No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States District Court for the District of Columbia

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the D.C. Circuit Court of Appeals should be reversed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics*, and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

IN ORDER TO ENSURE THAT THE BIPARTISAN CAMPAIGN REFORM ACT ("BCRA") IS LIMITED TO CONTENT THAT INCONTROVERTIBLY CONSTITUTES CAMPAIGN ADVERTISING, THE DISTRICT COURT'S DECISION MUST BE REVERSED.

The First Amendment was intended to protect the free discussion of public issues and governmental affairs, including the qualifications of candidates for public office. Such discussion is integral to the system of government established by the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (hereafter "*Buckley*"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978) (hereafter "*Bellotti*"); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (hereafter "*McIntyre*"). The freedom guaranteed "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Bellotti, supra*, 435 U.S. at 775. Government may not limit "the stock of information from which members of the public may draw." *Id*. at 783.

Carefully defined campaign finance laws exist to ensure the integrity of the electoral process by preventing corruption and assuring compliance with political contribution caps while simultaneously continuing to inform voters. But such laws must be strictly scrutinized to avoid chilling political speech and depriving the public of information that would

facilitate informed voting. Moreover, the right to make independent expenditures is at the very core of both the First Amendment and our electoral process. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 351 (1986) (hereafter "*MCFL*"); *Buckley, supra*, 424 U.S. at 39; *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). This Court has repeatedly struck down limits on expenditures--like the costs of producing "Hillary: The Movie"--that are wholly independent of any candidate or election campaign. *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (hereafter "*McConnell*"); *Buckley, supra*, 424 U.S. at 47.

> Citizens United is a nonprofit organization:
>
> ...dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.
>
> www.citizensunited.org/about (last accessed on January 5, 2009)

"Hillary: The Movie" (the "Movie") is one of nine documentary DVD movies produced by the organization to educate and inform the public about current political concerns. The DVD's are sold through its website, and the Movie has been shown in selected theatres across the country. Unlike the multitude of

TV campaign ads that flood the screens near election time, the Movie is a well-researched, full-length film featuring numerous individual speakers on a variety of political issues that concern the American public.

People need this type of information--*particularly in the crucial days preceding a national election*--in order to make informed decisions at the polls. If campaign finance laws muzzle such speech, either the respective law is facially deficient and should be struck down, or its application must be carefully and narrowly circumscribed. This Court should first determine whether BRCA's definition of "electioneering communications"--even as defined by prior case law--sweeps too broadly or has the effect of an improper prior restraint on speech.

The appeal-to-vote test of *WRTL II* requires a clear plea for action to vote for or against a candidate in order to constitute an "electioneering communication." The Movie does not have a "clear plea" for action and therefore can reasonably be interpreted as an informational documentary--"something other than an appeal to vote for or against a particular candidate"--thus it is not regulable under BCRA as an "electioneering communication."

Even if a narrow, constitutionally workable definition can be utilized, the Court should carefully consider whether it can be properly applied to the Movie. Finally, this case challenges the application of BRCA's burdensome disclosure/disclaimer requirements to the Movie, because such application does not further any of the purported government interests.

If the District Court decision is affirmed, then it will be "...entirely obvious that the object of the law [the Court has] approved today is not to prevent wrongdoing but to prevent speech." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 694 (1990) (Scalia, J., dissenting) (hereafter "*Austin*").

I. THE "ELECTIONEERING COMMUNICATION" PROVISIONS OF BCRA THREATEN TO CHILL CORE POLITICAL SPEECH.

This case presents an opportunity for the Court to reconsider whether BRCA § 203 is facially constitutional, even after implementing the as-applied standard articulated in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2674, 2680 (2007) (Alito, J., concurring) (hereafter "*WRTL II*"). Lack of clarity, lack of effective alternatives to broadcasting, and unreasonable burdens on free speech are among the reasons this Court should reassess the law, particularly as applied to this independently produced Movie.

There is no clear test available which would permit BRCA's ban on "electioneering communications" to be upheld. *See* § 203 of the Bipartial Campaign Reform Act of 2002, 2 U.S.C. § 441b(b)(2). All of the various tests are impermissibly vague and chill free speech. *WRTL II, supra,* 127 S. Ct. at 2675, 2680 (Scalia, J., concurring). If there were a test short of reliance on "magic words," surely *Buckley* would have adopted it. *Id*. at 2681. This lack of clarity is no justification to risk banning protected political speech. On the contrary, this Court has rejected the principle that protected speech can be banned merely because it is

difficult to distinguish from unprotected speech. *Id.* at 2681. Even virtual images of child pornography have been granted First Amendment protection because they are not readily distinguished from real ones:

> "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."
>
> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)

Calling the *McConnell* decision a "sad day for free speech," Justice Scalia noted the Court's protection for not only virtual child porn images, but also tobacco advertising (*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)), dissemination of illegally intercepted communications (*Bartnicki v. Vopper,* 532 U.S. 514, (2001)), and sexually explicit cable programming (*United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000)). Yet the law upheld by the *McConnell* majority "cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government." *McConnell, supra*, 540 U.S. 15 248 (Scalia, J., concurring); *see also id*. at 265 (Thomas, J., dissenting). Within the "right to criticize the government" is the right to fully examine the factual record of a government official.

