No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED

1. Whether the three-judge district court correctly concluded that appellant's film about then-Senator Hillary Clinton is the functional equivalent of express advocacy under the test set forth in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

2. Whether the three-judge district court correctly held that the reporting and disclaimer requirements of federal campaign finance law may permissibly be applied to advertisements that are not the functional equivalent of express advocacy.

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OPINIONS BELOW

The opinion of the three-judge district court granting appellee's motion for summary judgment (J.A. 261a-262a) is unreported. The opinion of the three-judge district court denying appellant's motions for preliminary injunctions (J.A. 195a-211a) is reported at 530 F. Supp. 2d 274.

JURISDICTION

The decision of the three-judge district court was entered on July 18, 2008. A notice of appeal was filed on July 24, 2008 (J.S. App. 22a-23a). The jurisdictional statement was filed on August 14, 2008. This Court noted probable jurisdiction on November 14, 2008. The jurisdiction of this Court rests on Section 403(a)(3) of

the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113.

STATEMENT

Appellant is a nonprofit corporation that produced a movie critical of then-Senator Hillary Clinton, who was at that time a candidate for the Democratic presidential nomination. Appellant wished to use its treasury funds to pay cable companies to broadcast the film before and during the 2008 presidential primary elections, contrary to a federal prohibition on the use of corporate treasury funds to finance "electioneering communications" as defined by federal law. Appellant also sought to run advertisements promoting the film without complying with federal reporting and disclaimer requirements. Appellant filed suit against the Federal Election Commission (Commission or FEC), alleging that those federal financing restrictions and disclosure requirements were unconstitutional as applied. A three-judge district court granted summary judgment for the Commission.

1. a. Since 1907, federal law has restricted corporations from using their general treasury funds to influence federal elections. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The restriction on a corporation's independent "expenditure[s]" has been construed to encompass "express advocacy," *i.e.*, the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*).

The general prohibition on express advocacy by corporations in federal elections has two principal exceptions. First, a corporation may establish a "separate segregated fund," commonly called a political action committee (PAC), to finance those disbursements. 2 U.S.C. 441b(b)(2)(C). The money in a corporation's PAC, which is raised from individuals associated with the corporation, can be contributed directly to candidates for federal office, and it may be used without limitation to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

Second, this Court has held that certain small, ideologically-oriented corporations may use their treasury funds for express advocacy notwithstanding the general financing restriction. That exception applies to corporations that (1) were "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) were "not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 264; see *McConnell* v. *FEC*, 540 U.S. 93, 210-211 (2003); 11 C.F.R. 114.10 (implementing *MCFL* exception). Corporations possessing these characteristics are commonly referred to as "*MCFL* organizations." *E.g.*, *McConnell*, 540 U.S. at 210.

b. Section 203 of BCRA extended the longstanding ban on corporate express electoral advocacy to an additional category of political spending. 116 Stat. 91. After this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), corporations and labor unions crafted political communications that avoided the so-

called magic words of express electoral advocacy. They financed those communications with "hundreds of millions of dollars" from their general treasuries "'while concealing their identities from the public,'" including by "'hiding behind dubious and misleading names.'" *McConnell*, 540 U.S. at 127, 196-197 (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (three-judge court)). "Congress enacted BCRA to correct the flaws it found in the existing system." *Id.* at 194.

Accordingly, Congress required any corporation or labor union that sponsors an "electioneering communication" to pay for it with PAC rather than general treasury funds. See 2 U.S.C. 441b(a) and (b)(2).[1] The term "electioneering communication" is defined, in the context of elections for President or Vice President, as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate; and (2) is made within 60 days before a general election, within 30 days before a presidential nominating convention, or within 30 days before a presidential primary election in the state holding that primary. 2 U.S.C. 434(f)(3)(A)(i); 11 C.F.R. 100.29(a)(2) and (b)(3)(ii). The definition generally excludes any broadcast "communication appearing in a news story, commentary, or editorial." 2 U.S.C. 434(f)(3)(B)(i).

2. a. Federal law has also long required disclosure of the dollar amounts expended on campaign activity. FECA required donors to disclose not only contributions to political candidates, but also "the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal

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[1] *MCFL* organizations are excepted. See *McConnell*, 540 U.S. at 211.

office." *Buckley*, 424 U.S. at 77 (quoting 2 U.S.C. 431(f)(1) (Supp. IV 1974)). The Court in *Buckley* upheld that requirement after construing it to avoid vagueness concerns. *Id.* at 76-84.

b. BCRA Section 201 added a requirement that any person who spends more than $10,000 to broadcast an electioneering communication must promptly file a comparable disclosure statement with the Commission. 2 U.S.C. 434(f)(1). The statement must identify the person making the disbursement; the amount and date of the disbursement; and, in the case of an electioneering communication made by a corporation, all those who contributed "$1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c). If the disbursement is made out of a "segregated bank account" established for electioneering communications, the report need only identify those who contributed $1000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E); 11 C.F.R. 104.20(c)(7).

c. BCRA Section 311 added a separate requirement that a televised electioneering communication must include both written and oral disclaimers. The screen must display (1) "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," and (2) a statement "that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3); 11 C.F.R. 110.11(b)(3). The communication must also include a statement that the entity funding the communication "is responsible for the content of this advertising," and that statement must be both (1) made orally by a representative of the entity making the communication and (2) printed "for a period of at least 4 sec-

onds" in text meeting specified size and contrast requirements. 2 U.S.C. 441d(d)(2); 11 C.F.R. 110.11(c)(4).

3. Soon after BCRA was enacted, appellant and other plaintiffs challenged the constitutionality of numerous BCRA provisions, including the reporting and disclaimer requirements that are at issue in this appeal. See Br. for Appellants Congressman Ron Paul, *et al.*, at iii, *McConnell*, *supra* (No. 02-1747). This Court rejected the plaintiffs' facial challenges to the corporate-funding restrictions, reporting obligations, and disclaimer requirements applicable to electioneering communications.

The Court in *McConnell* discussed its prior decisions upholding state and federal restrictions on corporate electoral advocacy. 540 U.S. at 204-205. The Court explained that, "[i]n light of [those] precedents, plaintiffs d[id] not contest that the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office." *Id.* at 205. The Court further explained that, "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," the same governmental interests apply equally to corporate financing of electioneering communications. *Id.* at 206. Based on a voluminous record examining the use of corporate-funded ads that influenced elections without using express advocacy, the Court concluded that BCRA's restrictions on the financing of electioneering communications are facially valid. *Id.* at 207.

The Court also upheld BCRA's reporting requirements. The Court explained that those requirements serve three valid purposes: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data nec-

essary to enforce more substantive electioneering restrictions." 540 U.S. at 196. Although the Court noted the possibility of future as-applied challenges by plaintiffs for whom disclosure represented an unusually severe burden, it concluded that none of the plaintiffs before it had shown such a burden. *Id.* at 198-199. Three other Justices, while rejecting much of the Court's reasoning, agreed that BCRA's reporting requirements (with one exception not relevant here) are constitutional because they "substantially relate" to the informational interest identified in the Court's opinion. *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Court in *McConnell* also upheld BCRA's disclaimer requirements. 540 U.S. at 230-231. Chief Justice Rehnquist, writing for eight Members of the Court, explained that BCRA's "inclusion of electioneering communications in the [pre-existing disclaimer] regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id.* at 231 (quoting *Buckley*, 424 U.S. at 81).

