Free Speech v. Campaign Finance Laws: The Reargument

Citizens United v. Federal Election Commission, No. 08-205, concerns the validity of the limitations placed on corporate-funded election broadcasts by the McCain-Feingold campaign finance law in the period before elections. The case, featuring a documentary attacking Hillary Rodham Clinton, was argued before the Supreme Court in March 2009, and media accounts confirm that the government's case seemed threatened when the Deputy Solicitor General had trouble answering a hypothetical question about the regulation of books containing "the functional equivalent of express advocacy." Adam Liptak, *Justices Consider Interplay Between First Amendment and Campaign Finance Laws,* N.Y. Times, Mar. 24, 2009, http://www.nytimes.com/2009/03/25/washington/25scotus.html ("A quirky case about a slashing documentary attacking Hillary Rodham Clinton would not seem to be the most obvious vehicle for a fundamental re-examination of the interplay between the First Amendment and campaign finance laws. But by the end of an exceptionally lively argument at the Supreme Court on Tuesday, it seemed at least possible that five justices were prepared to overturn or significantly limit parts of the court's 2003 decision upholding the McCain-Feingold campaign finance law, which regulates the role of money in politics."); Dahlia Lithwick, *The Supreme Court Reviews* Hillary: The Movie, Slate, Mar. 24, 2009, http://www.slate.com/id/2214514/ ("But it seems to me that all this talk of book banning and government regulation of signs in Lafayette Park is a pretty good way to get all five of them in the mood to run down yet more restrictions on political advertising. And maybe even back up and do it again.").

Still, it was somewhat of a surprise when, on the last regular day of the Court's term in June 2009, the Court announced it would rehear the case on September 9. More surprising, the Court asked for supplemental briefing on the following question: "For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n,* 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?" *Citizens United v. FEC,* Order, 2009 WL 1841614 (Jun. 29, 2009).

If the Court were going to decide the case on narrow statutory grounds, such as a ruling that video-on-demand is not properly classified as an electioneering communication, reargument on the constitutional question would be unnecessary. The order indicates a Court that is at least seriously considering the question. See Richard L. Hasen, *The Supreme Court Gets Ready to Turn on the Fundraising Spigot,* Slate, Jun. 29, 2009, http://www.slate.com/id/2221753/, and it stands in sharp contrast with the Court's statement a week before the order in *Northwest Austin Municipal Utility District Number One v. Holder,* 129 S.Ct. 2504 (2009), that "[o]ur usual practice is to avoid the unnecessary resolution of constitutional questions."

The simultaneous supplemental briefs were not available by *PREVIEW*'s deadline. The original case preview written before the March 2009 argument appears on page 473.

— Richard L. Hasen

Can McCain-Feingold Restrict a Corporation's "Video-on-Demand" Candidate Documentary and Advertising?

by Richard L. Hasen

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ISSUES

Does the McCain-Feingold provision barring corporate-funded broadcasts that mention a federal candidate shortly before an election constitutionally apply to corporate-funded broadcasts offered through a cable television video-on-demand service?

Are the McCain-Feingold provisions requiring disclosure by funders of broadcast advertising that mentions a federal candidate shortly before an election unconstitutional when the advertising reasonably might be interpreted as something other than an unambiguous appeal to vote for or against a candidate?

FACTS

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA," more commonly referred to as "McCain-Feingold"). This was the most significant federal campaign finance law since the 1974 amendments to the Federal Election Campaign Act (FECA), whose constitutionality the Supreme Court considered in *Buckley v. Valeo,* 424 U.S. 1 (1976). Although BCRA made many changes in the law, the changes most relevant for purposes of understanding this case concern BCRA's "electioneering communications" provisions.

FECA required those who spend money on activity related to federal elections to disclose their contributions and spending to the Federal Election Commission (FEC) and (continuing a law predating FECA) it barred corporations and unions from spending general treasury funds on election-related activities. FECA allowed corporations and unions instead to set up separate political committees (commonly referred to as PACs) to spend money on these campaigns, but it limited both the amount that could be contributed and who could be solicited to contribute to these PACs.