Whatever test the Court adopts--if there is one--should provide a safe harbor for citizens desiring to exercise their First Amendment rights. This Court has declined to adopt a test that turns on intent or effect because that would chill political speech without a

safety net. *WRTL II, supra*, 127 S. Ct. at 2665; *Buckley, supra*, 424 U.S. at 43-44. But the far-reaching statutory language--taking in "*any* broadcast, cable, or satellite communication" within a certain time frame that identifies a candidate--must be circumscribed in order to pass constitutional muster.

Even though BCRA leaves room for some alternative means to finance protected expression, these are often unreasonably burdensome or inadequate means to communicate. For example, "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *WRTL II, supra*, 127 S. Ct. at 2671. Websites and newspapers do not provide the impact and effectiveness of broadcast speech. *Id*. at 2671. But only broadcast speech is impacted by BCRA's definition of "electioneering communications."

Because of the onerous burdens imposed on broadcasting and the unavailability of effective alternative channels, many speakers will opt for silence. That silence is a loss to both the potential speaker and the voting public who might benefit from the information:

> "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, [citation omitted]--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."
>
> *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)

Finally, the right to free speech necessarily includes auxiliary rights, such as associating with others and financing the communication. The law at issue restricts such rights, thereby burdening core political speech:

> The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.
>
> *McConnell, supra*, 540 U.S. at 252 (Scalia, J., dissenting)

Political association is a well-established component of the First Amendment, including use of the corporate form for expression. *Bellotti, supra*, 435 U.S. at 776-777. Even the Declaration of Independence includes the promise that "we mutually pledge to each other our Lives, *our Fortunes* and our sacred Honor." *McConnell, supra*, 540 U.S. at 252 (Scalia, J., dissenting; emphasis added).

(A) THE STATUTORY DEFINITION OF "ELECTIONEERING COMMUNICATION" SWEEPS TOO BROADLY IN ITS REFUSAL TO CONSIDER ALL RELEVANT CONTENT, TAKING IN MESSAGES THAT ARE FAR FROM PURE ELECTIONEERING, INCLUDING PROTECTED POLITICAL SPEECH.

Buckley construed the term "expenditure" in 2 U.S.C. § 434(e) in terms of express advocacy because the statutory phrase "relative to" a candidate was

vague and impermissibly broad. The reporting requirements applied only to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley, supra*, 424 U.S. at 80. The Court thus narrowed the reach of the statute to ensure it would not be overbroad, i.e., *unconstitutional*. *McConnell, supra*, 540 U.S. at 280 (Thomas, J., dissenting).

It is by no means clear that the replacement statute solved the problem of overbreadth. *McConnell* admitted that the newly coined "electioneering communication" definition stretches beyond *Buckley's* "express advocacy." *McConnell, supra*, 540 U.S. at 189, 204. An "electioneering communication" is one that **"refers to** a clearly identified candidate for Federal office" (emphasis added). 2 U.S.C. § 434(f)(3)(A)(i)(I). *McConnell* held this language did not raise the vagueness concerns present in *Buckley*. *Id.* at 194.

Perhaps the definition is not vague, but it is surely broad. The mere mention of a candidate's name through broadcast media, within the forbidden time frame, captures the communication. If a prime time TV show--e.g., *Boston Legal* or *Law and Order*--mentioned a candidate's name in passing during an episode aired near election time--the statute would technically be triggered. The context and surrounding content are apparently irrelevant. This is no more constitutionally proper than the hypothetical proposed in *Buckley*, wherein it would be a "federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper." *Buckley, supra*, 424 U.S. at 40. It seems

that one "magic word"--the whisper of a candidate's *name*--subjects the speaker to legal penalties.

Former Chief Justice Rehnquist criticized *McConnell* because "...the Court gloss[ed] over the breadth of the restrictions...regulating a good deal of speech that does *not* have the potential to corrupt federal candidates and officeholders...." *McConnell, supra*, 540 U.S. at 351 (Rehnquist, J., dissenting). This Court later acknowledged that "BCRA's definition of 'electioneering communication' is clear and **expansive**" (emphasis added). *WRTL II, supra*, 127 S. Ct. at 2660. Indeed it is. The statute embraces *any* broadcast, cable, or satellite communication, and alternate modes of communication, such as newspapers and websites, are far less effective in reaching the public with the information they need to make informed voting decisions. *Id*. at 2671.

(B) THE STATUTE, AS INTERPRETED, COULD CONSTITUTE A PRIOR RESTRAINT OF SPEECH THAT CRITICIZES GOVERNMENT--AT A TIME WHEN SUCH SPEECH IS THE MOST VALUABLE TO CITIZENS ON THEIR WAY TO THE POLLS.

The Movie contains far more content than a 30-second or 60-second *advertisement* that endorses or opposes a candidate. It has detailed information and commentary about critical issues like health care, the war in Iraq, the economy, terrorism, corruption during Bill Clinton's administration, and Hillary Clinton's

alleged campaign finance violations.[2] Information that criticizes government must not be suppressed at the time when the people need it most in order to make informed decisions at the polls. If the District Court decision is allowed to stand, other politically motivated films could suffer a similar fate. Such productions are not limited to one political perspective, but would include movies critical of the Bush administration if a candidate's name is mentioned and they are aired in the critical pre-election period: *W.*, *Rendition*, or *Lions for Lambs*.