4. Four years later, in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), this Court sustained an as-applied challenge to Section 203. The Chief Justice's controlling opinion,[2] joined by Justice Alito, acknowledged *McConnell*'s holding that Congress may regulate corporate financing of communications that constitute the functional equivalent of express advocacy. The opinion then held that "an ad is the functional equivalent of express advocacy only if the ad is suscepti-

[2] The Chief Justice's opinion is controlling because he "concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted).

ble of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Three other Justices concluded that BCRA Section 203 is unconstitutional on its face and would have overruled the Court's contrary holding in *McConnell*. *Id.* at 2684-2687 (Scalia, J., concurring in part and concurring in the judgment).

5. Shortly before the 2008 presidential primaries began, appellant was preparing to release a film about then-Senator Hillary Clinton, entitled *Hillary: The Movie*. Appellant intended to distribute the film through theaters, DVD sales, video-on-demand broadcasts, and other broadcast means while Senator Clinton was a candidate for President. J.A. 19a, 196a. The video-on-demand broadcast apparently would have involved paying approximately $1.2 million to a consortium of cable companies, which in return would make the movie available to the companies' subscribers. J.A. 19a, 256a. Appellant also produced three television advertisements for the movie. J.A. 196a-197a & nn.2-4. Those advertisements mentioned Senator Clinton by name and therefore would have fallen within BCRA's definition of "electioneering communication" if they had been broadcast during the 30-day period before a primary election in which Senator Clinton was a candidate. See J.A. 198a-199a.

In December 2007, appellant filed suit in federal district court. The complaint alleged that BCRA Section 203 and the reporting and disclaimer requirements were unconstitutional as applied to both the film and the proposed advertisements, and that Section 203 was facially unconstitutional. See J.A. 200a-201a. The FEC conceded that Section 203 could not be applied to the advertisements because those advertisements were not the

functional equivalent of express advocacy as the lead opinion in *WRTL* used that term.

The three-judge district court denied preliminary injunctive relief on each of appellant's claims. J.A. 195a-211a. Appellant filed an interlocutory appeal in this Court, which dismissed the appeal for want of jurisdiction. 128 S. Ct. 1732 (2008) (No. 07-953). The district court then granted summary judgment to the Commission "[b]ased on the reasoning of [the court's] prior opinion" denying preliminary injunctive relief. J.A. 261a-262a.

a. The district court held that BCRA's ban on the use of corporate treasury funds to finance electioneering communications is constitutional as applied to *Hillary* because the film is the functional equivalent of express advocacy. J.A. 203a-206a. The court found that the film "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." J.A. 204a.

b. The district court also rejected appellant's contention that BCRA's reporting and disclaimer provisions are unconstitutional as applied to appellant's proposed advertisements. J.A. 206a-209a. The court explained that this Court in *McConnell* had upheld those provisions on their face, and that appellant had offered no specific evidence of reprisals or other unconstitutional burdens that could distinguish its challenge from the one rejected in *McConnell*. *Ibid.* The district court also observed that, in various contexts, this Court "has written approvingly of disclosure provisions triggered by political speech even though the speech itself was consti-

tutionally protected under the First Amendment." J.A. 208a.

c. The district court noted at the preliminary-injunction stage that appellant could not prevail on its facial challenge unless *McConnell* were overruled. J.A. 202a. In its subsequent motion for summary judgment, appellant stated that it no longer intended to pursue its facial challenge. 07-CV-2240 Docket entry No. 52, at 1-2 (May 16, 2008) ("[Appellant] hereby advises the Court of its intent to abandon the count and asks the Court to consider the count moot and not rule on it."). The parties subsequently stipulated to the dismissal of the facial challenge. See *id.* Nos. 53 (May 22, 2008), 54 (May 23, 2008).

SUMMARY OF ARGUMENT

I. This Court has repeatedly sustained federal statutes implementing Congress's compelling interest in ensuring the integrity of federal elections. In *McConnell*, the decision controlling here, the Court held that Congress may validly prohibit corporations and labor unions from using the wealth amassed in their treasuries to finance either express electoral advocacy or electioneering communications that are the functional equivalent of express advocacy. The Court therefore sustained BCRA Section 203 against a facial challenge. Subsequently, in *WRTL*, the lead opinion declined to reconsider *McConnell*'s holding on that issue because it concluded that the advertisements at issue were *not* the functional equivalent of express advocacy.

McConnell forecloses appellant's claim of entitlement to fund *Hillary* with corporate dollars, because *Hillary* is unmistakably an appeal to viewers to vote against Senator Clinton for President. Every element

of the film, including the narration, the visual images and audio track, and the selection of clips, advances the clear message that Senator Clinton lacked both the integrity and the qualifications to be President of the United States. The film focused not on legislative issues but on Senator Clinton's character, and it tied that message directly to her candidacy for President. Because *Hillary* cannot "reasonably be interpreted as something other than an appeal to vote * * * against" Senator Clinton, it is the "functional equivalent of express advocacy," and Section 203 validly regulates the use of corporate money to put it on the air. *WRTL*, 127 S. Ct. at 2670 (opinion of Roberts, C.J.).

Appellant's attempts to distinguish *McConnell* are unavailing. Appellant sought to have *Hillary* broadcast by purchasing time through a video-on-demand consortium, but that method of paid distribution is no different from buying an "infomercial" on a broadcast network, as political candidates have done for many years. Like any other television advertisement, *Hillary* uses the power of the visual medium to promote a message; broadcasting that message on the "Elections '08" video-on-demand channel rather than on Nickelodeon simply would increase the likelihood that the audience would be interested in the subject matter. Nor does *Hillary*'s 90-minute length have any constitutional significance once the film is found to be the functional equivalent of express advocacy. *McConnell*'s holding is not limited to 30-second advertisements.

Appellant also contends, without adequate record support, that it would have used many more individual donations than corporate donations to finance *Hillary*. But *any* use of corporate monies in this context would permit appellant to be used as a conduit to circumvent

the valid restrictions on corporate spending. Congress's bright-line rule against the use of corporate treasury funds is valid in this context.

Because *McConnell* is controlling, appellant asks this Court to take the avulsive step of overruling its previous holdings and ending *all* federal regulation of corporate-financed electioneering, including express advocacy. That contention is not properly presented and, in any event, provides no new basis for overturning holdings that this Court has repeatedly reaffirmed.

