UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 07-2240 (ARR, RCL, RWR) REPLY IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS COUNTS 3 AND 4 OF THE AMENDED COMPLAINT

Defendant Federal Election Commission ("Commission") submits this reply memorandum in further support of its Motion to Dismiss Counts 3 and 4 of the Amended Complaint. The Commission agrees with Plaintiff that Count 4 should be dismissed without prejudice as moot. Count 3, however, should be dismissed with prejudice because Plaintiff's film is the functional equivalent of express advocacy, and therefore Plaintiff has no constitutional right under *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"), to use its corporate treasury funds to broadcast *Hillary: The Movie* on cable television.

I. PLAINTIFF'S FILM IS THE FUNCTIONAL EQUIVALENT OF EXPRESS ADVOCACY

The main thrust of Plaintiff's response (*see* Pl.'s Mem. of L. Resp. to FEC's Mot. to Dismiss Counts 3 & 4 at 5-8, 12-16 ("Pl.'s Mem.")) is that *Hillary: The Movie* is constitutionally exempt from the electioneering communication ("EC") corporate funding restriction because the film purportedly contains "no *words* constituting" an appeal to vote against Senator Clinton. (*Id.* at 1.) This argument fails as a matter of law, for it seeks to reintroduce a test akin to the "magic words" requirement that the Supreme Court rejected in *McConnell v. FEC*, 540 U.S. 93 (2003),

and *WRTL*. Although the *WRTL* test requires a broadcast to be the "*functional equivalent* of express advocacy," 127 S. Ct. at 2667 (emphasis added), that analysis is necessarily broader than a wooden, "magic words" interpretation of express advocacy or any other standard that relies upon the presence of particular words, phrases, or grammatical constructs.

The history of the Supreme Court's express advocacy jurisprudence demonstrates the shortcomings of Plaintiff's argument. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court examined the provision of the Federal Election Campaign Act ("FECA") that limited expenditures made by certain persons "relative to a clearly identified candidate." *See id.* at 39-51. The Court held that this provision was unconstitutionally vague and, accordingly, construed it narrowly to encompass only expenditures for communications that expressly advocate the election or defeat of a candidate. *Id*. at 44; *see also id. at* 79-80 (employing same narrowing construction for certain disclosure requirements); *McConnell*, 540 U.S. at 190-93 (discussing *Buckley*). *Buckley* characterized express advocacy communications as those "containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52; *see also McConnell*, 540 U.S. at 191.

In part because the express advocacy requirement proved easy to evade, *see McConnell*, 540 U.S. at 193, Congress enacted the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, which expanded the application of FECA's corporate and union financing restriction. In relevant part, BCRA extended the restriction to all electioneering communications, which BCRA defined as television or radio broadcasts that refer to a federal candidate within a certain time window in advance of an election. *See* 2 U.S.C. § 434(f)(3)(A)(i). Other than a reference to a candidate, there is no content requirement in the EC definition. *See id*.

After BCRA was passed, the *McConnell* plaintiffs challenged the constitutionality of the EC definition because, *inter alia*, it restricted corporate and union funding of communications that did not contain express advocacy. *McConnell*, 540 U.S. at 205-06 ("[P]laintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications."). The Supreme Court rejected this argument, finding that the "vast majority" of communications mentioning candidates within the EC windows are "the functional equivalent of express advocacy," and therefore ECs may constitutionally be subject to the corporate funding restriction. *Id*. at 206. The Court further emphasized that its prior "express advocacy limitation [in *Buckley*], in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-92. The Court accordingly upheld BCRA's corporate funding restriction on its face. *Id*. at 209.

In *WRTL*, the Court held that BCRA's funding restriction for ECs could be applied constitutionally to broadcasts meeting the statutory EC definition only if they are the "functional equivalent" of express advocacy, *i.e.*, are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. This test, like *McConnell*, imposes no magic-words requirement; instead, *WRTL* explicitly states that the analysis must "focus[ ] on the substance of the communication." *Id*. at 2666. *WRTL* overruled neither *McConnell's* facial upholding of the EC provision nor its explanation that *Buckley's* express advocacy interpretation is not a constitutional requirement.

