No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the three-judge district court correctly held that the disclosure requirements of federal campaign finance law may permissibly be applied to advertisements that are not the functional equivalent of express advocacy under the test set forth in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

2. Whether the three-judge district court correctly concluded that appellant's film about Senator Hillary Clinton is the functional equivalent of express advocacy.

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OPINIONS BELOW

The opinion of the three-judge district court granting appellee's motion for summary judgment (J.S. App. 2a-3a) is unreported. The opinion of the three-judge district court denying appellant's motions for preliminary injunctions (J.S. App. 4a-20a) is reported at 530 F. Supp. 2d 274.

JURISDICTION

The decision of the three-judge district court was entered on July 18, 2008. A notice of appeal was filed on July 24, 2008 (J.S. App. 22a-23a), and the jurisdictional statement was filed on August 15, 2008. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113.

STATEMENT

In the district court, appellant argued that, under this Court's decision in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), the reporting and disclaimer requirements imposed by Sections 201 and 311 of BCRA, 116 Stat. 88, 105 (2 U.S.C. 434(f)(2), 441d(a)), are unconstitutional as applied to appellant's film criticizing Senator Hillary Clinton and to three planned advertisements to promote that film. The three-judge district court denied appellant's motion for a preliminary injunction, J.S. App. 4a-20a, and this Court dismissed appellant's direct appeal for lack of jurisdiction. 128 S. Ct. 1732 (2008) (No. 07-953). On similar reasoning, the district court then granted summary judgment to the Federal Election Commission (Commission or FEC). *Id.* at 2a-3a.

1. The FEC is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8); see 2 U.S.C. 438(d); and to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Since 1910, federal law has required disclosure of information related to the financing of federal election campaigns. See *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam). After Congress enacted a new disclosure regime in 1974, see *id.* at 62-64, this Court held that the new provisions were constitutional on their face, *id.* at

64-84. The Court explained that disclosure serves the important government interests of (1) providing the electorate with information on campaign financing "in order to aid the voters in evaluating those who seek federal office," *id.* at 66-67; (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," *id.* at 67; and (3) "gathering the data necessary to detect violations of the contribution limitations" that were simultaneously enacted, *id.* at 68.

The disclosure requirements at issue in *Buckley* pertained to "the use of money or other objects of value 'for the purpose of . . . influencing' nominations or elections to federal office." 424 U.S. at 77 (quoting 2 U.S.C. 431(f)(1) (Supp. IV 1974)). In order to avoid "serious problems of vagueness," the Court held that, as applied to organizations whose major purpose was not campaign activity, the disclosure provisions would "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *i.e.*, "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 76, 79-80 (footnote omitted). Consistent with earlier decisions regarding compelled disclosure, the Court held that the challenged provisions, so construed, would unconstitutionally infringe on associational rights only in the limited circumstance when such disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" against an organization or its members. *Id.* at 74.

3. Based on its assessment of evolving federal campaign practices and abuses, Congress subsequently determined, inter alia, that entities had been funding broadcast advertisements designed to influence federal

elections "while concealing their identities from the public," including by "hiding behind dubious and misleading names." *McConnell* v. *FEC*, 540 U.S. 93, 196-197 (2003) (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 237 (D.D.C.) (three-judge court), aff'd in part and rev'd in part, 540 U.S. 93 (2003)). In enacting BCRA, Congress amended FECA to require disclosure about the sources of funding for "electioneering communications." The term "electioneering communication" is defined, in the context of elections for President or Vice President, as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate; and (2) is made within 60 days before a general election, or within 30 days before a presidential primary election or nominating convention. 2 U.S.C. 434(f)(3)(A)(i).

The disclosure provisions at issue in this case include both reporting requirements, 2 U.S.C. 434(f)(2); 11 C.F.R. 104.20, and disclaimer requirements, 2 U.S.C. 441d; 11 C.F.R. 110.11. The reporting provisions state that any "person" (defined to include any corporation, labor organization, or other group, 2 U.S.C. 431(11)) expending more than $10,000 to produce or air an electioneering communication must file a statement with the Commission. 2 U.S.C. 434(f)(2). The statement must identify the person making the disbursement, the amount and date of the disbursement, and, in the case of an electioneering communication made by a corporation, "the name and address of each person who made a donation aggregating $1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c). If the disbursement is made out of a "segregated bank account established to pay for electioneering communications," the corporation making the electioneering communication need only

identify those individuals who contributed $1000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E); 11 C.F.R. 104.20(c)(7).