II. BCRA's reporting and disclaimer requirements may validly be applied to appellant's three advertisements. Appellant was permitted to use corporate funds to air the advertisements themselves, under the reasoning of the lead opinion in *WRTL*, because they are not the functional equivalent of express advocacy. Contrary to appellant's contention, however, the fact that appellant's advertisements are not unambiguously election-related does not mean that they are constitutionally exempt from *all* statutory provisions pertaining to the electoral process. The federal requirements that electioneering communications be reported to the Commission, and that they identify their sponsors to their viewers, are based on interests distinct from BCRA Section 203 and not considered in *WRTL*: the public interest in full information about participants in the electoral process, and the government's interest in enforcing other, independent provisions of the campaign finance laws. Those interests are directly implicated by broadcast communications that can reasonably be construed as either electoral or non-electoral advocacy. Under the standard that this Court has consistently applied to informational provisions of this sort—a standard more

permissive than strict scrutiny—these interests are fully sufficient to sustain Congress's chosen methods here.

Appellant identifies no burden that can outweigh these valid interests. As-applied challenges to disclosure requirements have been recognized for decades, based on genuine threats of harassment or reprisals, but appellant makes no effort to meet that standard. Instead, appellant contends (along with several amici) that disclosure *always* poses such a burden, or that disclosure *always* creates an unconstitutional chill on protected speech. This Court has repeatedly rejected such facial attacks on disclosure requirements, recognizing that disclosures of the sort at issue here serve rather than undermine First Amendment interests by increasing the amount of information available to the public.

Finally, appellant's challenge to the application of the disclaimer requirement is without merit. Appellant suffers no significant burden from identifying itself as the sponsor of *Hillary*; the film itself and the website promoting it make appellant's role clear. Appellant has offered no evidence to support the notion that the disclaimer will confuse viewers. And appellant does not have any constitutional entitlement to save money by *not* buying the four additional seconds of airtime necessary to air the disclaimer.

ARGUMENT

I. BCRA'S RESTRICTIONS ON CORPORATE FINANCING OF ELECTIONEERING COMMUNICATIONS ARE CONSTITUTIONAL AS APPLIED TO APPELLANT'S FILM

The district court correctly concluded that *Hillary*, taken as a whole, is the functional equivalent of express advocacy. Appellant therefore had no constitutional right to use its treasury funds, or treasury funds con-

tributed by other corporations, to broadcast *Hillary* during the 30-day period before a primary election in which Senator Clinton was a candidate.[3]

A. This Court Has Upheld Congress's Power To Restrict Corporations From Using Their Treasury Funds To Finance Express Advocacy Or Its Functional Equivalent

Corporations and labor unions have long been required to finance express electoral advocacy through a separate segregated fund rather than with general treasury monies. The constitutionality of that requirement has been "firmly embedded in our law" since this Court upheld FECA in *Buckley*, and it was common ground in the *McConnell* litigation. *McConnell* v. *FEC*, 540 U.S. 93, 203 (2003); see *id.* at 205. Section 203 of BCRA extended that requirement to a defined set of "electioneering communication[s]," and the Court in *McConnell* upheld Section 203 to the extent that the advertisements

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[3] *Hillary* is no longer subject to the restrictions on electioneering communications, and Senator Clinton now holds a Cabinet position that currently precludes her from seeking partisan political office. See 5 U.S.C. 7323(a)(3). Nonetheless, in our view the appeal is not moot, in light of this Court's holding in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), that a comparable challenge remained justiciable. See Mot. to Dismiss or Affirm 11 n.1; *WRTL*, 127 S. Ct. at 2662-2663. Appellant averred in the district court that it planned to produce, and to promote, a film about then-Senator Barack Obama. J.A. 214a. That film apparently has since been released. See Citizens United, *Hype: The Obama Effect* (visited Feb. 17, 2009) <http://www.hypemovie.com>. If aired during the period preceding a future election in which President Obama is a candidate, that film would fall within BCRA's definition of "electioneering communication." Appellant also expressed the "intention to do materially similar advertising in materially similar situations in the future." J.A. 214a. Accordingly, as in *WRTL*, appellant's challenge appears to be "capable of repetition, yet evading review," and therefore not moot.

it regulates are express advocacy or its "functional equivalent." 540 U.S. at 206. Appellant therefore has no constitutional right to use corporate treasury dollars to purchase airtime for a communication that unmistakably advocates a particular vote.

1. Congress has a compelling interest in protecting the electoral process from both actual corruption and the appearance of corruption. This Court has repeatedly recognized both the validity and the importance of that interest, see, *e.g.*, *WRTL*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.); *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976) (per curiam), and it has further recognized that the corruptive potential of campaign-related largesse is greatest in the context of *candidate* elections, see *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978).

Congress has historically imposed particularly stringent limits on the electoral advocacy of corporations and labor unions. Those restrictions reflect a "'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,'" and this Court has consistently "respect[ed]" that judgment. *FEC* v. *Beaumont*, 539 U.S. 146, 155 (2003) (quoting *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209-210 (1982)). In particular, because of the numerous advantages that the corporate form confers, a corporation's ability to pay for electoral advocacy has "little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 205 (quoting *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

2. The Court held in *McConnell* that those "unusually important interests" justify regulating corporations' use of treasury funds to influence elections directly, through either express advocacy *or* electioneering com-

munications that are the functional equivalent of express advocacy. 540 U.S. at 206 n.88; see *id.* at 205-207. The constitutionally valid justification for requiring corporations to fund express advocacy through PACs "appl[ies] equally" to corporate funding of "ads [that] are intended to influence the voters' decisions and have that effect," even if their electioneering message is less explicit than express advocacy. *Id.* at 206. In *WRTL,* the lead opinion recognized that the Court in *McConnell* had "already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent." 127 S. Ct. at 2664; see *ibid.* (explaining that, if the broadcast is "express advocacy or its functional equivalent," then "the FEC's burden is not onerous; all it need do is point to *McConnell* and explain why it applies here").

B. *Hillary* Is The Functional Equivalent Of Express Advocacy Because It Focuses On Senator Clinton's Candidacy And Character

As the term itself makes clear, a communication may be the "functional equivalent" of express advocacy even if it does not explicitly urge a vote for or against a candidate. See *McConnell*, 540 U.S. at 193 (noting the Court's "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad"). Rather, as the lead opinion in *WRTL* explained, a broadcast should be treated as electioneering if the only "reasonable interpretation" of its content is "as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Applying that standard, the three-judge district court correctly concluded that *Hillary* "is susceptible of no other interpretation than to inform the electorate that Senator

Clinton is unfit for office * * * and that viewers should vote against her." J.A. 204a.

The lead opinion in *WRTL* identified three reasons for its conclusion that the advertisements at issue there did not constitute the functional equivalent of express advocacy. First, the advertisements "focus[ed] on a legislative issue" and advocated specific congressional action; they did not simply "condemn[] [the target's] record on a particular issue." 127 S. Ct. at 2667 & n.6 (citation omitted). Second, they "d[id] not mention an election [or a] candidacy." *Id.* at 2667. Third, the advertisements "d[id] not take a position on a candidate's character, qualifications, or fitness for office." *Ibid.* The Commission has codified those criteria in implementing regulations, 11 C.F.R. 114.15. Under that analysis, *Hillary* is the functional equivalent of express advocacy.