Nonetheless, Plaintiff now attempts to import a narrow interpretation of express advocacy into the *WRTL* test. (*See, e.g.*, Pl.'s Mem. at 8 ("[T]he issue that must be decided . . . is whether there are actual words in *Hillary* that contain *WRTL II*'s required unambiguous 'appeal to

vote . . . .'").)[1] In support of its claim, Plaintiff selectively quotes *WRTL*'s language regarding an "appeal to vote." (*See id*. at 5-8.) Plaintiff fails to note, however, that the test from which this language is taken does not ask whether the communication contains specific words constituting an appeal to vote (as Plaintiff repeatedly suggests), but instead whether the communication "is susceptible of no reasonable interpretation other than *as* an appeal to vote." *WRTL*, 127 S. Ct. at 2667 (emphasis added). *WRTL*'s application of the test further demonstrates that the inquiry is holistic, examining the "focus" of the communication, any "position" it manifests, and whether the "content is consistent" with "genuine" issue advocacy. *Id*. Indeed, when the Court analyzed whether the content of WRTL's ads contained "indicia of express advocacy," it reviewed whether the ads "mention an election, candidacy, political party, or challenger," and whether they "take a position on a candidate's character, qualifications, or fitness for office," not whether the ads contain specific words exhorting viewers to vote for or against a candidate. *Id.* Thus, *WRTL* does not support Plaintiff's argument that the presence or absence of specific words of electoral advocacy is the determining factor in whether a communication is the *functional equivalent* of express advocacy.

As set forth in the Commission's motion to dismiss, Plaintiff's film is overwhelmingly focused on Senator Clinton's candidacy for president and devoted to attacking her character and her fitness for that office, such that it is susceptible of no reasonable interpretation other than as

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[1] Although Plaintiff has studiously avoided using the phrase "magic words," Plaintiff has acknowledged that this is the import of its argument. *See* Tr. of Prelim. Inj. Hr'g at 14-16 (Jan. 10, 2008) (attached as Exhibit 1):

> JUDGE LAMBERTH: Do you have to use the magic words "vote" for it to be express advocacy; is that your position? . . .
> MR. BOPP: Yes.
> . . .
> MR. BOPP: [The film] does not say vote against her.
> JUDGE LAMBERTH: Because it did not use the magic words[?]
> MR. BOPP: Exactly right.

an appeal to vote against her. (*See* Def.'s Mem. of L. in Support of Its Mot. to Dismiss Counts 3 and 4 of the Am. Compl. at 6-10 ("Def.'s Mem.").) *See also Citizens United v. FEC*, 530 F. Supp. 2d 274, 279-80 (D.D.C. 2008) ("*The Movie* is susceptible of no other interpretation than to inform the electorate 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."). Under the *WRTL* test, *Hillary: The Movie* "is thus the functional equivalent of express advocacy." *Citizens United*, 530 F. Supp. 2d at 280.

Plaintiff's related argument (Pl.'s Mem. at 12-15) that the film is issue advocacy — because of what Plaintiff calls the "dissolving-distinction problem" (Pl.'s Mem. at 6-7) — is similarly untenable. As the Chief Justice wrote in *WRTL*, the relevant constitutional question for communications that purport to be issue speech is not whether the communications *contain* issue speech, but whether they "*focus* on a legislative issue . . . and urge the public to contact public officials with respect to the matter." *WRTL*, 127 S. Ct. at 2667 (emphasis added). Merely including references to an "issue" within a communication that focuses on a candidate's fitness for office neither immunizes the communication from regulation nor renders it issue speech. *See McConnell*, 540 U.S. at 193 & n.78 (noting that, despite ad's references to family values issues, "[t]he notion that [the Bill Yellowtail ad] was designed purely to discuss the issue of family values strains credulity").[2] Thus, as *WRTL* confirmed, the relevant question is whether "the substance of the communication" as a whole is the functional equivalent of express advocacy. *See WRTL*, 127 S. Ct. at 2666; *see also MCFL*, 479 U.S. at 249-50 (holding that newsletter's

[2] As the Court has noted in the context of express advocacy, when a communication goes "beyond issue discussion" to campaign speech, the communication "falls squarely within" the corporate financing restriction. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249-50 (1986) ("*MCFL*") (holding that corporation's newsletter was express advocacy, despite inclusion of issue speech as part of the communication).

combination of exhortation to vote pro-life, plus separate list of pro-life candidates, constituted express advocacy, even though newsletter did not explicitly appeal for votes for named candidates).