BCRA's disclaimer provisions require that a televised electioneering communication include on the screen (1) "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," and (2) a statement "that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3); 11 C.F.R. 110.11(b)(3). The communication must also include a statement that the entity funding the communication "is responsible for the content of this advertising," and that statement must be (1) made orally by a representative of the person making the communication, and (2) printed "for a period of at least 4 seconds" in text meeting size and contrast requirements. 2 U.S.C. 441d(d)(2); 11 C.F.R. 110.11(c)(4).

4. Soon after BCRA was enacted, appellant and other plaintiffs challenged the constitutionality of numerous BCRA provisions, including the reporting and disclaimer requirements that are at issue in this appeal. In *McConnell*, this Court rejected the plaintiffs' challenges to those disclosure provisions. See 540 U.S. at 194-202, 230-231.

In upholding the reporting requirements applicable to "electioneering communications," the Court in *McConnell* explained that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA." 540 U.S. at 196. For that

reason, the Court concluded, "*Buckley* amply supports application of [the] disclosure requirements to the entire range of 'electioneering communications.'" *Ibid.* The Court also endorsed the conclusion of the district court in that case that the plaintiffs' challenge to BCRA's reporting requirements "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d at 241). Three other Justices in *McConnell*, while rejecting much of the Court's reasoning, agreed that BCRA's reporting requirements are generally constitutional because they "substantially relate" to the informational interest identified in the Court's opinion. *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part); see *id.* at 286 n.*.

Consistent with *Buckley*, the Court in *McConnell* recognized that, under certain limited circumstances, "compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. The Court explained that, under the governing standard, disclosure may not be required in circumstances where there is a "reasonable probability" that such disclosure "would subject identified persons to 'threats, harassments, and reprisals.'" *Id.* at 198-199 (quoting *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 100 (1982)). The Court agreed with the district court that the evidence in *McConnell* had "not establish[ed] the requisite 'reasonable probability' of harm to any plaintiff group or its members," but it noted that its rejection of the facial challenge to the reporting requirements did "not foreclose possible future challenges to particular applications of that requirement." *Id.* at 199.

The Court in *McConnell* also upheld BCRA's disclaimer requirements. 540 U.S. at 230-231. Chief Justice Rehnquist, writing for eight Members of the Court (see *id.* at 224 n.*), explained that BCRA's "inclusion of electioneering communications in the [pre-existing disclaimer] regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id.* at 231 (quoting *Buckley*, 424 U.S. at 81).

5. In *McConnell*, this Court also rejected a facial challenge to Section 203 of BCRA, 2 U.S.C. 441b(b)(2), which prohibits corporations or labor unions from using general treasury funds to pay for electioneering communications. 540 U.S. at 206. The Court noted that this corporate funding restriction encompassed both campaign advocacy and some "issue ads," but held that the government's long-recognized and compelling interests in regulating corporation-funded express advocacy apply with equal force to corporation-funded speech that is "the functional equivalent of express advocacy." *Id.* at 205-206. The Court reasoned that, because the statutory definition of "electioneering communication" encompasses only communications that refer to a specific candidate shortly before an election, the fact that a communication meets the statutory criteria "strongly supports" a finding that any given electioneering communication is the functional equivalent of express advocacy, such that the funding restriction's potential "application to pure issue ads" is insubstantial. See *id.* at 207. The Court further noted that, "[e]ven if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial." *Ibid.* (citation

and internal quotation marks omitted). Thus, the Court in *McConnell* held that the electioneering communication provision was "amply justifie[d]," *id.* at 208, and that the plaintiffs had not "carried their heavy burden" to show the funding restriction to be unconstitutional on its face, *id.* at 207.