1. Senator Clinton's candidacy for President is the central and unmistakable focus of the film. The narrator's first voiceover begins, "Hillary Rodham Clinton. Could she become the first female President in the history of the United States?" J.A. 35a. The final voiceover cautions that "before America decides on our next President, voters should need no reminders of * * * what's at stake—the well being and prosperity of our nation." J.A. 144a-145a. And throughout the film, Senator Clinton's candidacy is repeatedly brought up both by the narrator, see J.A. 35a, 37a-38a, 38a-39a, 39a-40a, 88a-89a, 94a-95a, 104a-105a, 112a, 115a, 125a, 142a, 143a-144a, and by a succession of featured commentators, all critical of Senator Clinton, see J.A. 30a-31a, 42a, 63a, 64a, 89a-90a, 100a, 146a, 147a, 148a-149a. The message is forthrightly stated in a clip from Tony Blankley: *Hillary* is intended to cover "things in the Clinton[s'] political history worth recalling *before you go in to po-*

tentially vote for a Clinton, in this case a Hillary Clinton." J.A. 42a (emphasis added).

The images and audio chosen by the film's editors evince a similar focus from beginning to end. As the film's title appears onscreen, the audio track plays Senator Clinton's message about starting her presidential campaign. J.A. 32a. And just before the film ends, the audio track plays Senator Clinton saying that "on January 20, 2009 . . . some one will stand on the steps of the [C]apitol . . . and raise his or her hand to take the oath of office as the 44th [P]resident." J.A. 149a.

2. *Hillary*'s unmistakable message is that Senator Clinton's character, beliefs, qualifications, and personal history make her unsuited to the office of President of the United States. That message is conveyed through the film's narration; through its choice of commentators and its selection of extracts from their interviews; and through its use of visual imagery. "And although the resulting [production] do[es] not urge the viewer to vote for or against a candidate in so many words, [it is] no less clearly intended to influence" voters' views of candidate Clinton. *McConnell*, 540 U.S. at 193.

Rather than examining issues that might be the subject of legislative votes or Executive Branch action, *Hillary* focuses on Senator Clinton's "character, qualifications, [and] fitness for office." *WRTL*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). The film repeatedly impugns Senator Clinton's honesty and character. See J.A. 39a ("She's deceitful. She'll make up any story; lie about anything."), 40a (narrator asking, "[I]s she ruthless, cunning, dishonest—willing to do anything for power?"), 41a ("the Clintons * * * speak dishonestly"), 64a (narrator's reference to Senator Clinton's "Machiavellian behavior" and "tendency to manipulate, deceive and de-

stroy for personal gain"), 68a (narrator's reference to her "hypocrisy and startling recklessness"), 86a ("congenital liar"), 111a ("[S]he's not flipping and flopping. [S]he's lying."), 112a (narrator stating, "The war on terror isn't the only issue where Hillary is trying to have it both ways."), 130a (narrator stating, "Character is defined as what we do when we think no one is looking. By that standard many critics say the Clintons are sorely lacking."). Those allegations are expressly tied to her fitness for elective office, and specifically for the office of President. *E.g.*, J.A. 62a ("I don't understand how any woman in this country * * * could vote for a woman who does that to other people."), 149a ("[T]he Hillary Clinton that I know is not equipped, not qualified to be our commander in chief.").

The images that appear onscreen reinforce the attack on Senator Clinton's character. For example, 37 seconds into the movie, after a montage of headlines containing the phrase "Mrs. Clinton," the visual zooms in and lingers on the word "perjury" (omitting the remainder of the headline). Four seconds later, after a montage of headlines referring to the "First Lady," the visual zooms in and lingers on the word "lies" (again omitting the remainder of the headline). Am. Compl. Exh. 2 (DVD version).

Appellant describes those manifestations of *Hillary*'s critical message as merely the opinion of "various commentators," offered only at the end of the movie. Br. 40; see Br. 37. That characterization is demonstrably inaccurate. As explained above, criticism of Senator Clinton's character and candidacy pervades the movie, beginning in the visual montages and statements in the *first minute* of the film and continuing throughout. That criticism comes in the filmmakers' own voice (and voice-

over) and cannot be dismissed as the opinions of the interviewees (who are in any event uniformly critical of Senator Clinton). And any potential ambiguity regarding the "focus" of the film as a whole, *WRTL*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.), is removed by the concluding section, which marshals all of the preceding evidence as support for the ultimate conclusion that Senator Clinton should not be elected president.[4]

3. Unlike a genuine issue advertisement, *Hillary* does not "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, [or] urge the public to contact public officials with respect to

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[4] Appellant suggests (Br. 37-38) that BCRA Section 203 is infirm because similar criticisms of Senator Clinton might have been aired on *Meet the Press* without running afoul of BCRA's restrictions on corporate financing of electioneering communications. BCRA provides that the electioneering communication requirements and restrictions do not apply to communications that "appear[] in a news story, commentary, or editorial distributed through the facilities of any broadcasting station." 2 U.S.C. 434(f)(3)(B)(i); see 11 C.F.R. 100.29(c)(1); cf. 2 U.S.C. 431(9)(B)(i) (FECA's longstanding media exemption). This Court has repeatedly sustained such federal and state exemptions for media activity as "wholly consistent with First Amendment principles." *McConnell*, 540 U.S. at 208; see *Austin*, 494 U.S. at 668.

Appellant does not contend that *Hillary* falls within BCRA's media exemption, and it appears that the film would not qualify because appellant paid for it to be broadcast in the manner of an infomercial. Although appellant ordinarily receives payment for DVDs and theater showings of its movies unrelated to candidates, it sought to spend over $1 million to have *Hillary* available during the election season. J.A. 11a-13a, 213a, 256a, 260a. See FEC Advisory Op. 2004-30, at 7 (Sept. 10, 2004) <http://saos.nictusa.com/aodocs/2004-30.pdf> ("[T]he very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the 'considerations of form' that can help to distinguish an electioneering communication from exempted media activity."); cf. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986).

the matter." *WRTL*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). In the few short portions of the film that touch on legislative issues, the film consistently and explicitly ties those issues to further critiques of Senator Clinton's character and fitness for the presidency. See, *e.g.*, J.A. 105a-108a (discussing Senator Clinton's positions on driver's licenses for illegal immigrants and concluding that her performance failed to show "presidential stature or character"); J.A. 108a-112a (discussing Senator Clinton's positions on the war in Iraq and concluding that Senator Clinton was "not flipping and flopping. [S]he's lying."). The film does not express disagreement with any of Senator Clinton's stands on the relevant issues but rather urges that her handling of those issues shows that she lacks both the forthrightness and the experience to be President. See J.A. 105a-112a.

