

No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTIONS COMMISSION,
Appellee.

**On Appeal from the United States District Court
for the District of Columbia**

**AMICUS CURIAE BRIEF OF THE AMERICAN
CIVIL RIGHTS UNION IN SUPPORT OF
JURISDICTIONAL STATEMENT OF
APPELLANT CITIZENS UNITED**

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INTEREST OF THE AMICUS CURIAE ¹

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular

¹ Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the right of Freedom of Speech under the First Amendment.

All parties consented to the filing of this brief, and were timely notified.

INTRODUCTION

This case involves the production, advertising, display, and broadcast of a movie about a major political figure — Hillary Clinton. The movie includes a mix of facts and opinion about Ms. Clinton. The movie and the expenditures behind it are not part of any political campaign, or coordinated in any way with any political campaign. The movie does not urge viewers to vote for or against Ms. Clinton.

The movie is the cinematic equivalent of an opinion commentary in a newspaper or magazine, or a book presenting political opinions. As such, it is core political speech entitled to the full protection of the First Amendment. It cannot be prohibited during any election period, or at any other time. Nor can its promotion be excessively burdened by regulatory requirements.

In seeking to prohibit the movie and burden its promotion, the Federal Elections Commission has strayed outside its constitutionally permissible zone of authority, which is to regulate campaign speech. Where the movie is not part of any campaign, nor coordinated in any way with any campaign, and does not urge viewers to vote for or against any candidate, the justification for allowing FEC regulation of campaign speech, preventing corruption or the appearance of corruption, does not apply. The FEC then has no constitutional authority to regulate such speech in contravention of the First Amendment.

The value that the First Amendment protects is freedom of speech, long recognized as a fundamental foundation of our democracy. The First Amendment places that value on a pedestal above competing values. The regulation at issue in this case ignores that pedestal, and the fundamental policy embodied in the First Amendment. That cannot be accepted as a matter of constitutional law.

These legal issues could not be more important and fundamental to our democracy. Therefore, it is urgent and critical for the Court to note probable jurisdiction in this case and resolve the legal questions it presents.

STATEMENT OF THE CASE

Appellant Citizens United is a non-profit, 501(c)(4) corporation founded in 1988. It was started by citizens who wanted to communicate and advance their viewpoint to the general public, and they have done so over the years through movies and other communications. Some of its movies have competed for and won awards from the motion picture industry and others.

One of its recent projects has been *Hillary: The Movie* (“Movie”), a feature-length, documentary film which presents facts and opinion regarding 2008 Presidential candidate Hillary Clinton. The Movie was planned for release in January, 2008, with full standard modern promotional efforts, including a website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs to be sold by prominent retailers. Citizens United also received an offer for the broadcast of the Movie on television.

Citizens United has no connection with any candidate, campaign, campaign committee, political committee or political party. No aspect of the production and promotion of the Movie was coordinated with any such political entity either. Moreover, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any office, or the election or defeat of any other candidate. It does not contain an appeal to vote for or against Hillary Clinton.

But under the Bipartisan Campaign Reform Act of 2002 (“BCRA”), the Movie would be considered an “electioneering communication” because it mentioned a federal presidential candidate and it would be screened during the 30-day periods before the prima-

ries, caucuses and conventions occurring throughout 2008, and during the 60 days before the 2008 general election. The broadcast ads for the movie would also be electioneering communications for these same reasons.

Consequently, the Federal Elections Commission (FEC) took the position that the Movie is prohibited under the BCRA until the 2008 election was over. Moreover, even ads promoting the Movie would be subject to regulation requiring Citizens United to publicly disclose its donors, which would likely reduce the number of donors and the amounts donated. Citizens United would also be required to report the ads in FEC filings as campaign speech when they are not. Mandatory FEC disclaimers would also have to be included in the ads.

Citizens United filed its complaint challenging the constitutionality of the application of these regulatory requirements to the Movie and its promotion on December 13, 2007. The District Court upheld the FEC, finding that the Movie was a prohibited electioneering communication. Citizens United noticed this appeal on July 24, 2008.

SUMMARY OF ARGUMENT

Appellant Citizens United has produced a movie that communicates facts and opinion regarding a top candidate for President of the United States. As such, it involves core political speech entitled to the highest protection under the First Amendment.

The Movie is not unambiguously related to the campaign of any candidate, or operationally related to any campaign or candidate in any way. The Movie does not contain an appeal to vote for or against

any candidate. Consequently, the Movie does not implicate the compelling state interest of preventing corruption or the appearance of corruption in our democratic system. Therefore, under the well-established precedents of this Court, the Movie cannot be prohibited, and its promotion cannot be excessively burdened by regulation under the BCRA, as held by the FEC and the court below. Such regulation of the core political speech involved in the Movie and its promotion cannot survive strict scrutiny for the reasons above.