Four years later, in *WRTL*, this Court considered and sustained an as-applied challenge to Section 203. Two Members of the Court framed the relevant inquiry as whether the advertisements at issue constituted "express advocacy or its functional equivalent." 127 S. Ct. at 2664 (opinion of Roberts, C.J.). Under their approach, "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." *Id.* at 2667. Those two Justices concluded that, "[u]nder this test, WRTL's three ads are plainly not the functional equivalent of express advocacy." *Ibid.* The lead opinion therefore concluded that no compelling interest supported Section 203 as applied to those advertisements. *Id.* at 2670-2673. Three other Justices concluded that Section 203 is unconstitutional on its face and would have overruled the Court's contrary holding in *McConnell*. *Id.* at 2684-2687 (Scalia, J., concurring in part and concurring in the judgment).

6. Appellant is a nonprofit corporation with tax-exempt status under 26 U.S.C. 501(c)(4). J.S. App. 5a. In early 2008, appellant released a film about Senator Hillary Clinton, entitled *Hillary: The Movie*, which appellant intended to distribute through theaters, video-on-demand broadcasts, and DVD sales while Senator Clinton was a candidate for President of the United States. See *ibid.* The video-on-demand broadcast was

to be made available to cable television subscribers for a fee to be paid by appellant, in the manner of an infomercial. See *id.* at 7a; Am. Compl. ¶ 28. Appellant also produced three television advertisements for the movie. J.S. App. 5a-7a & nn.2-4.

In December 2007, appellant filed suit in federal district court, challenging BCRA's application to both the film and the proposed advertisements. See J.S. App. 9a-10a. With respect to the film itself, appellant contended that Section 203's ban on the use of general treasury funds to broadcast the movie is unconstitutional under this Court's decision in *WRTL*. See *id.* at 11a-12a. With respect to the advertisements for the film, the FEC conceded in the district court that, under *WRTL*, appellant could not constitutionally be foreclosed from financing those advertisements with general treasury funds. See *id.* at 15a. The parties disagreed, however, on the question whether BCRA's reporting and disclaimer provisions were constitutional as applied to the advertisements. See *id.* at 16a.

7. The three-judge district court denied preliminary injunctive relief on both of appellant's claims. J.S. App. 4a-20a. Citizens United appealed that decision to this Court, which dismissed the appeal for want of jurisdiction. 128 S. Ct. 1732 (2008) (No. 07-953). The district court then granted summary judgment to the Commission "[b]ased on the reasoning of [the court's] prior opinion" denying preliminary injunctive relief. J.S. App. 2a-3a.

a. The district court rejected appellant's challenge with respect to the film itself on the ground that the film is the functional equivalent of express advocacy. J.S. App. 12a-15a. The court stated that the film "is susceptible of no other interpretation than to inform the elec-

torate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 13a. The court held that, under *McConnell* and *WRTL*, the film may constitutionally be subject to BCRA's corporate financing restriction. *Id.* at 15a.

b. The district court also rejected appellant's contention that BCRA's reporting and disclaimer provisions are unconstitutional as applied to appellant's proposed advertisements. J.S. App. 15a-19a. The court explained that this Court in *McConnell* had upheld those provisions "for the 'entire range of electioneering communications' set forth in the statute." *Id.* at 17a (quoting *McConnell*, 540 U.S. at 196). The court rejected appellant's contention that this aspect of *McConnell* had been superseded by *WRTL*, stating that "[t]he only issue in [*WRTL*] was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period." *Ibid.* The district court also observed that, in various contexts, this Court "has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.* at 18a.

The district court recognized that this Court in *McConnell* had "suggest[ed] one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus 'impose an unconstitutional burden on the freedom to associate in support of a particular cause.'" J.S. App. 18a (quoting *McConnell*, 540 U.S. at 198). The court explained, however, that while appellant's "memorandum in support of its motion [for a preliminary in-

junction] states that there may be reprisals," appellant had "presented no evidence to back up this bald assertion." *Id.* at 18a-19a. The court observed that appellant "is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support." *Id.* at 19a.