Even if one or more snippets of *Hillary* might in isolation be seen as issue advocacy, they are part of a larger work that, as a whole, unambiguously argues that Senator Clinton is unfit for the office for which she was a candidate.[5] Appellant cannot immunize such a communication from regulation simply by inserting some addi-

[5] The district court's focus on the film as a whole (while quoting illustrative excerpts, see J.A. 204a & n.12) was compelled by this Court's direction to examine the "substance of the [electioneering] communication" itself. *WRTL*, 127 S. Ct. at 2666 (opinion of Roberts, C.J.). Appellant complains (Br. 34-35) that the entirety of *Hillary*, not just the electioneering portions, is subject to BCRA's financing rules. But that consequence occurs only because appellant has produced a movie that, taken as a whole, is the functional equivalent of express advocacy. If portions of the film would qualify as protected issue advocacy (or would not fall within the definition of "electioneering communication"), and if appellant wished to use treasury funds to broadcast only those portions, nothing in BCRA would prevent it from doing so.

tional issue discussion. Indeed, much *express* advocacy contains issue discussion.[6] In *MCFL*, for instance, the Court held that a newsletter that contained issue advocacy nevertheless was "squarely" regulated by FECA because it *also* went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249-250.

4. Appellant observes (Br. 36-37) that *Hillary* does not urge viewers to undertake "the *specific* act of voting against Senator Clinton in a Democratic presidential primary." Appellant argues (Br. 37) that, "[i]n the absence of such an unambiguous call to action, it is difficult to envision any language or images, or mix of the two," that would satisfy the constitutional standard set forth in the lead opinion in *WRTL*. That contention is in substance an appeal for reinstatement of the "magic words" requirement that the Court in *McConnell* held was not constitutionally required. See 540 U.S. at 190-192. Acceptance of that argument would mean that BCRA Section 203 is unconstitutional in virtually all its applications, see *id.* at 127 & n.18, 193 & n.77 (explaining that modern campaign advertising, including advertisements run by candidates, rarely uses "magic words"), in contravention of *McConnell*'s holding that Section 203 is not facially overbroad because most of its applications are constitutional, see *id.* at 207; accord *WRTL*, 127 S. Ct. at 2683 (Scalia, J., concurring in part and concurring in the judgment).

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[6] Appellant asserts that "[t]he parties agree that *Hillary* is not express advocacy." Br. 34 (citing Def.'s Mot. for Summ. J. 37). The Commission has not expressed any opinion on that question, in the district court or elsewhere. Rather, the Commission has simply concluded that appellant's financing of *Hillary* may constitutionally be subject to BCRA Section 203 because the film is, "at a minimum, the functional equivalent of express advocacy." J.A. 236a.

C. There Is No Other Constitutional Basis For Exempting Appellant's Film From The Corporate Financing Restriction

In addition to arguing that *Hillary* is not the functional equivalent of express advocacy under the lead opinion in *WRTL*, appellant advances a variety of other arguments for finding BCRA's corporate financing restriction unconstitutional as applied to the film. Those arguments lack merit.

1. Video-on-demand has no special constitutional status

Appellant apparently wished to pay a consortium of cable television providers to show *Hillary* through the consortium's video-on-demand service. See J.A. 253a-260a. Appellant argues (Br. 24-29) that even if *Hillary* can be regulated as the functional equivalent of express advocacy when it is broadcast on television (including cable television), the film is constitutionally exempt from such regulation when it is distributed as a cable video-on-demand transmission. That newly raised contention lacks merit.

a. Appellant's argument was neither presented to nor ruled on by the court below.[7] Nor did appellant sug-

[7] To the contrary, the amended complaint alleged that appellant planned to televise the film both through video-on-demand and "by other means," and it did not suggest that video-on-demand placement had any special constitutional significance. J.A. 19a. Indeed, the offer for video-on-demand distribution did not come until after appellant filed this litigation. J.A. 230a-231a.

Appellant also alleged that *Hillary* would be "within the electioneering communication definition," including the requirement that the communication be "receivable by more than 50,000 persons." J.A. 19a-20a; see 11 C.F.R. 100.29(b)(3)(ii). Appellant now contends (Br. 26 n.2), however, that video-on-demand is categorically excluded from treatment as an electioneering communication because no single video-on-

gest in its jurisdictional statement that video-on-demand distribution might have constitutional significance. This Court generally "do[es] not decide in the first instance issues not decided below," *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999), and no exception should be made here. In particular, in opposing the Commission's summary-judgment motion, appellant never submitted any facts or argument to support its current contentions about the nature of video-on-demand.

b. In any event, appellant identifies no sound constitutional basis for exempting video-on-demand broadcasts from BCRA's restrictions on corporate financing of electioneering communications. As with a 30-second commercial or a 30-minute infomercial, the producer of a video-on-demand film pays the broadcaster to air the film without modification. See, *e.g.*, J.A. 253a (touting the "advanced advertising opportunities" of video-on-demand, which allows candidates and others to "craft[] and control[] [their] own long-form campaign message [and] reach voters with no media dilution or bias").

Appellant speculates (Br. 25, 26) that making *Hillary* available through video-on-demand would not change any voter's mind because only viewers who "want to learn what [appellant] has to say about Hillary Clinton"

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demand transmission can be received by 50,000 people. That argument was neither pressed nor passed upon below, see J.A. 199a n.6 (considering a different definitional question), and it is not fairly included within the questions presented in the jurisdictional statement. In any event, the argument lacks merit. The applicable FEC regulation, which is entitled to deference, provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area. See 11 C.F.R. 100.29(b)(7)(i)(G) and (ii). Because the digital video-on-demand system that appellant wished to use had 34.5 million subscribers nationwide (J.A. 256a), the regulatory definition appears to have been satisfied.

would select *Hillary* from a video-on-demand menu. An interested audience, however, is a virtue to an advertiser. Indeed, the "Elections '08" video-on-demand channel on which *Hillary* purportedly would have run is marketed—to *campaigns* as well as issue-advocacy groups—as an effective way to reach voters, including swing voters. See J.A. 258a, 259a. A voter's decision to select "*Hillary: The Movie*" from an on-screen menu does not logically imply that the voter has decided how to cast his ballot.

The apparent premise of appellant's argument—*i.e.*, that typical voters with access to video-on-demand may select programs that they believe will reinforce their pre-existing beliefs, but will not choose programs that may inform them with respect to electoral choices as to which they are currently undecided—reflects a jaundiced view of American democracy. But even if everyone who would have watched *Hillary* through video-on-demand was already opposed to Senator Clinton's candidacy, it would not follow that the film lacked electoral influence. A significant amount of electoral advertising is intended not to sway undecided voters, but rather to motivate the advertiser's political "base." To the extent that *Hillary* would have induced viewers already opposed to Senator Clinton to become more active in their opposition to her candidacy, the film's electoral effect would have been comparable to that of any other communication directed at decided voters.

