record concerning whether Citizens United solicits funds from for-profit corporations.[10]

When the four factors are combined with the volitional distribution mechanism contemplated by Citizens United, the communication falls within an implicit *de minimis* exception to statutory coverage. One of the basic purposes of BCRA was to prevent for-profit corporations from deploying the massive economic power of their corporate treasuries, which derive from economic transactions unrelated to politics, to influence electoral outcomes unfairly. However, where, as here, an electoral communication appears to be disseminated by a non-profit advocacy group that is allegedly funded overwhelmingly by personal donations, the accidental presence of a trace, unsolicited corporate contribution to the advocacy group should not trigger BCRA's ban on for-profit corporate electioneering communications. Under the apparent facts of this case, the canon of constitutional avoidance coupled with the Court's duty to respect BCRA's context, structure and purpose should lead to the recognition of an implicit *de minimis* exception to statutory coverage. *See Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1148-1151 (10th Cir. 2007) (recognizing *de minimis* exception).

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[10] Appellee's Supplemental Brief concedes the applicability of an *MCLF de minimis* exception if an organization's overall for-profit funding sources are tiny: "If appellant's overall operations are financed 'overwhelmingly' by individual donations, as it asserts is true of the financing of *Hillary*, appellant would appear to be covered by these decisions." (Appellee's Supplemental Br. 3, n.1.)

C. The Court Should Follow the Statutory Construction Principles Set Forth in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009)

Each of the exceptions to coverage urged by *amici* requires construction of the statutory text. Recognizing the "targeting" threshold advanced by *amici* requires the Court to construe the statutory terms "person" and "can be received" narrowly to exempt communications that are not likely to reach the requisite number of persons eligible to vote in the relevant election.

Recognizing the *de minimis* exception to statutory coverage urged by *amici* requires the Court to look to the structure and purpose of BCRA, rather than apply the text mechanically.

In approaching both questions of statutory interpretation, the Court should follow the approach of the Court in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009). In *Northwest Austin,* the Court was confronted with a provision in the Voting Rights Act that appeared to confine the ability to seek a judicial bailout from Section 5 pre-clearance obligations to political subdivisions that carry out voter registration. 42 U.S.C. § 1973c(a). Applying the literal text, the lower court declined to consider the Utility District's bailout application. *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 232 (D.D.C. 2008). This Court reversed.

The Chief Justice, writing for eight Justices, noted that the Supreme Court, in deference to Congress's purpose in enacting the Voting Rights Act, had

departed from the provision's literal text on two occasions to expand the scope of Section 5 coverage. *United States v. Board of Cmm'rs of Sheffield, Ala.*, 435 U.S. 110 (1978); *Daughterty County Bd. of Educ. v. White,* 439 U.S. 32 (1978). Given the serious constitutional issues posed in *Northwest Austin*, the Chief Justice invoked the canon of constitutional avoidance to depart from the literal text yet a third time in order to advance Congress's overarching purpose, this time enabling political subdivisions to seek statutory bailout even though they do not conduct voter registration. Similar respect for congressional purpose and the canon of constitutional avoidance should result, in this case, in the recognition of both statutory exceptions to BCRA coverage discussed *supra.*[11]

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[11] A similar approach to statutory interpretation was applied this Term in *United States v. Hayes*, 555 U.S. __, 129 S.Ct. 1079 (2009), when Justice Ginsburg, writing for seven Justices, declined to read the statutory term "misdemeanor crime of domestic violence" to require that domestic violence have been an element of the predicate offense. Faced with punctuation and grammar pointing in the other direction, Justice Ginsburg reasoned that such a reading would "frustrate Congress's manifest purpose" in enacting the statute. 555 U.S. __, 129 S.Ct. 1079, 1081 (2009). *Hayes* was a more difficult statutory construction case because the canon of constitutional avoidance was not available to guide the Court's deliberations. *See also Abuelhawa v. United States*, ___U.S.___, 129 S.Ct. 2102 (2009) (construing "facilitate"); and *Burlington Northern & Santa Fe Ry. v. United States*,___U.S.___, 129 S. Ct. 1870 (2009) (construing "arrange"). There is, of course, no argument for deference to the FEC's reading in a case involving the agency's statutory jurisdiction, especially in a First Amendment setting. *See NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 507 (1979).

II. CITIZENS UNITED IS ENTITLED TO "AS APPLIED" FIRST AMENDMENT PROTECTION UNDER A PROPER READING OF *AUSTIN*

If BCRA is construed to ban the dissemination of *Hillary* within thirty days of a presidential primary election solely because the film's funding included trace amounts of unsolicited corporate contributions to Citizens United, a proper reading of *Austin* renders the statute's application unconstitutional "as applied."