ARGUMENT

The district court correctly granted the Commission's motion for summary judgment, and that decision rests on a straightforward application of settled legal principles. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.[1]

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[1] Although at the present time *Hillary: The Movie* is no longer subject to the restrictions on electioneering communications—Senator Clinton will not be a candidate for federal office again before 2012—in our view the appeal is not moot in light of this Court's holding in *WRTL* that a comparable challenge remained justiciable. This Court held that the timing of Section 203's pre-election windows does not permit full litigation of as-applied challenges in advance, and that WRTL had sufficiently established that the issue was likely to recur by "credibly claim[ing] that it planned on running 'materially similar' future targeted [electioneering communications] mentioning a candidate during the [pre-election window]." 127 S. Ct. at 2662-2663. The Court accordingly held that WRTL's challenge was "capable of repetition, yet evading review," and thus not moot. *Id.* at 2662. Appellant averred in the district court that it planned to produce, and to promote, a film about Senator Barack Obama; that the film would "raise[] similar issues as *Hillary*" and would be an electioneering communication; and that it desired to broadcast the film during the 60-day period before the general election (in which Senator Obama is a candidate for federal office). Affidavit of David N. Bossie ¶¶ 8-11 (attachment to Pl.'s S.J. Mot.). That film apparently has since been released. See Citizens United, *Hype: The Obama Effect* (visited Oct. 16, 2008) <http://www.hypemovie.com>. More generally, appellant "reaffirm[ed] its intention to do materially similar advertising in materially similar situations in

1. In *McConnell*, eight Members of this Court—including three Justices who would have held Section 203's prohibition on the use of corporate treasury funds for "electioneering communications" to be unconstitutional on its face—agreed that the reporting and disclaimer requirements applicable to such communications are facially valid. See pp. 5-7, *supra*. In particular, the opinion for the Court stated that "*Buckley* amply supports application of [FECA's] disclosure requirements to the entire range of 'electioneering communications.'" 540 U.S. at 196. That holding controls this case.

Contrary to appellant's suggestion (J.S. 15-16), the government does not contend that *McConnell* precludes all as-applied challenges to BCRA's reporting and disclaimer requirements. The Court in *McConnell* made clear that as-applied challenges *are* available, stating that the Court's "rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. The Court further explained that, to succeed in such an as-applied challenge, a plaintiff must demonstrate a "reasonable probability" that the forced disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *Id.* at 198-199 (quoting *Brown*, 459 U.S. at 100). The Court observed that, although some plaintiffs had expressed concern that disclosure might lead to such harms, no plaintiff—including appellant—had made a sufficient evidentiary showing that those injuries

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the future." Pl.'s Statement of Undisputed Material Facts ¶ 15 (attachment to Pl.'s S.J. Mot.). Accordingly, as in *WRTL*, appellant's challenge appears to be "capable of repetition, yet evading review."

were actually likely to occur. *Id.* at 199.[2] The Court's statement in *McConnell* that BCRA's reporting requirements may constitutionally be applied "to the entire range of 'electioneering communications,'" 540 U.S. at 196, *combined with* the Court's express recognition that those requirements are subject to a different sort of as-applied challenge, *id.* at 199, strongly suggests that the Court did not contemplate as-applied challenges based solely on the content of the relevant communication.

Similarly, in the instant case, the district court did not read *McConnell* as foreclosing all as-applied challenges to BCRA's reporting and disclaimer requirements. To the contrary, the district court specifically noted that "[t]he *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals." J.S. App. 18a. The district court concluded, however, that appellant could not prevail in such an as-applied challenge because appellant (like the plaintiffs in *McConnell*) had raised the possibility of reprisals but had offered no evidence to support that concern. *Ibid.*[3] In this Court, appellant does not

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[2] Appellant notes (J.S. 20 n.9) that certain plaintiffs in *McConnell* did attempt to make such a factual showing regarding disclosure-related burdens. The Court deemed those submissions insufficient. And in any event, appellant itself introduced no such evidence, either in that case or this one. See *McConnell*, 251 F. Supp. 2d at 227-229 (discussing evidentiary submissions of NRA, ACLU, and three trade associations).

[3] Appellant has maintained a separate segregated fund (commonly referred to as a political action committee, or PAC) for more than 13 years and has disclosed the names and addresses of its donors pursuant to federal law. See Citizens United Political Victory Fund, *Statement of Organization* (June 15, 1994) <http://query.nictusa.com/cgi-bin/fecimg/?94039043287+0>; *FEC Disclosure Reports—Filer ID*

contend that the district court overlooked any record evidence showing a genuine burden.

2. Rather, appellant contends that reporting and disclaimer requirements are automatically so burdensome as to trigger strict scrutiny and that they cannot survive that exacting analysis when applied to communications that (like the advertisements promoting appellant's movie) are not the functional equivalent of express advocacy. Appellant's argument lacks merit.