Even if the Movie is not banned altogether, disclosure requirements might constitute a prior restraint. The statutory scheme defines the term "Disclosure Date" for required reporting. 2 USC § 434(f)(4). Required disclosures include the names and addresses of donors who contribute $1,000 or more to a segregated fund that disburses over $10,000 for direct costs to produce or air an electioneering communication. Disclosure requirements are triggered whenever the $10,000 mark is reached. 2 USC § 434(f)(2)(E). The cost to produce a full-length documentary film like the Movie would no doubt reach the $10,000 threshold *before* the speech is aired to the public.

McConnell concluded that the restriction on political spending from corporate general treasuries is "firmly embedded in our law" and the ability to segregate funds is "a constitutionally sufficient

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[2] It would be ironic indeed if the campaign finance laws were used to suppress speech exposing a candidate's alleged violation of those very laws.

opportunity to engage in express advocacy." *McConnell, supra*, 540 U.S. at 203. The majority argued that "it is 'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation" even though the restrictions extend to all electioneering communications and not merely "express advocacy." *Id*. at 204. But because segregated funds require advance planning, *spontaneous* corporate speech naming a candidate is prohibited unless a PAC is already established. *Id*. at 332 (Thomas, J., dissenting). Time constraints may foreclose speech where a new issue arises so close to an election that a PAC cannot be set up in time. *Id*. at 334 (Thomas, J., dissenting). These situations illustrate the potential for prior restraint. Although *Buckley* found no prior restraint problem with 2 USC § 434(e), the Court was careful to explain that the statute had been narrowed to reach only express advocacy and was a minimally restrictive means to further First Amendment values by opening the federal election system to public view. *Buckley, supra*, 424 U.S. at 82. "Electioneering communications" reach a far broader spectrum of speech and--under the circumstances surrounding production of the Movie--do not further any government interests sufficient to justify the intrusion.

II. THE MOVIE IS NOT AN "ELECTIONEERING COMMUNICATION" UNDER *WRTL II'S* APPEAL-TO-VOTE TEST.

In *McConnell*, the plaintiffs argued that justifications for the regulation of express advocacy were not applicable to a significant quantity of speech covered by the statutory definition of "electioneering communications." *McConnell, supra*, 540 U.S. at 205-

206. The Court rejected that argument for issue ads--broadcast during the relevant time frame--that are "the functional equivalent of express advocacy," reasoning that:

> The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect.
>
> *Id*. at 206.

Several years later, this Court rejected the use of an intent-and-effect test, concluding instead that:

> [A] court should find that an ad is the functional equivalent of express advocacy only if the ad is **susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate**.
>
> *WRTL II, supra*, 127 S. Ct. at 2667 (emphasis added)

The Court explained that WRTL's ads focused on a legislative issue (filibusters that delay confirmation of judicial nominees), took a position on that issue, and urged people to contact public officials. Moreover, the ads did not mention an election, candidate, or political party, and did not "take a position on a candidate's character, qualifications, or fitness for office." *Id*. at 2667. The ads were deemed "issue advocacy" in contrast to "express advocacy":

> Issue advocacy **conveys information and educates**. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose--uninvited by the ad--to factor it into their voting decisions.
>
> *Id*. at 2667 (emphasis added)

(A) *WRTL II'S* APPEAL-TO-VOTE TEST REQUIRES A CLEAR PLEA FOR ACTION TO VOTE FOR OR AGAINST A CANDIDATE, IN ORDER TO CONSTITUTE AN "ELECTIONEERING COMMUNICATION."

Buckley's examples of express advocacy language led to a "magic words" requirement--"vote for," "elect," "support," "defeat," "reject." *Buckley, supra*, 424 U.S. at 44, n. 52; *McConnell, supra*, 540 U.S. at 190. *McConnell* calls the "magic words" requirement a "functionally meaningless" test that is easily evaded. *Id.* at 193. The *McConnell* opinion reproduced a "Bill Yellowtail" ad that describes a candidate's abuse of his own family, then urges readers to "call Bill Yellowtail...tell him to support family values." This Court rejected the conclusion that this ad was about the issue of "family values" rather than Yellowtail's campaign. *Id*. at 194.

But the "Yellowtail" ad was a clear plea for action: "call Bill Yellowtail...." The Movie educates and informs, but never urges viewers to take any particular action. Content that educates and informs, without a plea to the audience to act, poses no risk of the campaign corruption the statute seeks to prevent.

In *WRTL II*, this Court acknowledged that "the First Amendment requires us to err on side of protecting political speech rather than suppressing it." *WRTL II, supra,* 127 S. Ct. at 2659. Such caution mandates an approach that steers clear of chilling protected speech and offers a safe harbor for speakers. The *WRTL II* Court substantially narrowed the reach of the statute to allow breathing room for core political expression--like the full-length feature film at issue in this case--that does not unequivocably constitute campaign advertising. A "clear plea for action to vote for or against a candidate" is an interpretation of *WRTL II* consistent with its recognition that the Court must err on the side of protecting political speech.

(B) THE MOVIE DOES NOT HAVE A "CLEAR PLEA" FOR ACTION. IT CAN REASONABLY BE INTERPRETED AS AN INFORMATIONAL DOCUMENTARY--"SOMETHING OTHER THAN AN APPEAL TO VOTE FOR OR AGAINST A PARTICULAR CANDIDATE"--AND THEREFORE NOT REGULABLE AS AN "ELECTIONEERING COMMUNICATION."