In *Austin*, an organization more than three-quarters of whose members were for-profit business corporations, produced a classic electioneering communication expressly urging the election of a named candidate in a local election. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990). Fearing that such direct for-profit corporate participation in electoral debate risked destabilizing the democratic process by permitting for-profit corporations to deploy massive economic power assembled through non-political economic transactions, the *Austin*-Court upheld a state statute that followed the settled national policy of limiting the direct participation of for-profit corporations in the electoral process, whether that participation takes the form of corporate campaign contributions, banned since 1907, or targeted "express advocacy" of the election or defeat of a named candidate. Tillman Act, ch. 420, 34 Stat. 864-865.

The speech at issue in this case carries none of the dangers perceived in *Austin*. Unlike the communication in *Austin*, the speech in this case appears to have been paid for and disseminated by a

non-profit advocacy organization funded overwhelmingly by like-minded individual donors. See *MCFL* 479 U.S. 238, 263-64 (1986). In *Austin*, the communication was funded by an organization 75% of whose members were for-profit corporations. In this case, more than 99% of the funding for *Hillary* appears to have come from individual sources, and no for-profit corporation appears to have played a role in determining the substantive content of the material. (Appellant's Br. 32.) In *Austin*, the communication was intended to be released on the eve of the election in a form directed to all prospective voters. *Austin*, 494 U.S. at 656. In this case, the communication was made available solely to those wishing to view it.

It is not necessary to determine at what point such differences render *Austin* inapplicable as precedent for the FEC's actions in this case. It is enough to note that since none of the dangers that drove the *Austin* decision are present in this case, the First Amendment protects the speech in question.

Given the ease with which this case can be disposed of on "as applied" First Amendment grounds that are fully consistent with *Austin*, it would be particularly inappropriate to reconsider *Austin* in a case that bears almost no resemblance to it.

III. NO REASON EXISTS TO RECONSIDER THE FACIAL CONSTITUTIONALITY OF BCRA

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803), Chief Justice Marshall stressed that the power of this Court to review the constitutionality of congressional legislation is rooted in the Court's duty

to resolve the "case or controversy" before it. Accordingly, in the vast bulk of cases, the Court applies the Constitution to the facts before it, but declines to decide whether the statute could be constitutionally applied in other settings. *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar*, 226 U.S. 217 (1912); *United States v. Raines*, 362 U.S. 17 (1960).

A major exception to the Court's "as applied" approach grew out of a concern that the mere existence of certain statutes, especially state statutes not subject to a narrowing construction by the Court, might operate to limit the free speech rights of non-parties who lacked the resources or sophistication to secure their own "as applied" protection. Accordingly, the Court developed a practice in the First Amendment area of invalidating statutes on their face in settings where: (1) a substantial number of applications would be unconstitutional; and (2) targets of the statutes were unlikely to be able to protect their own First Amendment rights. *See* Richard Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853 (1991). Not surprisingly, the Court often opted for facial review in settings involving state statutes where it lacked power to construe the statute narrowly to avoid collision with the First Amendment. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972).

In *McConnell*, this Court upheld BCRA against a facial challenge, while allowing for future "as applied" review. The Court rejected the facial challenge for three reasons. First, whatever BCRA's difficulties at the margins, the statute's core applications are clearly constitutional. For every *Citizens United* testing the outer margins of the statute and its relationship to the

First Amendment, there are innumerable garden variety applications that prevent massive inflows of corporate and private wealth with the capacity to corrupt the electoral process. *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

Second, the targets of FEC enforcement under BCRA's regulations governing for-profit corporate speech are generally well-funded and sophisticated speakers fully competent to protect their First Amendment rights through an "as applied" challenge to FEC regulation. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991); *Board of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989); *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504-505 (1985).

In fact, the "as applied" review process has worked well in the context of campaign finance regulation to permit both effective regulation and robust First Amendment protection. This Court began the "as applied" process in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), continued it in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) and in *MCFL*, 479 U.S. 238, 264 (1986), expanded it in *WRTL II*, 551 U.S. 449, ___, 127 S. Ct. 2652, 2659 (2007) and has the ability in this case to further refine the constitutionally permissible scope of the statute. Accordingly, there is no need to depart from classic principles of "as applied" review in this case, especially when such a departure would require overruling settled Supreme Court precedent, and risk a general destabilization of the law in many areas.

Finally, as *amici* have demonstrated, BCRA is subject to at least two narrowing constructions capable of advancing Congress's purpose, while protecting the

free speech interests of Citizens United. Under *Ashwander v. TVA*, 297 U.S. 288, 345-49 (1936), it is clearly preferable to explore such a non-constitutional approach before considering overturning settled constitutional precedent, and departing from the Court's long-standing commitment to "as applied" constitutional review.

CONCLUSION

For the above-stated reasons, *amici* urge that the decision below be vacated, and the case be remanded to consider whether BCRA applies to this case. In the alternative, *amici* urge the Court to recognize that the First Amendment, as applied, prevents the FEC from prohibiting the dissemination of *Hillary: The Movie* in the context of a presidential primary election.

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