It is well established that First Amendment challenges to disclosure requirements are analyzed under a standard that is more permissive than strict scrutiny. This Court has used the formulation "exacting scrutiny" and has required that the compelled disclosure bear a "substantial relation" to a "sufficiently important" government interest. *Buckley*, 424 U.S. at 64, 66, 75 (citation omitted); accord *Davis* v. *FEC*, 128 S. Ct. 2759, 2775 (2008) (reiterating that "there must be 'a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed,' and the governmental interest 'must survive exacting scrutiny'") (quoting *Buckley*, 424 U.S. at 64); *McConnell*, 540 U.S. at 196, 231.

"Exacting scrutiny," as this Court applies it to disclosure requirements, is more permissive than the "strict

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C00295527 (visited Oct. 16, 2008) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527>. During that time, appellant has disclosed approximately 1000 contributions from individuals in amounts of $200 or more, including address and employer information for most of the individuals. See FEC, *Individuals Who Gave to This Committee: Citizens United Political Victory Fund* (visited Oct. 15, 2008) <http://query.nictusa.com/cgi-bin/com_ind/C00295527/>. Appellant's inability to produce any evidence of actual reprisals is particularly striking in light of the large volume of donor information that it has previously released.

scrutiny" standard that appellant advocates. Strict scrutiny requires that the chosen means be "narrowly tailored" to serve a "compelling interest"; this Court in *Buckley* required only a "substantial relation" to a "sufficiently important" interest. That standard corresponds to *intermediate* scrutiny. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

Citing a footnote in *WRTL*, appellant contends (J.S. 21) that "exacting scrutiny" *is* "strict scrutiny." But both the footnote in *WRTL* (127 S. Ct. at 2669 n.7) and the passage of *Buckley* that the footnote cites (424 U.S. at 44) used the phrase "exacting scrutiny" in striking down *expenditure limits*, to which the Court applied strict scrutiny. See *id.* at 44-45. And the Court in *Buckley* explicitly distinguished the scrutiny applicable to such "limitations on core First Amendment rights of political expression," *ibid.*, from that applicable to encroachments on the "privacy of association" by *disclosure requirements*, *id.* at 64.

Appellant also cites *First National Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978), and *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995), in support of its contention that the strict-scrutiny standard applies to the disclosure requirements at issue here. But in *Bellotti*, as in *WRTL*, the Court applied strict scrutiny to a prohibition on corporate campaign expenditures, "a prohibition * * * directed at speech itself." 435 U.S. at 786. In *McIntyre,* the Court explicitly distinguished the state law at issue, which prohibited the distribution of anonymous handbills addressing a variety of political issues, see 514 U.S. at 338 n.3, from the disclosure requirements contained in federal campaign-finance laws, see *id.* at 355. And because BCRA's definition of "electioneering communication" is limited to specified categories

of "broadcast, cable, or satellite communication[s]," 2 U.S.C. 434(f)(3)(A)(i), the materials subject to the challenged disclosure requirements are far removed from the "personally crafted statement of a political viewpoint" involved in *McIntyre*, 514 U.S. at 355. In any event, the Court in *McConnell* resolved any confusion by expressly stating that the proper standard for disclosure obligations is the intermediate "important state interests" test. 540 U.S. at 196.

Appellant is also incorrect in arguing that this Court's cases treat disclosure as creating, per se, the type of burden on protected speech that *ought* to trigger strict scrutiny. Appellant cites the statement in *Buckley* that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." J.S. 20 (quoting *Davis*, 128 S. Ct. at 2774-2775) (in turn quoting *Buckley*, 424 U.S. at 64). The statement that disclosure *can* be a burden is far from a flat holding that it always *is* a burden. In fact, the Court in *Buckley* immediately followed this statement by analyzing whether the allegations of burden were supported by evidence showing a "reasonable probability that the compelled disclosure * * * will subject [the plaintiffs] to threats, harassment, or reprisals." See *Buckley*, 424 U.S. at 74. Finding the evidence insufficient to demonstrate such a probability, the Court upheld FECA's disclosure provisions. *Ibid.* The Court in *McConnell* employed the same mode of analysis and arrived at the same conclusion. See *McConnell*, 540 U.S. at 197-199; see also *McConnell*, 251 F. Supp. 2d at 246-249. In *Davis*, the Court did not even reach the issue of constitutional burdens because the government's sole interest in the disclosure provisions at issue was the administration of contribution limits that the Court had

struck down facially. See *Davis*, 128 S. Ct. at 2775. Thus, none of these cases supports appellant's claims that disclosure is burdensome per se. Rather, when the Court has addressed the issue, it has held that the government's interests were sufficient to justify disclosure in the absence of evidence of threats, harassment, and reprisals.