Longstanding federal restrictions on corporate and union electioneering, see 2 U.S.C. 441b(a), apply to *all* forms of express advocacy, including appellant's "free DVD by mail" hypothetical (Br. 27-28). It is true that the restrictions imposed by BCRA Section 203, which extend beyond express advocacy to its functional equiva-

lent, are limited to broadcast media and do not apply to newspaper advertising or the Internet. See 2 U.S.C. 434(f)(3)(A)(i). Based on an extensive factual record, this Court in *McConnell* upheld that legislative judgment, reiterating its statement in *Buckley* that "reform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind." 540 U.S. at 207-208 (quoting *Buckley*, 424 U.S. at 105).[8] Appellant identifies no sound basis for rejecting that conclusion now, and there are valid reasons to subject video-on-demand broadcasts to the same financing restrictions as other broadcast advertisements. Video-on-demand advertising has many of the strengths of the television medium, and it can target particular audiences. See J.A. 257a (regional targeting available); Brian Steinberg, *Custom National TV Spots Are Close: Verklin*, Advertising Age, Sept. 22, 2008, at 6, *available in* 2008 WLNR 18294102.

2. **Hillary*'s 90-minute length gives it no special constitutional status***

Appellant also contends (Br. 13, 28) that the holdings of *McConnell* and *WRTL* do not apply to "feature-length films," even when those films are the functional equivalent of express advocacy. That argument lacks merit. As explained above, *Hillary* is a 90-minute advocacy piece whose unmistakable import is that Senator Clinton should not be elected President. Once that proposition

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[8] Although the FEC has broadly exempted electioneering activity on the Internet from regulation, see 11 C.F.R. 100.26, 100.155 (exempting from most regulation Internet electioneering other than the purchase of paid advertising on another's website), nothing in *McConnell* or any other decision suggests that this exemption is constitutionally compelled.

is established, there is no principled constitutional basis for distinguishing *Hillary* from the attack advertisements discussed in *McConnell* simply because the movie spends more time on its electioneering than the advertisements do.

In arguing that the rationale of *McConnell* does not extend to feature-length movies, appellant notes (*e.g.*, Br. 24, 28) the apparent absence of evidence that such films had been the subject of widespread abuse before BCRA was enacted. But the legislative record on which BCRA was based amply established the prevalence, during the periods directly before federal elections, of corporate-funded broadcast attacks that carefully avoided using the explicit words of electoral advocacy but nonetheless urged the election or defeat of clearly identified candidates. *McConnell*, 540 U.S. at 206. And the *McConnell* record contained evidence that advocacy groups used corporate money to broadcast lengthy "infomercials" that were much longer than the traditional 30-second advertisement. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 305-306, 316-317 (D.D.C. 2003) (opinion of Henderson, J.); *id.* at 547-548 (opinion of Kollar-Kotelly, J.); *id.* at 906 (opinion of Leon, J.).[9] As appellant notes

[9] Appellant also contends (Br. 22-23) that the 30-second spot is the most effective form of advocacy and, therefore, the only form Congress was justified in regulating. But many politicians have used lengthy video segments (some with all the trappings of a studio release) to great political effect. Virtually every national political convention features a hagiographic film about the candidate (such as the Hollywood-produced *The Man from Hope*), and presidential candidates have bought infomercial-length blocks of advertising time for decades. See, *e.g.*, Frank Greve, *TV Ad Uses Flag, Prayers to Portray Reagan as Leader*, Miami Herald, Sept. 12, 1984, at 16A, *available in* 1984 WLNR 203856; William Safire, *Safire's Political Dictionary* 113 (2008) ("Checkers speech").

(Br. 26), video-on-demand technology is relatively new, and its advent has made buying a feature-length block of advertising time much easier. But nothing about the duration of *Hillary* separates it from the other pieces of broadcast advertising documented in the *McConnell* record.

3. The "overtly conservative" nature of Hillary's advocacy does not entitle appellant to use corporate treasury funds to broadcast the film

Appellant contends that despite its electioneering message, *Hillary* poses no risk of actual or apparent quid-pro-quo corruption because "[t]he self-selecting audience of an overtly conservative documentary like *Hillary* likely would not have included a significant number of Democratic primary voters." Br. 41. That contention fails for multiple reasons.

First, the lead opinion in *WRTL* made clear that the constitutional inquiry in this context does not turn on the sort of speculation in which appellant engages. Following *Buckley*, that opinion noted "the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test 'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.'" 127 S. Ct. at 2666 (quoting *Buckley*, 424 U.S. at 43). The application and constitutionality of the longstanding restrictions on corporate *express advocacy* do not depend on a determination that specific advertisements will actually achieve their intended objective. (There is, in other words, no constitutional exemption for ineffective corporate electioneering.) If a particular electioneering communication is the functional equivalent of express advocacy—*i.e.*, if it "can only be reasonably be viewed as advocating

or opposing a candidate in a federal election," *id.* at 2669—the likelihood that the communication will ultimately affect voting behavior is irrelevant to the constitutional analysis.

Second, there is in any event no sound basis for appellant's contention that *Hillary*'s "overtly conservative" orientation would deprive the film of any potential effect on voters in a Democratic presidential primary. Some members of the Democratic Party hold conservative views. In addition, many Democratic presidential primaries are open to unaffiliated voters and members of other parties. See, *e.g.*, Calvin Woodward, *Open Primaries in Texas and Ohio Will Test Clinton*, Hous. Chron., Feb. 24, 2008, at A4, *available in* 2008 WLNR 3698542. And while the film featured criticisms of Senator Clinton by well-known conservative commentators, its predominant thrust was that Senator Clinton was unfit to be President because of a flawed character, not because of an unduly liberal political ideology. Such attacks might influence the voting behavior even of Democratic party members who did not share the interviewees' conservative political views.

4. Appellant's purported use of funds acquired from individuals to finance the film at issue here does not entitle it to a constitutional exemption from BCRA Section 203's restrictions

Appellant contends (Br. 29-34) that BCRA Section 203 is unconstitutional as applied to *Hillary* because the film was financed "overwhelmingly" by donations from individuals. That argument is not properly before the Court and in any event lacks merit.

Appellant has not previously contended, either in the district court or in its jurisdictional statement, that it is

entitled to distinct constitutional treatment because it relies primarily on individual donations. With respect to its sources of funding, appellant's complaint simply alleged that the organization "is not a 'qualified nonprofit corporation'" within the meaning of 11 C.F.R. 114.10 (which implements the *MCFL* exemption, see p. 3, *supra*) because appellant "receives corporate donations and engages in business activities." J.A. 11a.

Because appellant failed to raise its current line of argument in the district court, the evidentiary record is inadequate to determine whether *Hillary* was in fact financed "overwhelmingly" by individual donations. During discovery, appellant disclosed *only* those donations of $1000 or more that were made or pledged for the purpose of furthering the production or public distribution of appellant's films regarding then-Senators Clinton and Obama. See J.A. 225a, 244a; 11 C.F.R. 104.20(c)(9). The total amount of disclosable donations was approximately $200,000. J.A. 251a-252a. The record does not disclose the movie's production cost, but the cost of distributing the film, including through video-on-demand, would have greatly exceeded $200,000. See J.A. 256a (nationwide video-on-demand availability for four weeks would cost $1.2 million). It is therefore unclear from the record how appellant obtained (or intended to obtain) a substantial percentage of the funds needed to produce and distribute the film.