By the 1990s, many people viewed the FECA as ineffective, thanks to an interpretation of the statute by the Court in *Buckley.* The *Buckley*

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CITIZENS UNITED V. FEDERAL ELECTION COMMISSION
DOCKET NO. 08-205

ARGUMENT DATE:
MARCH 24, 2009
FROM: THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Case at a Glance

An ideological corporation produced an anti-Hillary Clinton documentary. The corporation wanted to air the documentary during the presidential primary season through a cable television "video-on-demand" service and to advertise for it on television. McCain-Feingold bars certain corporate-funded television broadcasts, such as this documentary, in the period before the election and requires disclosure by the funders of election-related broadcast advertising, such as these ads. The question before the Court is whether these limits and disclosure rules are unconstitutional as applied to this case.

Court held that, to avoid vagueness and overbreadth problems within FECA, its provisions should be interpreted to reach only election-related activity containing "express advocacy," such as "Vote for Smith." Individuals, corporations, and unions began running "issue ads" that appeared aimed at influencing federal elections but that escaped FECA regulation through an avoidance of words of express advocacy. Thus, individuals and entities that spent money on "Vote against Jones" ads had to disclose the sources of payment and those ads could not be paid for with corporate or union treasury funds. In contrast, there were no such limitations on ads that appeared intended to influence federal elections but that avoided the magic words of "express advocacy." These ads would include ones that said "Call Senator Jones and tell her what you think of her lousy vote on the stimulus bill." Spending on such ads increased dramatically in the 1990s.

BCRA sought to close this issue advocacy "loophole" by creating new "electioneering communications" provisions. Electioneering communications are television or radio (not print or Internet) advertisements that feature a candidate for federal election and are capable of reaching 50,000 people in the relevant electorate 30 days before a primary or 60 days before a general election. Anyone making electioneering communications over a certain dollar threshold must *disclose* contributions funding the ads and spending related to the ads to the FEC (BCRA § 201). In addition, corporations and unions *cannot spend* general treasury funds on such ads (but could pay for the ads through their PACs) (BCRA § 203). In addition, anyone broadcasting an electioneering communication must disclose in the ad the person or committee funding the ad and whether or not it is authorized by any candidate (BCRA § 311).

The § 203 spending limit does not apply to nonprofit corporations that meet certain requirements, including that the nonprofit has a policy not to take for-profit corporate or union funding. These groups are referred to as *MCFL* groups (named after a 1986 Supreme Court case, *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986)), or *QNC* groups (named after an FEC regulation defining "qualified nonprofit corporation"). *MCFL* groups still must comply with the disclosure provisions in BCRA § 201 and § 311.

A broad coalition of plaintiffs challenged each of these BCRA provisions (along with a number of others) in *McConnell v. FEC,* 540 U.S. 93 (2003). By a 5-4 vote, the Supreme Court upheld BCRA § 203 against facial challenge. It reaffirmed the Court's controversial holding in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990). *Austin* held that corporate spending on elections could be limited because of what the Court termed the "distorting and corrosive effects" of immense aggregations of wealth accomplished with the corporate form, which could be spent on elections despite the corporation's ideas having little or no public support. Relying on *Austin*'s upholding of corporate limits on "express advocacy," the *McConnell* Court held that the "issue ads" regulated by the electioneering communications provisions of BCRA could constitutionally be limited because most of them were the "functional equivalent of express advocacy." By an 8-1 vote, the Court also upheld BCRA § 201 and § 311 against facial challenge. Five justices took the position the disclosure provisions were necessary to prevent *Austin*-style corruption, to enforce other campaign finance laws, and to provide information relevant to voters as they decide how to vote. Three other justices held the disclosure provisions were justified on information grounds only. Only Justice Thomas dissented, viewing the disclosure provisions as a violation of a First Amendment right to anonymous speech.

In *Wisconsin Right to Life v. Federal Election Commission,* 546 U.S. 410 (2006) (*WRTL I*), the Court held that *McConnell* did not preclude an "as applied" challenge to BCRA § 203 for a corporation or union whose ads were not the "functional equivalent of express advocacy." *WRTL I* involved a corporate-funded broadcast advertising that mentioned Senator Feingold's and Senator Kohl's position on judicial filibusters, and was to be broadcast in Wisconsin during the period of Senator Feingold's reelection campaign. After remand, in which the lower court found the ads were not entitled to an exemption because they were the functional equivalent of express advocacy, the case returned to the Supreme Court.