3. In addition to seeking the application of strict scrutiny, appellant argues (J.S. 18-19) that, because *WRTL* precludes the application of Section 203's corporate-financing restriction to appellant's advertisements promoting its movie, application of BCRA's reporting and disclaimer provisions is necessarily barred as well. That argument rests on the premise that the authority of Congress (and state legislatures) to require disclosure of financing sources is coextensive with the authority to bar the use of corporate treasury funds to pay for particular communications. This Court has repeatedly rejected that proposition, and nothing in *WRTL* endorsed it.[4]

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), for example, this Court held that the defendant corporation was constitutionally entitled to use its general treasury funds to engage in express advocacy in federal campaigns, notwithstanding the ban imposed by 2 U.S.C. 441b(a) on use of corporate treasury funds for that purpose. 479 U.S. at 263-264. The

[4] Appellant also seeks (J.S. 16) to draw support for this notion from *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008). But in holding that legislatures' power to "establish campaign finance laws" is limited to regulating express advocacy and its functional equivalent, *id.* at 282-283, the Fourth Circuit was referring to regulation of expenditures, and did not consider reporting requirements standing alone. See *id.* at 280.

Court explained that, given the particular characteristics of the corporation involved, the corporation's campaign-related spending would not pose the danger at which Section 441b was directed. See *ibid.* The Court made clear, however, that the corporation remained subject to the applicable FECA disclosure requirements. See *id.* at 262 (explaining that "MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures").

The Court has taken a similar approach to corporate spending in the context of ballot initiatives. In *Bellotti*, this Court struck down a Massachusetts law that prohibited banks and business corporations from making certain expenditures for the purpose of influencing the outcome of public referenda. 435 U.S. at 767, 786-795. In holding that the plaintiff bank had a First Amendment right to engage in such advocacy, the Court specifically contrasted public referenda with "the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. The Court observed, however, that even in the context of ballot initiatives, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The Court's subsequent decisions have continued to recognize that, while advocacy of particular referendum outcomes is entitled to full constitutional protection, persons who engage in such advocacy may be required to identify their expendi-

tures and the sources of their funding. See *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202-203, 205 (1999); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 n.4, 298-299 (1981).

This Court has also held that "those who for hire attempt to influence legislation" may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The Court explained that, if Congress could not mandate the provision of that information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625. In *Bellotti*, this Court noted its prior First Amendment holdings "protect[ing] the right of corporations to petition legislative and administrative bodies," 435 U.S. at 792 n.31, but cited *Harriss* with approval as support for the proposition that compelled disclosure of financing information is permissible, *id.* at 792 n.32. The Court has thus recognized that legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence occurs outside the election context.

Many of these cases postdate *Buckley*, on which appellant principally relies. Appellant repeatedly invokes the Court's determination in *Buckley* that a prior FECA disclosure provision was limited to spending that is "unambiguously related to the campaign of a particular federal candidate." J.S. 16, 18 (quoting *Buckley*, 424 U.S. at 80). Appellant's reliance on that aspect of *Buckley* is misplaced. The Court in *Buckley* announced the express advocacy test (for which the reference to "unambiguously campaign related" spending, 424 U.S. at 81, was

shorthand) as a *construction* of the statutory phrase "for the purpose of * * * influencing [federal elections]." *Id.* at 78-81; see p. 3, *supra*. This Court has since recognized that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192; see *WRTL*, 127 S. Ct. at 2670 n.7 (opinion of Roberts, C.J.). With respect to disclosure requirements in particular, this Court's precedents squarely refute appellant's contention that Congress's power is limited to communications that are "unambiguously related" to an identified federal candidate's campaign. The decisions discussed above make clear that compelled disclosure of financing information may be permissible even when the disbursements in question have *nothing* to do with any candidate election.