Plaintiff also claims that its film is akin to the issue ads in *WRTL III*, Civ. No. 04-1260 (D.D.C.), and *Christian Civic League of Maine v. FEC*, Civ. No. 06-614 (D.D.C.). Those ads, however, contained only brief references to candidates, while focusing on legislative issues and urging the public to take positions on those issues. (*See* Pl.'s Mem. at 13 n.1, 14 n.2.) *Hillary: The Movie* inverts this formula: It contains only brief references to legislative issues, while focusing on Senator Clinton's character and fitness for office and omitting any appeal for public action (other than voting against Senator Clinton). (*See* Def.'s Mem. at 7-9.) In fact, even the fleeting instances of issue-related discussion within *Hillary: The Movie* are not genuine issue speech, for each issue is discussed only as a further means of attacking Senator Clinton's character and fitness for higher office. (*See, e.g.*, Am. Compl. Exh. 2 at 46-47 (discussing immigration debate and concluding that Senator Clinton's response "doesn't suggest presidential stature or character"); *id*. at 47-49 (discussing Iraq war and concluding that "the potential future commander-in-chief" is "not flipping and flopping. [S]he's lying.").) In addition to contemporaneously tying its brief issue discussions to her character, the film concludes emphatically that these are reasons that she should not be elected to the presidency. (*See id*. at 68-72 (concluding, *inter alia*, that Senator Clinton "has great defects" as potential president, lacks experience to "become the most powerful person in the country," is not "going to [be] good for the security of the United States," and poses "fundamental danger . . . to every value that we hold dear").) Plaintiff does not and cannot identify a single issue that is raised in the film without being connected to Senator Clinton's candidacy. Thus, under the plain language of the

WRTL test, *Hillary: The Movie* does not "focus on a legislative issue," and it therefore cannot be a "genuine issue ad."[3] Because the film has no reasonable interpretation other than as an appeal to vote against Senator Clinton, Count 3 of the Amended Complaint must fail as a matter of law.

II. PLAINTIFF'S REMAINING ARGUMENTS ARE ALSO WITHOUT MERIT

Plaintiff makes four additional arguments in opposition to the Commission's motion to dismiss, and each one lacks merit. First, Plaintiff claims that the EC financing restriction should be construed to apply only to "ads," not to "a full-length documentary movie shown in theaters, sold on DVD, and with a compendium book." (Pl.'s Mem. at 10-11.) But none of these cited methods of distributing *Hillary: The Movie* is subject to any EC regulations whatsoever; only the cable television distribution of the film falls within the statutory definition of an EC, and that definition draws no distinction between advertisements or movies. *See* 2 U.S.C. § 434(f)(3)(A)(i) (defining EC as "broadcast, cable, or satellite communication"). Furthermore, although *McConnell* upheld BCRA's corporate financing restriction on its face, 540 U.S. at 209, Plaintiff attempts to limit this holding to advertisements, stating that "there was no record evidence [in *McConnell*] that *movies* were a problem." (Pl.'s Mem. at 11.) This assertion, however, is belied by the thirty-minute broadcasts that, as Plaintiff notes, were not only in the *McConnell* record, but were actually discussed by the district court in that case. *See* Pl.'s Mem. at 10 (*citing McConnell*, 251 F. Supp. 2d at 305-06, 316-17); *see also McConnell*, 251 F. Supp. 2d at 547-48 (opinion of Kollar-Kotelly, J.), 906 (opinion of Leon, J.). Thus, the *McConnell*

[3] Plaintiff's claim (Pl.'s Mem. at 15) that its film is a "biography" fails for the same reason: Senator Clinton's actions and experiences are discussed solely in the context of criticizing her character and fitness for office. (*See* Def.'s Mem. at 6-9.) *Hillary: The Movie*, therefore, is as much a biography of Senator Clinton as the Bill Yellowtail ad was a biography of Bill Yellowtail.