The FEC is now asserting regulatory powers well beyond constitutional bounds, and its regulatory excesses regarding the most critical and fundamental freedom of core political speech need to be reined in.

The focus of Congress in enacting the BCRA, and of this Court in *McConnell* mostly upholding the BCRA, was on the speech involved in broadcast campaign ads, not feature length movies. Feature-length, documentary movies independent of any campaign do not involve the same issues of potential corruption or the appearance of corruption as presented by the financing of campaign speech in broadcast ads. The speech involved in feature length films has enjoyed the same constitutional protection as the speech involved in books. This Court should maintain that equivalent protection, and not read the regulatory restrictions of the BCRA as applying to feature-length, documentary films as in this case.

Because of the fundamental importance of the freedom of core political speech involved, this case presents the most weighty and substantial of legal questions. For these reasons, it is urgent for this Court to note probable jurisdiction in this case and resolve these questions.

ARGUMENT**I. The Movie Involves Core Political Speech Which Cannot Be Prohibited or Excessively Burdened.**

The Movie communicates facts and strongly held opinions about a candidate for President who has long been highly controversial among the public. It is the cinematic equivalent of an opinion commentary in a newspaper or magazine, or a book presenting political opinions.

The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). As the Court said in *McIntyre*,

“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”

514 U.S. at 347.

Yet, the FEC claims the authority to ban the movie during the 2008 election season, exactly the period when the right to such speech should be the most urgently protected. It also claims the authority to burden promotion of the film to the general public with excessive regulatory requirements.

The FEC claims this authority based on the BCRA. But that Act granted the FEC authority to regulate only campaign speech. In this case, the Movie and

the expenditures behind it are not part of any campaign, or coordinated with any campaign in any way. Appellant Citizens United has been producing such political movies for years, to advance its message and cause on a broad range of different topics. Moreover, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any public office, or that viewers should vote for or against her for any office.

Consequently, the Movie does not involve campaign speech. Rather, it involves core political speech entitled to the maximum protection under the First Amendment. That protection does not allow the Movie to be prohibited, or excessively burdened by regulation.

Regulation of campaign speech under the BCRA was upheld on the grounds that preventing corruption or the appearance of corruption in our democracy was a compelling state interest. *McConnell v. FEC*, 540 U.S. 93 (2003); *Wisconsin Right to Life, supra*; *Davis v. FEC*, 128 S. Ct. 2759 (2008). *See also Buckley v. Valeo*, 424 U.S. 1 (1976). But precisely because the Movie and its financing are not part of any campaign, nor coordinated with any campaign, nor does the Movie urge viewers to vote for or against any candidate, the Movie and its financing do not implicate this compelling state interest. The Movie is independently financed outside of any campaign, and is consequently entitled to the maximum protections of any other core political speech.

Any speech falling under the First Amendment is entitled to the protections of strict scrutiny analysis. *McIntyre, supra*; *Boos, supra*; *Wisconsin Right to Life, supra*. Under that analysis, any restriction on free speech must be narrowly tailored to serve a compel-

ling state interest. *Id.* Precisely because the Movie and its expenditures do not involve campaign speech, but, rather, independently financed core political speech, the restrictions the FEC seeks to impose on it do not serve the compelling state interest of preventing corruption or the appearance of corruption in our democracy. Allowing FEC restrictions on speech to apply outside the strictly defined realm of campaign speech is not narrowly tailoring those restrictions to serve a compelling state interest.

For these reasons, the regulatory restrictions the FEC seeks to impose on the Movie and its promotion fail strict scrutiny. Consequently, they are unconstitutional under the First Amendment as applied to the Movie and its promotion.

The FEC would remain within the bounds of the Constitution if it would just comply with the guidelines established by the directly applicable precedents of this Court. The FEC can impose its regulatory requirements only on campaign speech, which is speech that is “unambiguously related to the campaign of a particular federal candidate.” *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). As the court said in *North Carolina Right to Life v. Leake*, 525 F. 3d 274, 281 (4th Cir. 2008), “after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are ‘unambiguously related to the campaign of a particular . . . candidate.’” The FEC cannot regulate political speech that is outside this definition, which is fully protected by the First Amendment. *Wisconsin Right to Life, supra*; *McConnell, supra*. Moreover, as the Supreme Court has said, “the benefit of any doubt [goes] to protecting rather than stifling speech.” *Wisconsin Right to Life, supra*, at 2667.

Moreover, the FEC can regulate speech only if it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Wisconsin Right to Life, supra*, at 2667. *See also, Buckley, supra*, at 44, 80 (Created the express advocacy test, limiting regulation to communications that contain explicit words expressly advocating the election or defeat of a clearly identified candidate). If the speech “may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate,” it is protected from FEC regulation under the First Amendment. *Wisconsin Right to Life, supra*, at 2670. “Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election.” *Id.* at 2669.