Nothing in *WRTL* unsettles that principle.[5] The lead opinion determined that, when a particular "electioneering communication" can reasonably be viewed as "something other than as an appeal to vote for or against a specific candidate," Congress may not prohibit the use of corporate or union money to finance the advertise-

[5] The plaintiff in *WRTL* did not link BCRA's corporate-financing and disclosure requirements in the manner that appellant now advocates, but instead affirmatively disavowed any challenge to BCRA's reporting and disclaimer provisions. WRTL's brief in this Court explained: "Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue." Br. for Appellee at 49, *WRTL*, *supra* (Nos. 06-969 & 06-970).

ment. *WRTL*, 127 S. Ct. at 2670, 2673 (opinion of Roberts, C.J.). But the Court did not hold that this sort of electioneering communication is constitutionally exempt from *any* form of regulation. The fact that appellant's advertisements are not *unambiguously* election-related—*i.e.*, the fact that they may reasonably be construed as something other than an appeal to vote against Senator Clinton—does not eliminate the possibility that the advertisements may influence electoral results. See *id.* at 2659 ("We have long recognized that the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application.'") (quoting *Buckley*, 424 U.S. at 42).

Disclosure requirements do not result in "suppression" of speech, however, and nothing in *WRTL* suggests that these lesser burdens render disclosure requirements invalid as applied to issue advocacy. As this Court has long recognized, disclosure regulations *increase* the range of information available to citizens and thereby further First Amendment values. See *McConnell*, 540 U.S. at 197 (explaining that "[p]laintiffs' argument for striking down BCRA's disclosure provisions * * * ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace") (quoting *McConnell*, 251 F. Supp. 2d at 237); *Buckley*, 424 U.S. at 82 (characterizing FECA disclosure requirements as "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view"). The corporate-financing prohibition that this Court invalidated in *WRTL* had no such similar potential to increase the range of information available to the public, and *WRTL* therefore does not cast doubt on this Court's

prior decisions upholding the application of disclosure requirements to various forms of political advocacy.

4. Appellant next contends (J.S. 24-26) that the district court erred when it concluded from the evidence that *Hillary: The Movie* is the functional equivalent of express advocacy. The district court's legal analysis straightforwardly applies the holding of *WRTL*, and its application of that holding to the facts presented here is unexceptionable. Further review of the movie's status as an electioneering communication therefore is not warranted.

a. The lead opinion in *WRTL* held that BCRA's restriction on corporate funding for electioneering communications is constitutional only insofar as it applies to communications that are either "express advocacy or its functional equivalent." *WRTL*, 127 S. Ct. at 2664. The lead opinion defined "the functional equivalent of express advocacy" as speech that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. The opinion immediately then listed criteria relevant to the application of this standard and explained why the advertisements at issue in *WRTL* could be so interpreted:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or

> challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Ibid. The FEC included these criteria, effectively verbatim, in its regulations implementing *WRTL*. See 11 C.F.R. 114.15.

As the district court correctly found, *Hillary: The Movie* is the functional equivalent of express advocacy under these criteria. First, *Hillary: The Movie* repeatedly adverts to Senator Clinton's candidacy and her fitness for the office she sought. J.S. App. 13a n.12; Def.'s Statement of Material Facts As to Which There Is No Genuine Dispute ¶¶ 4-5 (FEC Facts) (attachment to FEC Mot. for S.J.). For example, the film makes the election a central focus, stating that Senator Clinton "will run on attacking Republicans, and being the first woman president—oh isn't that amazing, she's a woman she can walk and talk," and that "[o]ver the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." J.S. App. 13a-14a n.12. The movie also attacks Senator Clinton's character and fitness by declaring that she is "steeped in sleaze," "is not equipped, not qualified to be our commander in chief," and lacks "the legislative gravitas and qualifications enough to elect her [P]resident of the [U]nited [S]tates." *Id.* at 14a-15a n.12; FEC Facts ¶ 5(e). The film concludes that Senator Clinton poses a "fundamental danger * * * to every value that we hold dear." J.S. App. 15a n.12.