In any event, even if appellant's current representations about the film's funding sources were treated as established, they would not entitle it to a constitutional exemption from BCRA Section 203's restrictions. Appellant concedes that it does not qualify for the narrow as-applied exemption announced in *MCFL* because it both engages in business activities and receives corporate

donations.[10] See Br. 5, 30; J.A. 11a. Thus, as in *WRTL*, this case does not present the question (raised by amicus National Rifle Association) whether a corporation funded only by individuals can make out an as-applied challenge on that basis. See *WRTL*, 127 S. Ct. at 2673 n.10 (opinion of Roberts, C.J.) (declining to reach that question "because WRTL's funds for its ads were not derived solely from individual contributions").

In *McConnell*, the Court reaffirmed that its holding in *MCFL* "related to a carefully defined category of entities," and that each of the three features of the nonprofit corporation in that case was "central" to the Court's holding. *McConnell*, 540 U.S. at 210. In particular, by limiting the *MCFL* exception to entities that do not accept contributions from business corporations, the Court ensured that *MCFL* organizations cannot "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264; see *Beaumont*, 539 U.S. at 160 (noting that "[n]onprofit advocacy corporations are * * * no less susceptible than traditional business companies to misuse as conduits for circumventing * * * contribution limits").

Appellant's proposed constitutional exemption is in two respects a significant expansion of the *MCFL* exception beyond the boundaries previously recognized and reaffirmed by this Court. First, appellant would abandon an existing bright-line rule, see *MCFL*, 479 U.S. at 264 (noting that Massachusetts Citizens for Life had a "policy not to accept contributions from" business corporations or labor unions); *McConnell*, 540 U.S. at 210, for a more amorphous inquiry into whether *Hillary* was

[10] The corporate donors identified as contributing to *Hillary* were business corporations, not member-supported ideological entities like Massachusetts Citizens for Life. See J.A. 244a, 252a.

funded "predominantly" or "overwhelmingly" by individuals, Br. 31, 32. Cf. *WRTL*, 127 S. Ct. at 2666, 2669 n.7 (opinion of Roberts, C.J.) (agreeing with "the imperative for clarity in this area"); *id.* at 2680-2681 (Scalia, J., concurring in part and concurring in the judgment) (same).

Second, whereas the *MCFL* exception turns on an assessment of an organization's overall operations, appellant does not assert that the bulk of its *total resources* were acquired from individual donations, but only that *Hillary* itself was financed "predominantly" or "overwhelmingly" in that manner. It would appear that, under appellant's theory, even an advocacy corporation that obtains most of its funds from business corporations would be constitutionally exempt from BCRA's restrictions with respect to any particular electioneering communication that is financed (or mostly financed) through individual donations.

Finally, there is no logical reason to allow appellant's business-corporation donors, which could not spend their treasury funds to finance electioneering communications directly, to achieve the same result by using appellant as a conduit. The fact that funds provided by appellant's business-corporation contributors are commingled with other dollars does not eliminate the government's interest in preventing the use of those corporations' treasury funds for electoral advocacy. Appellant contends (Br. 32-33) that all of its advocacy accurately reflects the views of its individual donors. Even if that is so, it does not follow that appellant's electioneering necessarily reflects the views of the shareholders and customers of its business-corporation donors. See *McConnell*, 540 U.S. at 205 (citing *Austin*, 494 U.S. at 660).

D. Appellant Presents No Basis For Overruling This Court's Decision In *Austin*

In *Austin*, this Court held that corporations may constitutionally be barred from using their treasury funds to finance express advocacy for or against a candidate for elective office.[11] 494 U.S. at 660. Appellant contends (Br. 30-31) that this Court should overrule *Austin* and hold that *all* corporations are entitled to use their treasury funds to engage in *all* forms of electioneering, including express advocacy in candidate elections.[12]

Appellant's argument is not properly before the Court. Although appellant previously sought to have BCRA Section 203 declared facially unconstitutional, see J.A. 24a, it later abandoned that claim, and the district court ultimately ordered dismissal of the relevant count pursuant to the parties' stipulation. See p. 10, *supra*. In addition, appellant's jurisdictional statement presented only "an as-applied challenge to * * * BCRA § 203." J.S. 5. In setting out the substantial federal questions

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[11] The question had been a recurring one, but the Court had not previously needed to decide it. See *MCFL*, 479 U.S. at 257-259; *Bellotti*, 435 U.S. at 788 n.26; see also *National Right to Work Comm.*, 459 U.S. at 208-209; *United States* v. *International Union UAW*, 352 U.S. 567, 589-592 (1957) (union express advocacy).

[12] Acceptance of appellant's argument would effectively invalidate not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy, as well as any state-law analogues. Notably, appellant does *not* ask this Court to reconsider *McConnell*'s holding that, if corporate spending on express advocacy in candidate elections may be regulated, so may corporate spending that is the functional equivalent of express advocacy. Cf. *WRTL*, 127 S. Ct. at 2686 (Scalia, J., concurring in part and concurring in the judgment) (advocating, as "modest medicine," the overruling of only *McConnell*'s comparatively recent holding as to nonexpress advocacy). Rather, appellant seeks to invalidate *both* forms of regulation.

that it believed warranted plenary review, appellant identified a dispute over the application of *WRTL* and a question about whether Section 203 can be applied to a "feature-length documentary movie." J.S. i, 24-28. No issue as to the continuing vitality of *Austin* was either "set out" in the questions presented or "fairly included therein." Sup. Ct. R. 14.1(a) (rule for certiorari petitions), 18.3 (applying Rule 14 to jurisdictional statements).

In any event, this case presents none of the considerations that might support a departure from this Court's customary fidelity to precedent. *Austin* has been relied on by the other branches of the federal government, especially in crafting BCRA; by this Court, which applied *Austin* in upholding that statute, see *McConnell*, 540 U.S. at 203, 205 (explaining that none of the plaintiffs in that case, which included appellant, challenged the correctness of *Austin*'s holding); and by legislatures and courts considering state and local campaign-finance measures. In short, "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203.

Appellant makes virtually no effort to explain why *Austin* should be overruled under "the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). Appellant devotes less than two pages of its 58-page brief (Br. 30-31) to this issue, and it identifies no relevant new evidence or other intervening

development that was unavailable to the Court when *Austin* was decided. That "incomplete presentation" is "reason enough to refuse" appellant's extraordinary request to overrule *Austin*, and as a consequence the relevant holding of *McConnell* as well. *Randall*, 548 U.S. at 263 (Alito, J., concurring in part and concurring in the judgment).