In *Wisconsin Right to Life v. Federal Election Commission,* 127 S.Ct. 2652 (2007), (*WRTL II*), the Court held, on a 5-4 vote, that BCRA § 203 could not be constitutionally applied to such ads. Three justices in the majority (Justices Kennedy, Scalia, and Thomas) held, consistent with their dissenting opinions in *McConnell,* that BCRA § 203 was unconstitutional as applied to any corporate advertising, stating that *McConnell* and *Austin* should be overruled. Chief Justice Roberts and Justice Alito, in a narrower controlling opinion, did not reach the question whether *McConnell* and *Austin* should be overruled. They held instead that

the only corporate-funded advertisements that BCRA could bar constitutionally were those that were the "functional equivalent of express advocacy." The controlling opinion held that in making the "functional equivalent" determination, the question the FEC or a court must consider is whether, without regard to context (such as the fact that the filibuster issue was one that conservatives were using to attack liberal Democrats) and without detailed discovery of the intentions of the advertisers, the advertisement was susceptible of no reasonable interpretation other than as an advertisement supporting or opposing a candidate for office. Unless the ad was susceptible to "no reasonable interpretation" other than as an advertisement supporting or opposing the candidate, it would be unconstitutional to apply BCRA § 203 to bar corporate funding for it. The controlling opinion then held that the ad at issue in *WRTL II* was susceptible to an interpretation as something other than an ad against Senator Feingold: it did not mention Senator Feingold's character or fitness for office, and had no other clear indicia of the functional equivalent of express advocacy. Accordingly, WRTL was entitled to an as-applied exemption and could pay for the ads with corporate funds.

The case at bar is a follow-on case to *WRTL II*. Citizens United, a nonprofit ideological corporation (but one that took some for-profit corporate funding) produced a feature-length documentary entitled *Hillary: The Movie.* The documentary appeared in theaters and was available to order via DVD during the 2008 primary season. Citizens United wished to distribute the movie as well through a cable television "video-on-demand" service. In exchange for a $1.2 million fee, a cable television operator consortium would have made the documentary available to be downloaded by cable subscribers for free "on demand" as part of an "Election 08" series. The documentary contained no express advocacy, but it did contain a great deal of negative statements about Hillary Clinton, including statements that she was a "European socialist" and not fit to be commander-in-chief. The FEC took the position that the documentary was the functional equivalent of express advocacy and therefore subject to BCRA § 201, meaning it was an electioneering communication that could not be paid for with corporate funds.

Citizens United also wished to broadcast some 10-second and 30-second advertisements promoting the documentary. The corporation wished to do so without complying with BCRA § 201 (requiring disclosure of funders) or § 311 (requiring the "disclaimer" stating who paid for the advertisement and that it was not approved by any candidate or committee). The FEC conceded that the advertisements (as opposed to the documentary itself) were not the "functional equivalent of express advocacy," but it took the position that the rules of BCRA § 201 and § 311 still applied. According to the FEC, the disclosure rules were not eligible for the "as applied" exemption that the Court created for corporate *spending* in *WRTL II.*

Pursuant to a special jurisdictional provision of BCRA, Citizens United filed suit against the FEC before a three-judge court in the United States District Court for the District of Columbia (with direct appeal to the Supreme Court). Citizens United, at that point represented by James Bopp (who had successfully argued *WRTL II*), moved for a preliminary injunction barring enforcement of BCRA § 203 for its broadcast of the documentary through "video-on-demand" and barring enforcement of BCRA § 201 and § 311 disclosure requirements as to the advertisements.

The three-judge court unanimously rejected Citizens United's arguments. As to the documentary itself, the court held that under *WRTL II* the documentary was the functional equivalent of express advocacy and was therefore not entitled to an as-applied exemption: the movie could not be paid for with for-profit corporate funds. As to the advertisements, the district court held that the *WRTL II* exemption did not apply to the disclosure rules, relying on language in *McConnell* broadly upholding these requirements. Citizens United appealed from the denial of the preliminary injunction to the Supreme Court, which dismissed the appeal. 128 S.Ct. 1732 (2008). The case returned to the trial court. The district court then granted summary judgment, relying on its earlier opinion on the preliminary judgment.