Court undeniably was aware of the existence of ECs longer than thirty- or sixty-second ads when it upheld the EC definition.[4]

Second, Plaintiff argues (Pl.'s Mem. at 8-12) that *Hillary: The Movie* is "the functional equivalent of a book," and therefore it is entitled to greater First Amendment protections than is a standard television advertisement. Under FECA, however, this is an irrelevant comparison, for a book (such as the companion book to Plaintiff's film) could never be an EC. Plaintiff's choice to broadcast the film on cable television falls squarely within the EC provision, and neither this provision nor the Supreme Court's opinions provide a basis for exempting certain broadcasts simply because they differ in form from standard television advertisements, much less because they might *theoretically* have been distributed in some other medium subject to different regulation.[5] *Cf. McConnell*, 540 U.S. at 207 (rejecting argument that EC provision is "underinclusive because it does not apply to advertising in the print media").

Third, as it has done several times during this litigation (*see, e.g.*, Tr. of Prelim. Inj. Hr'g at 19, 48-49 (Jan. 10, 2008) (attached as Exh. 1)), Plaintiff again attempts to draw a parallel between *Hillary: The Movie* and the film *Fahrenheit 9/11*. (Pl.'s Mem. at 11.) The apparent implication of Plaintiff's argument is that, if Michael Moore's film criticizing President Bush was not subject to regulation as an EC, then neither should Plaintiff's film criticizing Senator

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[4] Plaintiff also repeatedly quotes isolated words from *McConnell* in an attempt to argue that the Court never *specifically* found movies to be constitutionally regulable. (*See* Pl.'s Mem. at 9-10.) This argument, however, is baseless, for *McConnell*'s facial upholding of the EC corporate funding restriction included film-length broadcasts by definition. *See* 2 U.S.C. § 434(f)(3)(A)-(B) (defining ECs by method of broadcast and providing no exemption based on length of broadcast).

[5] Plaintiff's argument also fails as a factual matter. For example, as the Commission noted in its motion to dismiss, Plaintiff's film contains multiple visual attacks on Senator Clinton's character that are not reflected in the written script. (Def.'s Mem. at 9.) Because these attacks consist primarily of carefully edited video montages that could not be duplicated on the pages of a book, *Hillary: The Movie* cannot reasonably be considered "the functional equivalent of a book."

Clinton. But this comparison is meaningless, for *Fahrenheit 9/11* was never shown on television during an electioneering communication window, and thus it was never an EC or otherwise subject to the Commission's jurisdiction.

Finally, Plaintiff argues (Pl.'s Mem. at 16-17) that Count 3 of the Amended Complaint should not be dismissed because the Commission has sought discovery regarding the "press exception" to the EC regulations. However, the Commission is seeking this discovery primarily to prepare for the possibility that Plaintiff, having failed in its constitutional claims, may raise a press exemption argument (*see* Exh. 1 at 19 (comparing film to "Frontline or Nova or 48 Hours or 60 Minutes")) in the context of Plaintiff's challenges to the EC *disclosure* provisions — challenges that are not at issue in this motion to dismiss. The Commission has every right under the Federal Rules of Civil Procedure to protect itself through discovery against an argument — no matter how weak that argument would be.[6] Plaintiff cites no authority for the proposition that the Commission's inquiry about its other claims somehow rescues Plaintiff's *financing* challenge from its legal insufficiency. There is no such authority: Count 3 fails as a matter of law, and the Commission's unrelated discovery request cannot redeem that failure.

III. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss Count 3 of the Amended Complaint with prejudice, and dismiss Count 4 of the Amended Complaint without prejudice as moot.

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[6] The argument would lack merit because, *inter alia*, Plaintiff intends to pay a cable provider to air the film. Am. Compl. ¶ 28; FEC Advisory Opinion 2004-30 at 7 (Sept. 10, 2004), http://saos.nictusa.com/aodocs/2004-30.pdf (denying media exemption to Citizens United). In any event, Plaintiff does not actually attempt to claim the press exemption in its opposition to the Commission's motion to dismiss (*see* Pl.'s Mem. at 16-17; *see also* Am. Compl. ¶ 15 (citing Advisory Opinion 2004-30)), and no facts about the exemption are relevant to the constitutional issue now before the Court.

Respectfully submitted,

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

/s/ Adav Noti
Adav Noti (D.C. Bar No. 490714)
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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