No. 08-205

IN THE
SUPREME COURT OF THE UNITED STATES

CITIZENS UNITED, *Appellant*,
v.
FEDERAL ELECTION COMMISSION, *Appellee*.

On Appeal from the United States District Court
For the District of Columbia

MOTION OF THE WYOMING LIBERTY GROUP AND GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICI CURIAE* FOR AS LONG AS ONE MINUTE AND FOR DIVIDED ORAL ARGUMENT

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In accord with Rules 21 and 28 of this Court, the Wyoming Liberty Group and Goldwater Institute Scharf-Norton Center for Constitutional Litigation move for leave to participate in oral argument for as long as one minute as *amici curiae* and for divided oral argument.

1. Senators and Citizens Share Equal Rights to be Heard by This Court

Before this Court is a sizeable collection of Senators and former Representatives whom this Court has agreed may participate in oral argument. One Senator describes himself as "uniquely qualified" to educate this Court about the Bipartisan Campaign Reform Act ("BCRA"). McConnell Mot. 2. Senator McCain and others promised to

deliver a well touted, but vaguely referenced, "additional perspective." FEC Mot. 3. We, the people, wish to provide a counterpoise to the argument of these distinguished gentlemen.

The Wyoming Liberty Group and Goldwater Institute offer this Court a systematic and reasoned argument why Section 203 of the BCRA, upheld in *McConnell v. FEC*, 540 U.S. 93 (2003), cannot be applied in a manner protective of speech by the Federal Election Commission ("FEC"). As they have done in their earlier briefings, the Wyoming Liberty Group and Goldwater Institute provide extensive examples of how the Commission has misinterpreted the law and befuddled or contradicted itself on key free speech principles found in *McConnell* and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). *See* Opening Brief at 17; 24-25 (detailing the FEC's extensive areas of potentially banned speech in rulemaking notices), 28-33 (analyzing the National Right to Life advisory opinion request and open meeting transcript to illustrate the continued misapplication of the appeal to vote test). The perspectives offered by the Wyoming Liberty Group and Goldwater Institute prove exceptional and are rooted in norms conducive to free expression.

It should not go unnoticed that public officials, like those lined up for oral argument, would be subject to increased accountability were this Court to fundamentally alter its holdings in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell*. Should this Court open the floodgates of speech, citizens will be better able to organize and publicly discuss the qualifications of political candidates and incumbents. Reversing this Court's jurisprudential path in both cases ensures more public discussion about elected representatives – or what the *Buckley* Court described as "uninhibited,

robust, and wide-open" debate. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (internal citations and quotations omitted). No doubt, incumbents would find such a victory for the people quite aversive, as would members of the FEC, who, more often than not, experience their organization as something of a commissariat.

It is natural that those in power fear such oversight. As Alexis De Tocqueville explained, "Among democratic nations it is only by association that the resistance of the people to the government can ever display itself; hence the latter always looks with ill favor on those associations which are not in its power" and when those associations prove powerful, the exercise of their liberty is "almost regarded as a dangerous privilege." Alexis De Tocqueville, *Democracy in America* 384 (Francis Bowen, ed., University Press, Cambridge 1863). Without doubt, many of the elected representatives before this Court understand that citizens who speak freely exercise just such a dangerous privilege – establishing all the more reason why this Court should permit the Wyoming Liberty Group and Goldwater Institute to be heard since it has granted incumbents the same privilege. Allowing the powerful few to speak while denying citizens the same ability attenuates healthy debate that this Court so depends upon as a chamber of justice.

2. The Wyoming Liberty Group and Goldwater Institute Offer Unique Details About the Unworkable Nature of *McConnell's* Holding

The Wyoming Liberty Group and Goldwater Institute were the sole *amici curiae* to thoroughly describe how the Commission consistently errs in applying this Court's "appeal to vote" test. In addition, counsel to these *amici* served as an advisor to two chairmen of the FEC, affording more thorough insight about why this Court's holding in *McConnell* can never be expected to be applied by the Commission in a manner respectful of liberty. Replete with FEC advisory opinions, historical

Commission references, enforcement matters, split FEC votes, and open meeting transcripts, these briefs demonstrated why McConnell ought to be undone. See WLG Opening Brief at 17, 24-25, 28-33; Supplemental Brief at 9-10 (illustrating the Commission's inability to consistently apply its own regulations).