The Supreme Court noted probable jurisdiction and set the case for argument. Ted Olson, who had argued on the government's side for the constitutionality of BCRA in the *McConnell* case, replaced Jim Bopp as counsel for Citizens United on the merits stage of the appeal. Bopp filed an amicus brief supporting Citizens United on behalf of a group that had wished to broadcast a documentary against Barack Obama under similar circumstances.

Case Analysis

The Documentary Broadcast over "Video-on-Demand"

Citizens United raises a number of arguments against the government's position that this documentary could not be broadcast over cable television's "video-on-demand" service because it constituted a corporate-funded "electioneering commu-

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nication." Some of these arguments appear to have been raised for the first time in the Supreme Court's merits brief (perhaps a consequence of the change of lead lawyers), and for this reason the Court may reject them as not properly before it.

First, Citizens United argues that, under a strict scrutiny standard, the government cannot demonstrate a compelling interest in regulating a feature-length documentary broadcast through a cable television "video-on-demand" service. There are two aspects to this argument. (A) Citizens United argues that the *feature-length* nature of the documentary is different from the short "issue ads" considered in *McConnell*. While the record demonstrated a potential corruption problem with these short ads, there is no evidence a feature-length documentary would raise the same sorts of problems. (B) The fact that this is a "video-on-demand" service makes it more akin to the distribution of a DVD to interested viewers than to a normal television broadcast. Because viewers must effectively "opt-in" to view the documentary, and viewers who opt in are likely to already be opponents of the candidate, the documentary does not have the same corruptive potential.

The FEC takes issue with both of these points. As to Point (A), if the concern is about disproportionate corporate influence on the political process, the government says corporations can have just as disproportionate influence through a long message as through a short one. As to Point (B), the government disputes the notion that only Clinton opponents would tune into such a documentary, and in any case the advertisement could still be useful in energizing the base of Clinton opponents and getting out the vote. The interests supporting the corporate limit on regular broadcasts apply equally to video-on-demand.

Citizens United also raises a second argument related to Point (B), that the FEC regulations should not be construed to apply to "video-on-demand" cable broadcasts. Citizens United concedes that it did not raise the issue below (see Brief of Appellants, footnote 2), but notes that the district court passed on it and that the canon of constitutional avoidance (construe a statute to avoid constitutional issues when possible) gave the Court a reason to reach the statutory question. The government disagrees that the Court should reach the question. However, the BCRA legislative sponsors (Sens. McCain and Feingold, and former Representatives Shays and Meehan) filed an amicus brief suggesting that if the Court is otherwise inclined to find for Citizens United in this case, it should do it on grounds that the FEC's implementing regulations did not clearly apply to "video-on-demand" broadcasts.

Citizens United's second set of arguments take on existing Supreme Court precedent. First, Citizens United argues that *Austin* was wrongly decided and should be overruled, with the result being that even express advocacy by corporations in federal elections could be paid for with corporate treasury funds. Second, Citizens United argues that *MCFL* should be expanded to include nonprofit corporations that take some corporate money, so long as funds from individuals are the predominant form of funding.

The FEC's main argument against these points is that they were not properly presented below. As to the *Austin* argument, the FEC notes that Citizens United did not raise this point below, and that it expressly withdrew any facial challenges before the district court issued its summary judgment. On the merits, the FEC argues that Citizens United presented no special reasons to overcome stare decisis in this case. As to the *MCFL* argument, the FEC notes that Citizens United specifically pleaded the case as one that did *not* involve an *MCFL* corporation (Jim Bopp's strategy at the time appeared to be to expand *WRTL II* for all corporations, not to expand the scope of the *MCFL* exemption). Moreover, the FEC argues that there is not enough evidence developed in the record as to the extent of corporate contributions either supporting the documentary in particular or supporting Citizens United more generally.

Finally, Citizens United argues that its documentary, considered as a whole, is not the "functional equivalent of express advocacy" under *WRTL II*. Citizens United concedes that its documentary includes portions questioning Clinton's character and fitness for office, but contends that considered as a whole, the documentary could be seen as about issues, not about Clinton's candidacy. The FEC disputes this characterization, pointing to numerous statements in the documentary questioning Clinton's character and fitness for office.

