

**United States District Court
Eastern District of North Carolina
Northern Division**

<p>Holly Lynn Koerber and Committee for Truth in Politics, Inc.,</p> <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>Federal Election Commission,</p> <p style="text-align: right;"><i>Defendant.</i></p>	<p>Case No. 2:08-cv-00039-H</p>
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**Memorandum in Support of
Plaintiffs’ Motion to Stay all Proceedings
Pending a Decision in *Citizens United v. FEC***

Plaintiffs Holly Lynn Koerber and Committee for Truth in Politics, Inc. (“CTP”) respectfully move for a stay of all proceedings in this action pending a decision from the United States Supreme Court in *Citizens United v. FEC*, 2008 WL 2788753 (D.D.C. July 18, 2008), *prob. juris. noted*, -- S.Ct. -- (Nov. 14, 2008). A stay would be a proper exercise of this Court’s discretion because *Citizens United* will likely be dispositive on a question of law at issue here. *See U.S. v. Jones*, 136 F.3 342 (4th Cir. 1998) (lower court granted motion to stay proceedings until the Supreme Court ruled on similar issues in a pending case).

At issue in *Citizens United* is one of the very same questions at issue in the present case: Whether “electioneering communications” that may not be prohibited under *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL II*”), may nonetheless be subject to reporting requirements, BCRA § 201, and disclaimer requirements, BCRA § 311.”¹ The ads at issue in

¹ The relevant question presented to the Supreme Court is as follows:

Whether BCRA's disclosure requirements impose an unconstitutional burden

Citizens United qualify as “electioneering communications” but are protected from prohibition by *WRTL II*’s “appeal to vote” test. *WRTL II*, 127 S. Ct. at 2670. *Citizens United* asserts that because these ads have a reasonable interpretation other than as an appeal to vote, they are not unambiguously-campaign-related and must be free from regulation, including disclosure requirements. Here, CTP’s Ads are also “electioneering communications” protected from prohibition under *WRTL II*’s appeal to vote test. *Verified Complaint* (Dkt. 1) ¶¶ 4-5 (“*VC*”), *Defendant FEC’s Opposition to Plaintiff’s Motion for Preliminary Injunction* (Dkt. 21) at 8 (agreeing that CTP’s Ads may not be prohibited under *WRTL II*). And just like *Citizens United*, CTP argues that because its Ads may reasonably be interpreted as something other than an appeal to vote, *WRTL II*, 127 S. Ct. at 2670, they are not unambiguously-campaign-related and must be free from all regulation, including disclosure requirements. *VC* ¶¶ 47-48. Thus, the Supreme Court’s ruling on this issue in *Citizens United* has direct bearing on the constitutional question before this court.

Furthermore, whether CTP’s Ads may be constitutionally subject to regulation has direct bearing on the second issue in this case, CTP’s challenge to the FEC’s enforcement policy for determining PAC status, *see* FEC, “Political Committee Status,” 72 Fed. Reg. 5595 (Feb. 7, 2007), *VC* ¶¶ 14-15. This challenge asserts that the FEC employs a vague and overbroad totality-

when applied to electioneering communications protected from prohibition by the appeal-to-vote test, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) (“*WRTL II*”), because such communications are protected “political speech,” not regulable “campaign speech,” *id.* at 2659, in that they are not “unambiguously related to the campaign of a particular federal candidate,” *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), or because the disclosure requirements fail strict scrutiny when so applied.

Citizens United v. FEC, Questions Presented, Docket 08-205 (available at <http://origin.www.supremecourtus.gov/qp/08-00205qp.pdf>) (fourth question presented omitted).

of-the-circumstances test for determining major purpose instead of the required “empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech,” *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (emphasis added). Central to this challenge is whether CTP’s ads are “regulable.”

In sum, because the issues to be decided in *Citizens United* will have a substantial impact on the disposition of CTP’s claims, a stay is appropriate. Moreover, Defendant FEC does not object to a stay in this case. *Joint Report of the Parties* (Dkt. 40) ¶ 1. Plaintiffs respectfully request that the Court stay all proceedings in this matter until the Supreme Court of the United States has decided *Citizens United v. FEC* (No. 08-205).

On this 2nd day of January, 2009.

Respectfully submitted,

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I hereby certify that on January 2, 2008, I served upon the below listed persons copies of this document by electronically filing this document for electronic transmission.

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