A public communication does not fit *WRTL II's* appeal-to-vote test if it may be "reasonably interpreted as something other than as an appeal to vote for or against a specific candidate." *WRTL II, supra*, 127 S. Ct. at 2670. This Court recognized that the distinction between campaign and issue advocacy "may often dissolve in practical application." *Id*. at 2659. In the event of a close call, the "...tie is resolved in favor of protecting speech." *Id*. at 2669, n. 7.

Prior to *WRTL II*--but after *McConnell*--the Ninth Circuit considered an advertisement about Jimmy Carter to be a "close call" even though it contained an "unequivocal message that Carter must not 'succeed' in burden[ing] the country with 'four more years' of his allegedly harmful leadership." *FEC v. Furgatch*, 807 F.2d 857, 860-861 (9th Cir. 1987). The Carter ad is similar to the Movie in that both criticize the public record of a federal candidate, and listeners might decide to vote against that person. But the Movie is substantially different, not only in length but in content. The Movie "conveys information and educates." *WRTL II, supra*, 127 S. Ct. at 2667 (defining "issue advocacy"). There are many speakers on the screen--news commentators, public figures, and private figures--plus extensive documentation of facts concerning Hillary Clinton's public record over a period of years. A variety of crucial public issues are discussed, including government corruption, health care, the economy, the war in Iraq, terrorism, and Freedom of Information Act requests.

Even if the intent of producing the Movie was to discourage voters from supporting Hillary Clinton, and even if had such an effect, this Court's rejection of intent-and-effect tests cautions against reliance on these factors. This type of test chills free speech because it "blankets with uncertainty whatever may be said" and "offers no security for free discussion." *WRTL II, supra*, 127 S. Ct. at 2666; quoting *Buckley, supra*, 424 U.S. at 43.

The Ninth Circuit foreshadowed *WRTL's* "susceptible of no other reasonable interpretion" language and suggested three components for the analysis. First, the message must be "unmistakable

and unambiguous, suggestive of only one plausible meaning." Second, there must be a "clear plea for action" rather than a presentation that is "merely informative." Finally, "it must be clear what action is advocated." *FEC v. Furgatch, supra*, 807 F.2d at 864. The Movie does not urge listeners to take action, but informs and educates the public about pressing current issues and Hillary Clinton's years as First Lady and New York Senator.

(C) A BROADCAST FEATURE-LENGTH DOCUMENTARY MOVIE SOLD ON DVD, SHOWN IN THEATERS, AND ACCOMPANIED BY A BOOK IS NOT A "CAMPAIGN AD" SUBJECT TO REGULATION AS AN "ELECTIONEERING COMMUNICATION."

When Congress enacted legislation regulating "electioneering communications," its concern focused on the use of corporate funds "to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell, supra*, 540 U.S. at 207, citing 3 1998 Senate Report 4465, 4474-4481. But the Movie, in contrast to these fleeting 30-second to 60-second ads that flood the television screen, provides 90 minutes of detailed documentation that educates and informs voters. *McConnell* rejected the argument that the law was underinclusive because it does not encompass print media or the internet. *McConnell, supra*, 540 U.S. at 208. But by indiscriminately taking in *all* broadcast media without consideration of content, the law is vastly overinclusive and unlawfully regulates protected political speech.

The Movie differs from TV campaign ads in several significant ways. It was produced by a nonprofit group that can be deemed a "media corporation" with requisite rights to freedom of the press. The film reasonably constitutes "issue advocacy" because of its in-depth coverage of major public issues. The Movie also falls within the First Amendment protection granted to artistic and entertainment speech. It is not merely an extremely long campaign *advertisement*, but rather a feature film documentary--a category the Academy of Motion Picture Arts and Sciences deems worthy of nominations and awards.

(i) THE MOVIE SHOULD ENJOY FREEDOM OF THE PRESS BECAUSE IT EDUCATES AND INFORMS THE PUBLIC.

This Court has observed that the press has a "recognized role...in informing and educating the public, offering criticism, and providing a forum for discussion and debate" but "does not have a monopoly on the First Amendment or the ability to enlighten." *Bellotti, supra*, 435 U.S. at 781, 782. Past decisions have acknowledged the role of "corporations in the business of communication or entertainment...in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id*. at 783. Even *Austin*, upholding a Michigan law that restricted corporate funding of express advocacy, recognized that "media corporations" differ from their corporate counterparts because "their resources are devoted to the collection of information and its dissemination to the public." *Austin, supra*, 494 U.S. at 667. *McConnell* rejected the argument that the law discriminated in favor of media companies, again

affirming the distinction for corporations regularly engaged in the business of imparting news to the public. *McConnell, supra*, 540 U.S. at 208.

Citizens United exhibits the core characteristics of a "media corporation." It is primarily and regularly engaged in "the collection of information and its dissemination to the public." The Movie is one of nine informative feature length films offered to the public on DVD and in theatres.

The Press Clause complements the Free Speech Clause but "focuses specifically on the liberty to disseminate expression broadly." *Bellotti, supra*, 435 U.S. at 800. It has historical roots in the early British efforts to restrain the press, soon after the invention of the printing press:

> Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

Bellotti, supra, 435 U.S. at 800

In *McConnell* both the majority and dissent agreed that Congress could not regulate contributions to political talk show hosts or newspaper editors. *McConnell, supra*, 540 U.S. at 156, n. 51. But legislation that targets broadcasting--the twentieth century equivalent of the printing press when it was first invented--is just as objectionable as those early attempts to inhibit the print media when it was a new "means of mass communication."