The Disclosure and Disclaimer Provisions in the Advertisements

The issue in the second part of this case differs significantly from the first. The question here concerns advertisements that the FEC concedes are not the "functional equivalent of express advocacy" under the controlling *WRTL II* test.

Recall that BCRA § 201 requires anyone (not just corporations or unions) spending money on "electioneering communications" to disclose contributors and expenditures. Citizens United argues that the disclosure rules are subject to strict scrutiny. According to Citizens United, under this standard it is

unconstitutional to apply the disclosure rules to it. Citizens United further argues that because the advertisements are not the "functional equivalent of express advocacy," information about contributors and expenditures would not be relevant to voters deciding how to vote, nor would disclosure serve an anti-corruption function. It says the disclosure rules chill political speech.

The FEC disagrees, stating that intermediate (or "exacting") scrutiny applies, and that under this standard the disclosure rules are constitutional. The FEC notes that the Supreme Court in *McConnell* upheld the disclosure rules with very broad language, and that eight of the nine justices supported disclosure in *McConnell* to prevent corruption, enforce other campaign laws, and provide valuable information to voters. The FEC also argues that the First Amendment costs of the corporate ban in the *WRTL II*—which led to the as-applied exemption for corporate *spending*—are much higher than the costs of disclosure at issue here. It concludes that as-applied exemptions from disclosure rules are unwarranted. The FEC notes that if Citizens United faces real threats of harassment, the organization can seek an exemption from disclosure rules under *Brown v. Socialist Workers.* Finally, the FEC points to a number of earlier Supreme Court cases (including *MCFL, First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), and *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981)) containing holdings or dicta supporting disclosure requirements in cases in which the Court held spending limits unconstitutional.

Citizens United also takes issue with BCRA § 311's requirement that include a disclaimer in its advertising, arguing that the disclaimer is compelled speech and that it is burdensome (using up 4 seconds in a 10-second advertisement). The FEC argues that the Court upheld § 311 in the *McConnell* case against a similar challenge, and that there is no reason to treat this case differently. It also argues that the disclaimer provides important information to voters.

Significance

This case has the potential to be a blockbuster if the Court overrules *Austin* and *McConnell* and holds that the Constitution bars limits on corporate spending in federal elections. The limit on corporate and union spending in federal elections has existed in some form since the early 20th century, and has been enforced strictly since at least the 1970s. Many states also limit corporate and union spending in candidate elections, and these limits too would be unconstitutional if the Court accepted Citizens United's invitation to overrule these cases.

That said, it seems unlikely that a Court majority will be prepared to go this far in this case. Three justices (Justices Kennedy, Scalia, and Thomas) have voted repeatedly for *Austin* to be overruled, but Chief Justice Roberts and Justice Alito thus far have moved more cautiously in the campaign finance cases. In each of the campaign finance cases decided by the Roberts Court, the Court has sided with those challenging the law, but has done so in an incremental way. There are many ways for these two justices to side with Citizens United on the question of airing the documentary without overruling *Austin,* an issue which was not presented until the merits stage. Perhaps the easiest way to support Citizens United would be for the Court to construe the FEC regulations so as not to apply to "video-on-demand" broadcasts. Of course, these justices could also vote with the other justices generally supporting the constitutionality of campaign finance regulation (Justices Breyer, Ginsburg, Souter, and Stevens) to uphold application of BCRA § 203 to Citizens United's documentary. Such an outcome would be notable as the first time the Roberts Court upholds a campaign finance regulation.

On the challenge to BCRA's electioneering communications disclosure rules, a holding that *WRTL II's* "no reasonable interpretation" test applies to the disclosure rules would also be significant, because it would seriously undermine the effectiveness of disclosure. Citizens United's disclosure argument seems somewhat of a long shot, however. In *McConnell,* eight justices voted to uphold those disclosure laws broadly. Two of those justices (Chief Justice Rehnquist, and Justice O'Connor) are no longer on the Court, but six of them still are, including Justices Kennedy and Scalia, who view disclosure rules as a more narrowly tailored way than contribution and spending limits to accommodate the state's interests in campaign finance regulation. So regardless of how Chief Justice Roberts and Justice Alito view this question, Citizens United will need to move at least two justices from their positions on disclosure in *McConnell* in order to prevail on this issue. A decision to uphold the disclosure rules would reaffirm the status quo and therefore be somewhat less significant.

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