Second, these key "indicia of express advocacy" are not offset by any focus on a genuine legislative issue. *WRTL*, 127 S. Ct. at 2667. Rather, the film focuses exclusively on Senator Clinton's character and fitness

for office and her actions in relation to certain controversies during Bill Clinton's presidency. In the few short portions of the film that touch on legislative issues, the film consistently and explicitly uses those issues to further attack Senator Clinton's character and fitness for the presidency. The inclusion of such issue-based criticisms does not mean that appellant's movie is genuine issue advocacy. See *id.* at 2667 n.6 (contrasting issue advertisements in that case with hypothetical advertisement described in *McConnell* that "condemned [the candidate]'s record on a particular issue"). And the overwhelming majority of the movie's advocacy criticizes Senator Clinton's character without reference to any issues at all.

b. Appellant does not seriously contend otherwise.[6] Rather, it asserts that *Hillary: The Movie* is constitutionally exempt from the corporate funding restriction because the film purportedly contains no "actual words * * * that constitute 'an appeal to vote'" against Senator Clinton. J.S. 26. This argument fails as a matter of law, for it seeks to reintroduce a test akin to the "magic words" requirement that this Court rejected in *McConnell* and *WRTL*. The *WRTL* test does not ask whether the communication *contains* specific words constituting an appeal to vote, but instead whether the communication "is susceptible of no reasonable interpreta-

[6] Appellant briefly asserts that the district court erred by quoting a statement that one of the movie's interviewees made about the movie in another forum, *i.e.*, not in the movie itself. J.S. 24-25. But the district court made abundantly clear that its focus was the correct one—on the "substance of the [electioneering] communication" itself. *WRTL*, 127 S. Ct. at 2666; see J.S. App. 13a-15a & n.12 ("[a]fter viewing *The Movie* and examining the 73-page script at length," the court identified a dozen excerpts "indicative of the film's message as a whole").

tion other than *as* an appeal to vote." *WRTL*, 127 S. Ct. at 2667 (emphasis added). As discussed above, the application of the test in *WRTL* further demonstrates that the inquiry is holistic, examining whether the "focus" of the communication is on a legislative issue or instead on an election and the desirability or undesirability of one candidate (or party) in that election. See *id.* at 2666-2667. The lead opinion in *WRTL* looked for "*indicia* of express advocacy," *id.* at 2667 (emphasis added), not just (as appellant proposes) for particular words that were alone sufficient to *constitute* express advocacy. See also *id.* at 2669 n.7 (declining to adopt, as a constitutional test, the interpretation requiring express advocacy that the Court adopted in *Buckley* to narrow an ambiguous term in FECA). Indeed, as the lead opinion in *WRTL* recognized throughout, Congress could permissibly regulate the "*functional equivalent* of express advocacy." *Id.* at 2664, 2665, 2667, 2668, 2669, 2670 (emphasis added). Appellant's reading, under which Congress has the power to regulate express advocacy *and no more*, is therefore unpersuasive. And as appellant effectively concedes, it can prevail on this factual record only if the absence of "magic words" is alone enough to upset the district court's finding that *Hillary: The Movie* is functionally equivalent to express advocacy. Because appellant's legal contention fails, the district court's factual finding is dispositive here.

c. Appellant's final argument (J.S. 26-28) is that the Court in *McConnell* upheld the electioneering-communication financing restriction only as applied to "ads," and that although the statute makes no distinction based on the length of the broadcast, the prohibition is unconstitutional as applied to a "full-length documentary film[]." J.S. 27. This assertion (which the district court

did not separately address) is without merit. The *McConnell* record included evidence of broadcast advocacy longer than the traditional 30- or 60-second spot, such as paid, 30-minute "infomercials." See *McConnell*, 251 F. Supp. 2d at 305-306, 316-317 (opinion of Henderson, J.); *id.* at 547-548 (opinion of Kollar-Kotelly, J.); *id.* at 906 (opinion of Leon, J.). Thus, "to the extent that [broadcast communications during the 30- and 60-day periods] are the functional equivalent of express advocacy," *McConnell*, 540 U.S. at 206, there is no basis in the statute, in this Court's decisions, or in the First Amendment for treating those communications differently when they are broadcast in the form of a two-hour film or when they otherwise vary in length or form from standard television advertisements.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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