Moreover, this Court has noted the difficulty in distinguishing media corporations from other companies. *Bellotti*, 435 U.S. at 796 (Burger, J., concurring). As Justice Thomas observed in *McConnell*: "The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press." *McConnell, supra,* 540 U.S. at 283 (Thomas, J., dissenting). Similarly, regarding the Movie as an "electioneering communication" is an onimous step in the direction toward outright regulation of the press.

(ii) THE MOVIE IS "ISSUE ADVOCACY" BECAUSE IT EDUCATES VIEWERS ABOUT MANY PRESSING PUBLIC ISSUES.

The Movie can also reasonably be viewed as issue advocacy because it "conveys information and educates." *WRTL II, supra*, 127 S. Ct. at 2667.

The line between issue advocacy and express advocacy is admittedly a thin one. *WRTL II, supra*, 127 S. Ct. at 2669; *Buckley, supra*, 424 U.S. at 42. *McConnell* rejected any constitutionally mandated line between the two, observing that the new definition of "electioneering communication" covers both. *McConnell, supra*, 540 U.S. at 189, 190. The *McConnell* majority went so far as to conclude that there is no constitutional right to issue advocacy as compared to express advocacy (*id*. at 192-193), but at the same time, the Court acknowledged that the First Amendment protects both campaign and issue speech (*id*. at 205).

WRTL II reigned in the far-reaching implications of *McConnell*. The earlier decision concluded that corporations could simply avoid any specific reference to a candidate (perhaps a "magic omission" comparable to *Buckley's* "magic words"), or use a PAC in doubtful cases. *McConnell, supra*, 540 U.S. at 206. *WRTL II* carved out breathing room for speech that names a candidate but is not truly a "campaign ad" because there is no clear plea to vote for or against a candidate. The Movie names a candidate--Hillary Clinton--but leaves all decisions with the voters, depending on their individual responses to the documentary information and speakers presented on the screen.

(iii) THE MOVIE IS AN ARTISTIC ENDEAVOR ENTITLED TO FIRST AMENDMENT PROTECTION.

The Movie also shares characteristics with speech in the realm of art and entertainment. First Amendment protection extends to artistic and entertaining speech. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious" motion picture); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (borderline obscene film in movie theatre); *Winters v. New York*, 333 U.S. 507 (1948) (magazines); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (school library books). Motion pictures, like radio and television, are entitled to freedom of the press. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). "Hillary: The Movie" and other politically motivated films (*W.*, *Rendition*, *Lions for Lambs*) should enjoy similar First Amendment protection.

III. THE DISCLOSURE/DISCLAIMER REQUIREMENTS CANNOT BE CONSTITUTIONALLY APPLIED TO THE MOVIE.

McConnell found that "amended FECA § 304's disclosure requirements are constitutional because they do not prevent anyone from speaking." *McConnell, supra*, 540 U.S. at 201. But this Court has long recognized that compelled disclosure of political associations and beliefs "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley, supra*, 424 U.S. at 64; *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982); *Davis v. FEC*, 128 S. Ct. 2759, 2774-2775 (2008).

The required disclaimers are constitutionally suspect because they directly regulate the content of speech. *McIntyre, supra*, 514 U.S. at 345-346 (speaker identification on documents designed to influence voters). *McIntyre* and a more recent Ninth Circuit case both involved "campaign statutes that go beyond requiring the reporting of funds used to finance speech to affect the content of the communication itself." *ACLU of Nev. v. Heller*, 378 F.3d 979, 987 (9th Cir. 2004). Disclaimers would use a substantial portion of Citizens United's proposed ads for the Movie and would burden the organization with the cost of additional air time in order to run the ads in their entirety.

This Court has recognized as-applied challenges to disclosure laws where there are threats of harm or retaliation, even if the risk does not extend to all those exposed to public scrutiny. *Brown v. Socialist Workers*

'74 Campaign Comm. (Ohio), supra, 459 U.S. at 97, n. 14. This is a common situation where the application of disclosure laws violates the First Amendment. But it is not necessarily the only one. For example, coerced disclosure can distort the listener's receptiveness to a message because of preconceived prejudices about the speaker. Anonymity would facilitate transmission of the speech and protect the speaker's right to disseminate his message without that distortion. *ACLU of Nev. v. Heller*, *supra*, 378 F.3d at 990.

The Court is urged to consider the facts of *this* case. The Movie has a wide spectrum of speakers appearing on the screen and is anything but anonymous--even though anonymous speech is protected under *McIntyre*. Viewers can check out the facts presented in the documentary without knowing the identity of those who contributed to get the Movie produced. Moreover, unlike the typical *advertisement*, it costs money to purchase the DVD, to see the Movie at a theatre, or to subscribe to cable TV. The Movie is not a campaign ad where disclosure of funding sources would enlighten viewers or serve any other important governmental interests.

(A) *McCONNELL* EXPRESSLY LEFT OPEN THE POSSIBILITY OF AS-APPLIED CHALLENGES TO THE DISCLOSURE REQUIREMENTS IMPOSED ON "ELECTIONEERING COMMUNICATIONS" WHEN IT UPHELD THE REQUIREMENTS AGAINST FACIAL CHALLENGE--"FOR THE ENTIRE RANGE OF ELECTIONEERING COMMUNICATIONS."