But the FEC, and the Court below, did not apply these guidelines in this case. Prohibition of the Movie, and regulatory burdens on its promotion, were upheld even though it is not unambiguously related to the campaign of any federal candidate, and it does not appeal to viewers to vote for or against any candidate. Consequently, the application of these FEC regulations to Citizens United and its Movie is unconstitutional as discussed above.

Indeed, instead of limiting its regulatory authority to the guidelines established in the Supreme Court precedents above, the FEC asserts that its regulatory authority “extends beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues.” FEC SJ Mem. (Doc. 55) at 22; Opp’n to Mot. for Prelim. Inj. (Doc. 18) at 19. In asserting this authority, as it does in this case, the FEC is seeking powers well beyond constitutional bounds. Regulatory burdens on political speech beyond

candidate elections cannot pass strict scrutiny for the reasons discussed above.

The FEC, in fact, is now following a practice, exemplified in this case, of arguing that the upholding of its regulatory authority against a facial challenge in *McConnell* precludes all as applied challenges to its regulatory burdens as in the present case. It persists in this practice, and convinced the court below to follow this logic, even though it is contrary to the express language of *McConnell*, and the same argument was rejected by this Court in *Wisconsin Right to Life*. In that case, the Court went on to uphold the as applied challenge of petitioner to the FEC's regulatory burdens on its political speech.

We respectfully submit that this Court needs to enforce its well grounded precedents protecting the core freedoms of the First Amendment so essential to the functioning of our democracy, and rein in the regulatory excesses of the FEC.

II. The FEC May Not Regulate the Speech Involved In a Feature-Length Movie as a Broadcast Campaign Ad.

This Court in *McConnell* considered the regulatory burdens of the BCRA on the speech involved in broadcast campaign ads, not feature length movies. The record in *McConnell* shows that this was the focus of Congress in enacting the BCRA as well.

Feature-length movies independent of any campaign do not involve the same issues of potential corruption or the appearance of corruption as presented by the financing of campaign speech in broadcast ads, which was the focus of the BCRA. Consequently, such movies do not involve the same compelling state

interest that justifies the regulation of broadcast campaign ads

The speech involved in feature length films has enjoyed the same constitutional protection as the speech involved in books. *See Jenkins v. Georgia*, 418 U.S. 153 (1974); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982). We submit that this Court should maintain that equivalent protection, and not read the regulatory restrictions of the BCRA as applying to feature-length films. If Congress decides in the future that such regulatory restrictions should apply to feature-length movies, it can say so expressly in a statute. This Court can then evaluate whether those restrictions pass constitutional muster in the case of feature length films.

The Movie at issue in the present case, therefore, would then be free of the regulatory burdens the FEC seeks to impose on it, as would all other feature length films.

III. This Case Presents Crucial, Urgent Questions of Law Regarding Fundamental Free Speech Rights Which this Court Should Resolve Expeditiously.

This case involves the most basic and fundamental free speech rights, core political speech. Citizens need to understand what their rights are and what permissible restrictions they may face on their participation in the political debate. The same is true for candidates and their campaign associates.

Indeed, even the FEC seems confused as to the limits on its regulatory authority and the degree to which it can burden or even prohibit core political speech.

We respectfully submit that this Court needs to enforce its clear precedents regarding these most fundamental of constitutional rights. It needs to ensure maximum freedom to engage in core political speech, and maximum protection for this right. The constitutionally mandated limits on the FEC's powers need to be reiterated, and regulatory excesses regarding these most basic constitutional rights need to be stopped.

Among the specific substantial legal questions presented by this case that need to be resolved are: Can a feature length movie that is not unambiguously related to the campaign of any candidate, and that does not contain an appeal to vote for or against any candidate, be prohibited from screening or broadcast? Can broadcast ads promoting such a movie be subject to disclosure requirements and other burdensome regulation on speech? Can a feature length, documentary movie that is not unambiguously related to the campaign of any candidate, and that does not contain an appeal to vote for or against any candidate, be subject to regulation under the BCRA intended for broadcast campaign ads? Can the FEC assert its regulatory authority beyond speech about candidate elections to encompass activity that attempts to sway public opinion on issues? Did this Court's decision in *McConnell* addressing facial challenges to the BCRA foreclose all as applied challenges to the BCRA's regulatory burdens on freedom of speech, as the FEC is asserting in the federal courts, including the court below?

Because of the fundamental importance of the freedom of core political speech involved, this case presents the most weighty and substantial of legal questions. We respectfully submit that for these

reasons it is urgent for the Court to accept jurisdiction in this case and resolve these questions.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction, and review the decision of the court below.

Respectfully submitted,

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