No. 07-953

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

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEE

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A. Congress Has Not "Required" This Case To Be Decided By A Three-Judge District Court

Our supplemental brief explains why this Court lacks jurisdiction over appellant's interlocutory appeal from the decision of the three-judge district court denying preliminary injunctive relief. Appellant contends (Supp. Br. 1-7) that the government's position is inconsistent with the language of 28 U.S.C. 1253, under which the Court's jurisdiction over this appeal turns on whether appellant's suit is "required by any Act of Congress to be heard and determined by a district court of three judges." That argument lacks merit.

Appellant correctly explains (see Supp. Br. 3) that, under the plain terms of Section 1253, the relevant question is whether *Congress* has "required" this suit to be adjudicated by a three-judge district court, not whether *appellant* has

"required" the suit to be heard by such a tribunal. That premise, however, self-evidently does not support appellant's contention that its suit falls within Section 1253's coverage. Congress cannot naturally be said to have "required" a three-judge court when it authorized a private party to *choose* a different court. See Gov't Supp. Br. 6. Indeed, if Section 1253 were rewritten in the way that appellant accuses the government of attempting to rewrite it (*e.g.*, Appellant Supp. Br. 2)—*i.e.*, as making this Court's jurisdiction contingent on whether the *plaintiff* has "required" the suit to be heard by a three-judge court—appellant's argument that Section 1253 applies here would be much stronger. It is precisely because Section 1253 focuses on whether *Congress* has "required" adjudication by a three-judge court that the statute is not triggered when the use of such a court depends on a plaintiff's election.

At most, appellant's focus on whether Congress has required a three-judge panel for this suit exposes the ambiguity of the phrase "action, suit or proceeding" in 28 U.S.C. 1253. To the extent that phrase refers to the suit actually filed subsequent to the plaintiff's election of a three-judge panel, then at that point a three-judge panel is required. To the extent it refers to the suit in the abstract (*i.e.*, the substantive claims asserted) before the election takes place, then a three-judge panel is not required because a suit asserting the same legal claims could have been filed before and heard by a single judge.[1] This simply restates the alternatives of looking at the question from the perspective of the district court (three-judge panel required) or the

[1] BCRA § 403(d)(2) appears to support the latter reading because it refers to "any action" as a broad concept and allows the plaintiff to elect to have the three-judge court provisions "apply to the action." 116 Stat. 114. That wording suggests that the plaintiff's election of a three-judge court is distinct from, rather than part of, the pre-existing "action."

litigant (not required). The difficulty of concluding that a non-mandatory three-judge panel is "required," especially when Section 1253 is read in light of rules of construction disfavoring piecemeal appeals to this Court, counsels in favor of resolving those ambiguities against jurisdiction.

Appellant's reliance (Supp. Br. 7-8) on *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-5992, 2004 WL 1946452 (D.C. Cir. Sept. 1, 2004) (*WRTL*), is misplaced. Because the suit in *WRTL* was filed before December 31, 2006, the three-judge procedure was mandatory rather than elective. See Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(d)(1), 116 Stat. 114. Under the law in effect at that time, the suit was unambiguously "required" by BCRA to be adjudicated by a three-judge court, and the District of Columbia Circuit correctly held that the plaintiff's interlocutory appeal lay to this Court rather than to the court of appeals. The court in *WRTL* had no occasion to apply 28 U.S.C. 1253 to a post-2006 suit, in which the three-judge court procedure is elective rather than mandatory.[2]

B. Appellant's Policy Arguments Lack Merit

Appellant contends that construing 28 U.S.C. 1253 to apply in these circumstances would represent a wise policy choice because "there needs to be a mechanism for expeditious appeal of preliminary injunction denials [in suits chal-

[2] Appellant speculates (Supp. Br. 8) that, if the plaintiff in a post-2006 challenge to BCRA elected a three-judge district court and the court granted a preliminary injunction, the FEC would argue that the injunction was reviewable by this Court. As the government's supplemental brief explains (at 9 n.2), however, we agree with appellant that both grants and denials of preliminary injunctive relief in such cases would be reviewable in the same manner. The FEC's appeal from a preliminary injunction issued by a three-judge court in a post-2006 suit would therefore lie to the court of appeals rather than to this Court.

lenging BCRA] in order to protect free speech." Appellant Supp. Br. 9; see *id.* at 9-11. But the question here is not *whether* such a mechanism will be provided; the question is only which court will furnish that mechanism. This Court's cases establish a preference for having the court of appeals perform that role.

1. This Court has consistently interpreted Section 1253 in light of the "overriding policy, historically encouraged by Congress, of *minimizing* the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (emphasis added); see Gov't Supp. Br. 5. That policy, the Court has stated, "must be applied with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court." *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970).