This Court has affirmed the general principle that facial validity does not foreclose a later as-applied challenge:

> Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack, so *McConnell* could not have settled the issue we address today. See *Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803, n. 22, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)* ("The fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied to these litigants"). Indeed, *WRTL I* confirmed as much. *Wisconsin Right to Life v. FEC*, 546 U.S. 410, 411-412 (2006).
>
> *WRTL II, supra*, 127 S. Ct. at 2670

The *McConnell* court acknowledged that evidence of a "reasonable probability" of "threats, harassment, and reprisals" could successfully establish an as-applied challenge to the campaign finance law disclosure requirements. *McConnell, supra*, 540 U.S. at 198-199; *see Brown v. Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87 (1982). But the Court did not stop there. Instead, the language appears to expressly leave open the potential for later as-applied challenges, in spite of upholding the disclosure requirements against facial challenge for "the entire range of electioneering communications":

> In this litigation the District Court applied *Buckley*'s evidentiary standard and found--consistent with our conclusion in *Buckley*, and in contrast to that in *Brown*--that the evidence

> did not establish the requisite "reasonable probability" of harm to any plaintiff group or its members. The District Court noted that some parties had expressed such concerns, but it found a "lack of specific evidence about the basis for these concerns." *251 F. Supp. 2d, at 247 (per curiam).* We agree, but we note that, like our refusal to recognize a blanket exception for minor parties in *Buckley,* **our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement**.
>
> *McConnell, supra*, 540 U.S. at 199 (emphasis added)

While the particular challenge before the *McConnell* Court related to threats of harm, this language does not foreclose the possibility of a different as-applied challenge based on other circumstances.

Additional observations from *McConnell* support this conclusion. The Court observed that *Buckley* upheld the contribution and expenditure disclosure requirements against facial attack, but "recognized that compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." *McConnell, supra*, 540 U.S. at 197-198. Facial validity indicates that there are constitutional applications of the law, but such a ruling does not foreclose the possibility that the same law might be unconstitutional as applied to other circumstances not before the court.

In rejecting claims that FECA § 316(b)(2)'s segregated-fund requirement for electioneering communications is overbroad, *McConnell* admits that the law may inhibit some constitutionally protected corporate and union speech. *McConnell, supra*, 540 U.S. at 207. Although that conclusion would not justify the prohibition of all enforcement of the law, it does appear to leave the door open for as-applied challenges. If the disclosure requirements inhibit protected speech under particular circumstances, an as-applied challenge should be viable.

Finally, *McConnell* admits that the line between express advocacy and other expression influencing elections is a fuzzy, "functionally meaningless" line. Consequently, restrictions on independent express advocacy do not serve a strong government interest. *McConnell, supra*, 540 U.S. at 217. This observation is made in the context of a discussion about the use of a nonprofit corporation's general funds for advocacy--not disclosure requirements. Nevertheless, the blurry line separating regulable campaign speech from other political expression should signal the very real possibility that a valid as-applied challenge may come before the Court under circumstances not considered in any of its prior decisions. In this case, Citizens United has independently produced a full-length documentary film without the assistance, authorization, or endorsement of any political party, candidate, or campaign. Viewers pay to see it, either through the purchase of a DVD, theatre ticket, or cable TV subscription. Such independent activity is protected expression that is fundamentally different from the barrage of TV ads that Congress sought to address when it enacted BCRA.

(B) THE DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL AS APPLIED TO ELECTIONEERING COMMUNICATIONS NOT PROHIBITED BY *WRTL II'S* APPEAL-TO-VOTE TEST. SUCH COMMUNICATIONS ARE PROTECTED "POLITICAL SPEECH"--NOT REGULABLE "CAMPAIGN SPEECH."

In considering this as-applied challenge, the Court should apply a high standard of review consistent with its past decisions about political expression. Compelled disclosure can seriously infringe protected rights to both political association and speech. *Buckley, supra*, 424 U.S. at 64; *Davis, supra*, 128 S. Ct. at 2775. It is not enough to merely assert a legitimate governmental interest. The statute must survive exacting scrutiny, even if rights are burdened "indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley, supra*, 424 U.S. at 65. Similarly, this Court applied "exacting scrutiny" in its review of a law that prohibited corporate speech "intimately related to the process of governing." *Bellotti, supra*, 435 U.S. at 786. That exacting scrutiny required the government to show a compelling interest and means closely drawn to achieve it. *Id*. at 786. A few years later, this Court required a compelling state interest to justify restrictions on independent expenditures, noting that restrictions on expenditures demanded a more compelling justification than restrictions on contributions. *MCFL, supra*, 479 U.S. at 251, 259-260. Again in *Austin*, a compelling governmental interest and narrow tailoring were needed to infringe the right to engage in political expression. *Austin, supra*, 494

U.S. at 666. *McIntyre* applied exacting scrutiny to assess restrictions on anonymous speech. *McIntyre, supra*, 514 U.S. at 347. Even *McConnell* acknowledged the need for a compelling interest to curtail political expression. *McConnell, supra*, 540 U.S. at 205. More recently, this Court applied strict scrutiny to evaluate the application of BCRA § 203 to WRTL's ads. *WRTL II, supra*, 127 S. Ct. at 2664.