It was the Wyoming Liberty Group and Goldwater Institute's opening brief that illustrated a striking history of contradiction, abysmal misunderstanding, internal bickering, confusion, and complete constitutional chaos practiced by the Commission in implementing this Court's holding in McConnell and then WRTL. It was both groups who further developed this theme into their supplemental brief, illustrating more of the FEC's follies. Indeed, only these amici presented these arguments in painstaking detail to this Court and are best equipped to make them in a concise manner in oral argument.

In rare circumstances, this Court does permit divided oral arguments to assist its resolution of complex matters, especially where parties hold different interests. See Robert L. Stern, Eugene Gressman, Et al., Supreme Court Practice 680 (8th Ed. 2002). It remains true that Citizens United assails the electioneering communications ban, but only in the most reserved manner. Citizens United did articulate a compelling constitutional argument about the need to protect a limited form of communication, video-on-demand. It did a commendable job explaining why this Court's holding in *Austin* should be reversed in its supplemental briefing. It did not provide this Court with foundational and detailed reasons why this Court's holding in *McConnell* is inherently unworkable. It did not bring years of historical data, enforcement actions, and contradictory Commission analyses to this Court's attention. Likewise, Senator McConnell's brief recounted analyses put before this Court in the Senator's first challenge to the BCRA. *See*

McConnell *Amicus* Brief at 12-14 (repeating the Senator's examples previously before this Court in "Brief for the Appellants/Cross-Appellees Senator Mitch McConnell, et al." in No. 02-1674). It did not offer more current details and analysis of the Commission's haphazard application of *McConnell*. The Wyoming Liberty Group and Goldwater Institute did. It is precisely this sort of modern and exhaustive analysis that proves helpful in answering this Court's inquiry about whether the part of *McConnell* upholding the facial validity of Section 203 of the BCRA should be overruled.

The Wyoming Liberty Group and Goldwater Institute provided this Court with a systematic explanation and critique of the FEC's fabrication of a misplaced and virulent appeal to vote test. They illustrated, with specific reference to FEC practices, that *McConnell*'s appeal to vote test is inherently flawed, giving inevitable rise to Commission speech standards that include two-prong, eleven-factor analyses. Opening Brief at 18, 23. Similarly, they demonstrated to this Court that even the Commission does not apply it consistently. *Id.* at 28-33 (discussing haphazard approaches). It remains the place of these *amici* to bring these details to the Court's attention for further clarification and explanation.

This Court has granted leave to *amici curiae* for oral argument when they present divergent views, expert and detailed analysis, or special knowledge in the matter at hand. *See, e.g., Citizens United v. FEC*, 08-205 (2009) (Order, August 17, 2009, granting motions to participate in oral argument); *Alabama v. Shelton*, 535 U.S. 654 (2002) (National Association of Criminal Defense Lawyers permitted to participate in oral argument as *amicus curiae*); *Concrete Pipe & Products v. Construction Laborers*

Pension Trust, 508 U.S. 602 (1993) (Pension Benefit Guaranty Corporation permitted to participate in oral argument as *amicus curiae*).

Because this Court has already granted leave to the Senators and former Representatives to participate in oral argument, it should grant the Wyoming Liberty Group and Goldwater Institute's motion for leave due to the exclusive research and analysis they provided concerning this Court's holding in *McConnell*, as well as current evidence addressing the Commission's inconsistent application of it.

3. Conclusion

Appellant Citizens United has declined the Wyoming Liberty Group and Goldwater Institute's request to participate in oral argument. The Wyoming Liberty Group and Goldwater Institute respectfully request that their motion for leave to participate in oral argument and for divided oral argument be granted and counsel given as long as one minute to present oral argument, either allocated from Citizens United's allotment or from this Court's extension of oral argument time limits.

Respectfully submitted,

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