Without explicitly acknowledging that established rule of construction, appellant suggests (Supp. Br. 6, 10) that such an interpretive approach is no longer appropriate because Congress has reduced the range of circumstances in which three-judge courts are required. This Court, however, has never disavowed the canon of construction set forth in such cases as *Gonzalez* and *Goldstein*. And, to the extent that the overall coverage of three-judge court statutes has declined during the years since those decisions were issued, that fact simply suggests that Congress has embraced the view that this Court's mandatory jurisdiction should be minimized. Indeed, BCRA itself reflects Congress's determination that, in constitutional challenges to that statute, the three-judge court procedure was essential (*i.e.*, required) only during a relatively brief period following the law's enactment (*i.e.*, in suits filed on or before December 31, 2006). See BCRA § 403(d), 116 Stat. 114.

2. If this Court finds jurisdiction lacking under Section 1253, the courts of appeals will provide "a mechanism for expeditious appeal of preliminary injunction denials" (Appellant Supp. Br. 9) under 28 U.S.C. 1292(a)(1) in post-2006 constitutional challenges to BCRA.[3] Not only is that result consistent with the preference reflected in *Gonzalez* and *Goldstein*, but it has practical advantages as well. In many instances, particularly when a preliminary injunction is denied at a time when this Court is in recess, the court of appeals may be better positioned to give expeditious attention to such an appeal. See Gov't Supp. Br. 9.

The court of appeals' decision in such a case is in turn reviewable by this Court under 28 U.S.C. 1254(1). Indeed, because Section 1254 vests this Court with certiorari jurisdiction over "[c]ases in the courts of appeals," the Court has authority (albeit authority that is very rarely exercised) to hear such a case even before the court of appeals renders its decision. See 28 U.S.C. 2101(e); S. Ct. R. 11; *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947)

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[3] Without citing any statute or rule, appellant states (Supp. Br. 11 n.3) that "[t]he time for noticing appeal in the D.C. Circuit has expired." That is incorrect. See Gov't Supp. Br. 10 n.3. The district court's decision denying appellant's request for a preliminary injunction was issued on January 15, 2008. BCRA § 403(a)(3)'s ten-day deadline for filing a notice of appeal applies only to an appeal to this Court from a "final decision" of the three-judge district court. 116 Stat. 114. If this Court lacks jurisdiction pursuant to 28 U.S.C. 1253, then the 30-day deadline in 28 U.S.C. 2101(b) is likewise inapplicable. Rather, the time for filing a notice of appeal to the court of appeals is governed by the generally applicable provisions of 28 U.S.C. 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(B), which establish a 60-day deadline in civil cases to which a federal agency (here, the FEC) is a party. Thus, appellant can still preserve its option to file a timely appeal to the District of Columbia Circuit if it files a protective notice by March 17, 2008. See Gov't Supp. Br. 10 n.3.

(Court granted certiorari before judgment to review a preliminary injunction issued by the district court). Even if Section 1253 is held to be inapplicable to post-2006 BCRA challenges in which the plaintiff elects the three-judge court procedure, this Court therefore will have ample authority to hear such cases and to provide whatever clarification it deems necessary concerning either the applicable First Amendment principles or the standards governing preliminary injunctive relief.

Thus, the disputed jurisdictional question in this case goes not to this Court's *power* to resolve interlocutory disputes in constitutional challenges to BCRA, but to its *duty* to do so. Appellant identifies no reason to conclude (or to suppose that Congress concluded) that recognition of such a duty would be sound policy.[4]

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[4] The appeal in this case presents a relatively pure question of law—*i.e.*, whether advertisements that fall within BCRA's definition of "electioneering communication," BCRA § 201(a) (2 U.S.C. 434(f)(3) (Supp. V 2005)), but that do not constitute the "functional equivalent of express advocacy" under the lead opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) (opinion of Roberts, C.J.), may constitutionally be subjected to BCRA's reporting and disclaimer requirements. Under appellant's construction of 28 U.S.C. 1253, however, this Court would also have been required to review the district court's factbound ruling (see J.S. App. 10a-11a) that "Hillary: The Movie" is the functional equivalent of express advocacy if appellant had chosen to appeal the district court's denial of preliminary injunctive relief with respect to the film itself. More generally, determining (sometimes on the basis of an incomplete record) whether a particular plaintiff has established a substantial likelihood of success on the merits of its constitutional claim, and assessing the relative harms to the parties of granting or withholding interim relief, will rarely be a sound use of this Court's resources. BCRA § 403(a)(3)'s grant of a right of appeal to this Court from the district court's "final decision" in this case is itself a significant deviation from the generally discretionary character of this Court's docket. That deviation, however, is mandated by BCRA's plain

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For the reasons stated above and in the FEC's supplemental brief, the appeal should be dismissed for lack of jurisdiction. In the alternative, for the reasons explained in the FEC's motion to dismiss or affirm, the appeal should be dismissed for lack of a substantial federal question, or the judgment of the district court should be affirmed.

Respectfully submitted.

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MARCH 2008

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text. Neither BCRA nor 28 U.S.C. 1253 contains a comparable directive that this Court entertain appellant's direct appeal from the interlocutory order at issue here.