Even if this Court were to deem the Movie to be an "electioneering communication," the lack of a clear plea for action--specifically, an unequivocable appeal to vote against Hillary Clinton--renders it protected political speech rather than campaign speech that can be lawfully restricted. It not only fails to qualify under either *WRTL II's* appeal-to-vote test or *Buckley's* unambiguously-related test, but it also fails the applicable strict scrutiny test. Moreover, application of the "campaign ad" disclosure requirements to the Movie would not serve any of the compelling government interests that ordinarily justify this type of campaign finance regulation, such as anti-corruption, informing voters, and preventing circumvention of the campaign contribution caps.

(i) THE MOVIE IS NOT "UNAMBIGUOUSLY RELATED TO THE CAMPAIGN OF A PARTICULAR FEDERAL CANDIDATE." *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

Buckley adopted this language to ensure that the statutory disclosure requirements were not impermissibly broad. The Court easily validated the requirements as applied to candidates and political committees, because these are "by definition, campaign

related." *Buckley, supra*, 424 U.S. at 79. The Court continued its analysis with great caution:

> But when the maker of the expenditure is not within these categories -- when it is an individual other than a candidate or a group other than a "political committee" -- the relation of the information sought to the purposes of the Act may be too remote.
>
> *Id*. at 79-80.

Buckley went on to conclude that independent expenditures came within the reach of the statute only when funds were used for "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80. The Movie differs substantially from the typical campaign ad in its thorough, extensively documented presentation of issues with no clear "appeal-to-vote" for or against a candidate. Application of the disclosure requirements under these circumstances bears only the most tenuous relationship to the governmental interests asserted.

(ii) THE DISCLOSURE REQUIREMENTS FAIL STRICT SCRUTINY BECAUSE THEIR APPLICATION TO THE MOVIE IS NOT NARROWLY TAILORED TO SERVE ANY OF THE PURPORTED GOVERNMENT INTERESTS.

McConnell expressed concern about corporations funding broadcasting advertisements while concealing their identities. *McConnell, supra*, 540 U.S. at 196.

The Court provided several illustrations of misleading names that masked the real powers behind them: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), and "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). *Id*. at 197. The Court identified three main governmental interests to sustain the "entire range" of electioneering communications--informing the electorate about the source of speech, preventing corruption (particularly "quid pro quo"), and precluding circumvention of the political contribution caps.

The strict standard of review requires that the law be narrowly tailored to further these interests. Narrow tailoring is particularly crucial here because the disclosure laws burden *two* First Amendment rights--core political speech *and* the freedom to associate with others. It is questionable whether the disclosure requirements--as applied to the Movie--are sufficiently linked to any of the three stated governmental interests, let alone narrowly tailored.

(a) THE ELECTORATE DOES NOT NEED TO BE INFORMED OF FUNDING SOURCES FOR A DOCUMENTARY MOVIE FOR WHICH THEY HAVE PAID AN ADMISSION PRICE.

One of the government interests asserted is providing voters with additional relevant information to facilitate their evaluation of speech. However, that interest alone is insufficient to justify requiring a

speaker to make statements or disclosures that would otherwise be omitted. *McIntyre, supra*, 514 U.S. at 348. As this Court stated, listeners are able to consider anonymity along with content:

> "Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth." *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (1974).
>
> *Id.* at 348, n. 11

Coercive disclosure requirements may actually inhibit speech and accomplish the very opposite of the intended effect. "[I]f anonymous speech is banned, some useful speech will go unsaid." *ACLU of Nev. v. Heller, supra*, 378 F.3d at 993.

Disclaimer requirements can cut into the limited (and costly) time and space available for other speech, decreasing the overall content. *McConnell* held that the Sect. 318 disclaimer provisions bear "a sufficient relationship to the important governmental interest of shed[ding] the light of publicity" on campaign financing. *McConnell, supra*, 540 U.S. at 231. Even if that were true as applied to the Movie, a short on-screen statement would be more narrowly tailored to that interest than the burdensome requirements that eat up a substantial portion of the allotted ad time.

The Movie includes a variety of speakers identified by name and interviewed on the screen. This serves the voters' interest in having information about who is speaking and undermines any argument that the statutory disclosure requirements are narrowly tailored to serve that interest.

(b) DISCLOSURE OF FUNDING SOURCES FOR THIS INDEPENDENTLY PRODUCED MOVIE WOULD NOT SERVE THE GOVERNMENTAL INTEREST IN PREVENTING CORRUPTION.

The government has a legitimate interest in preventing corruption--or even the appearance of it--in federal elections. Large political contributions have the potential to "buy" favors from a candidate who is elected to office. Public communications that promote or attack a candidate also have an impact on elections and directly benefit candidates. Contribution caps are closely tied to preventing corruption. *McConnell, supra*, 540 U.S. at 169. However, campaign finance restrictions must be narrowly tailored to combat corruption without chilling protected speech. *Buckley* struck down limitations on independent expenditures, finding the governmental anti-corruption interest sufficient to justify the $1,000 contribution cap but inadequate to uphold limits on independent expenditures. *Buckley, supra*, 424 U.S. at 26, 47-48.

This case is not about contributions caps. It is about independent expenditures that are far removed from any candidate, campaign, or political party. No candidate or political entity has authorized, endorsed, or in any way financed the production of the Movie.

The potential for corruption is too remote to justify either banning it at election time or imposing intrusive disclosure requirements.

There is also little risk that Citizens United can accumulate sufficient wealth to endanger the integrity of the electoral process. *McConnell* expressed concern about the "corrosive and distorting effects of immenses aggregations of wealth." *McConnell, supra*, 540 U.S. at 205; citing *Austin, supra*, 494 U.S. at 660. However real this concern may be in some circumstances, its heaviest impact is likely to fall on "budget-strapped nonprofit entities." *McConnell, supra*, 540 U.S. at 340 (Thomas, J., dissenting). Citizens United is such an entity, financially dependent on many small membership fees, non-deductible contributions, and sales of products.

Citizens United is similar to the group involved in *MCFL, supra,* 479 U.S. 238. Such groups pose no danger of corruption through mass accumulation of funds that can be used to gain improper political advantage. *Id*. at 259. Contributors are aware of and support the group's political purposes. *Id*. at 260-261. *MCFL* considered three factors the key to its decision. *Id*. at 264. First, MCFL was expressly formed to promote political ideas. Second, MCFL had no shareholders or other persons with a claim on corporate income or assets. Finally, MCFL was not formed as a business corporation or labor union and did not accept contributions from such entities.

Citizens United is a nonprofit organization tax-exempt under Sect. 501(c)(4) of the Internal Revenue Code. 26 U.S.C. § 501(c)(4). Its mission statement, reproduced above (Introduction) and displayed on its

website, shows that it was formed to promote political ideas such as limited government, free enterprise, strong families, national sovereignty and security. As a non-business nonprofit corporation, it has no shareholders or others with a vested financial interest in its income or assets. The website offers memberships for a contribution of $15.00 or more, and the website format is designed solely for individual donors. See https://secure.donationreport.com/donation.html?key=ME6AVZNKIFP2.

MCFL challenged the pre-election ban of its ads rather than disclosure requirements. The corporation had to make various disclosures. However, MCFL's distinguishing characteristics--formation for political purposes, lack of shareholders, and non-business status--are also relevant to finding that there is only a tenuous link between the disclosure requirements and the government's interest in preventing corruption. Citizens United brings private citizens together, not to curry political favor but to engage in protected political speech that is independently funded and disseminated.

(c) DISCLOSURE OF THE MOVIE'S FUNDING SOURCES DOES NOTHING TO DETER VIOLATIONS OF THE POLITICAL *CONTRIBUTION* LIMITS.

This Court has upheld legislation designed to curb "the corrosive and distorting effects of immense aggregations of wealth" accumulated by corporations but having little correlation to public support for the political views funded with that wealth. *McConnell, supra*, 540 U.S. at 205; *Austin, supra*, 494 U.S. at 660.

Even nonprofit advocacy groups can be subjected to limitations on direct contributions, which involve speech by someone other than the donor and thus are "closer to the edges" of the First Amendment. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003).

But this Court has repeatedly have struck down limitations on expenditures "made totally independently of the candidate and his campaign." These provide little (if any) assistance to candidates and may even be counterproductive. *McConnell, supra*, 540 U.S. at 221; *Buckley, supra*, 424 U.S. at 47. Limits on independent expenditures "impose far greater restraints on the freedom of speech and association than do limits on contributions and coordinated expenditures" without serving the governmental interest in stemming corruption. *McConnell, supra*, 540 U.S. at 221; *Buckley, supra*, 424 U.S. at 44, 47-48. Justice Blackmun's concurring opinion in *Cal. Medical Ass'n v. FEC*, 453 U.S. 182, 203 (1981) stressed that "contributions to a committee that makes only independent expenditures...pose no threat" of corruption or the appearance thereof.

Disclosure requirements allegedly serve the government's interest in curbing violations of political contribution caps. But contributions to Citizens United are not the direct political contributions targeted by those caps. The disclosures impose a substantial burden on the First Amendment rights of the people who have associated with Citizens United in order to engage in protected speech. Moreover, the cost of producing the Movie is partially offset by revenue from DVD and theatre ticket sales.

Finally, as the late Chief Justice Rehnquist cautioned, the alleged "circumvention" interest eviscerates the narrow tailoring requirement:

> In allowing Congress to rely on general principles such as affecting a federal election or prohibiting the circumvention of existing law, the Court all but eliminates the "closely drawn" tailoring requirement and meaningful judicial review.
>
> *McConnell, supra*, 540 U.S. at 357 (Rehnquist, C.J., dissenting)

This comment was not made in the context of examining disclosure requirements. However, requiring disclosure about the independent expenditures of a nonprofit advocacy group is far removed from the direct political contributions that Congress may lawfully regulate. It is unclear how disclosing information about Citizens United's donors and expenditures does anything to facilitate compliance with laws that limit such contributions.

CONCLUSION

Regulation of this type of movie as an "electioneering communication," subject to pre-election ban and burdensome disclosures, could ultimately inhibit a broad array of protected political speech at the time when citizens need it most. The mere mention of a candidate's name during the crucial days before an election triggers a host of onerous regulations that chill core political speech. Although current law extends only to broadcast media, if it is applied to an informational documentary so dissimilar

to the "virtual torrent" of TV ads that concerned Congress, the potential exists to enact laws that regulate television shows, books, magazines, and newspaper editorials--in short, the entire press. This Court, in accord with *WRTL II's* narrowing language, should construe the Bipartisan Campaign Reform Act so that it only reaches that small slice of speech that unambiguously constitutes regulable campaign advertising.

Respectfully Submitted,

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