In arguing that *Austin* was "wrongly decided" (Br. 30), appellant relies in part on this Court's subsequent decision in *Davis* v. *FEC*, 128 S. Ct. 2759 (2008). That ruling, however, invalidated statutory conditions placed on a wealthy *individual*'s expenditure of personal funds in support of his own candidacy. See *id.* at 2766-2767, 2770-2774. The case therefore did not implicate this Court's consistent "respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" *McConnell*, 540 U.S. at 205 (quoting *National Right to Work Comm.*, 459 U.S. at 209-210). Indeed, neither the Court nor the dissenters in *Davis* suggested that there was any inconsistency between that decision and the prior ruling in *Austin*.

Appellant also relies (Br. 30) on *Bellotti*, which was decided 12 years *before Austin*. But the Court in *Bellotti*, while invalidating state-law restrictions on the use of corporate funds to influence ballot-question referenda, explained that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S. at 788 n.26. The Court further observed that "Congress might well be able to demonstrate the existence of a danger or apparent corruption in independent expenditures by corporations to influence can-

didate elections." *Ibid.* Far from providing a basis for overruling *Austin*, the decision in *Bellotti* anticipated the rationale on which the *Austin* Court later relied.

II. BCRA'S REPORTING AND DISCLAIMER REQUIREMENTS ARE CONSTITUTIONAL AS APPLIED TO APPELLANT'S FILM AND ADVERTISEMENTS

Appellant contends (Br. 42-57) that BCRA's reporting and disclaimer requirements are unconstitutional as applied to *Hillary* and the advertisements promoting it. Because *Hillary* itself is the functional equivalent of express advocacy, see pp. 16-22, *supra*, the constitutionality of the reporting and disclaimer provisions as applied to the film is clearly established by this Court's decision in *McConnell*. See 540 U.S. at 196.[13] Although the advertisements are not the functional equivalent of express advocacy under the lead opinion in *WRTL*, they would fall within BCRA's definition of "electioneering communication" if they were broadcast during the periods immediately preceding federal elections in which Senator Clinton was a candidate, and their airing during those periods would implicate important governmental interests related to the federal electoral process. Application of BCRA's reporting and disclaimer requirements to those and similar advertisements is therefore constitutional.

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[13] If this Court holds that *Hillary* is not the functional equivalent of express advocacy, or that appellant's financing of the film is otherwise constitutionally exempt from the restrictions imposed by BCRA Section 203, application of the reporting and disclaimer requirements to the film would nevertheless be constitutional for the reasons set forth below.

A. Disclosure Requirements Are Subject To Intermediate Scrutiny

Because "disclosure requirements * * * do not prevent anyone from speaking," *McConnell*, 540 U.S. at 201 (citation and brackets omitted), they are not subject to strict scrutiny. Rather, First Amendment challenges to disclosure requirements are analyzed under a more permissive standard, which this Court has called "exacting scrutiny," and which requires that the disclosure requirement bear a "substantial relation" to a "sufficiently important" governmental interest. *Buckley*, 424 U.S. at 64, 66, 75 (citation omitted); accord *Davis*, 128 S. Ct. at 2775 (reiterating that "there must be 'a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed,' and the governmental interest 'must survive exacting scrutiny'") (quoting *Buckley*, 424 U.S. at 64); *McConnell*, 540 U.S. at 196, 231. That standard corresponds to *intermediate* scrutiny, not strict scrutiny. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996).

This Court in *Buckley* expressly distinguished the strict scrutiny applicable to statutes (such as expenditure limits) that impose "limitations on core First Amendment rights of political expression," 424 U.S. at 44-45, from the lesser scrutiny applicable to encroachments on the "privacy of association" by disclosure requirements, *id.* at 64. Neither *Buckley*, nor *McConnell*, nor any of the other cases that appellant cites applied strict scrutiny to an election-disclosure requirement. *E.g.*, *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (*ACLF*) (applying "exacting scrutiny" and requiring that disclosure requirements

be "substantially related to important governmental interests").[14]

Nor does *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995), support the application of strict scrutiny here. The Court in *McIntyre* explicitly distinguished the state law at issue, which prohibited the distribution of anonymous handbills addressing a variety of political issues, see *id.* at 338 n.3, from the disclosure requirements contained in federal campaign-finance laws. See *id.* at 355. BCRA's reporting requirements apply only to broadcast, cable, or satellite communications, materials far removed from the "personally crafted statement of a political viewpoint" involved in *McIntyre*. *Ibid.* And the required disclosure pertains in part to contributors, who often will have played no part in crafting the corporation's electioneering message beyond contributing financially.

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[14] Appellant's reliance (Br. 43) on *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), is even more misplaced. In *Hurley*, this Court did not apply strict scrutiny. See 515 U.S. at 577-578 (holding that the state failed to identify any "legitimate interest" in the challenged application of the statute). And in *Riley*, the portion of the disclaimer statute at issue that was comparable to BCRA's electioneering communication disclaimer requirement—*i.e.*, the portion requiring the speaker to identify himself—was not challenged. 487 U.S. at 786; see *id.* at 800 (noting difference between challenged disclaimer and requiring "detailed financial disclosure forms"); see also *McConnell*, 540 U.S. at 140 (distinguishing *Riley* on other grounds).

B. As Applied To Advertisements That Fall Within BCRA's Definition Of "Electioneering Communication," But That Are Not The Functional Equivalent Of Express Advocacy, BCRA's Reporting And Disclaimer Requirements Are Substantially Related To Important Governmental Interests

The challenged disclosure provisions require the sponsor of an electioneering communication to identify itself to the Commission, disclose the amount spent on the advertisement and any large contributions earmarked to underwrite it, and identify itself in the advertisement itself. Important governmental interests support each of these requirements. First, disclosure serves the public interest in transparency in political activity. Second, disclosure permits the Commission to enforce the substantive requirements of the law. *Buckley*, 424 U.S. at 83; accord *McConnell*, 540 U.S. at 196. As this Court has held, these interests readily satisfy exacting scrutiny.

Nothing in *WRTL* casts doubt upon those holdings. In that case the government asserted a different interest, and the Court applied a more stringent standard of scrutiny. The Court concluded that the government's interest in protecting the political process from corruption was insufficiently compelling to justify a *ban* on corporate-treasury financing of advertisements that, like those at issue in this case, fell within the statutory definition of "electioneering communication" but were not the functional equivalent of express advocacy. The Court did not hold, however, and its decision does not logically suggest, that such advertisements are constitutionally exempt from *all* regulation. To the contrary, many categories of constitutionally protected political speech and related spending are properly subject to dis-

closure requirements. The government's informational and enforcement interests are distinct and substantial, and they amply justify the application of BCRA's reporting and disclaimer requirements under the exacting-scrutiny standard.

1. The government has an important interest in providing information to the public

a. In upholding the disclosure requirements at issue here against a facial challenge, this Court relied first on the important interest in securing the public's access to full information about the selection of their elected leaders. *McConnell*, 540 U.S. at 196, 200-201. The Court had long recognized the validity of that interest in upholding requirements to disclose contributions, express advocacy, and political committees' disbursements. *Buckley*, 424 U.S. at 66-68, 81-82. In *McConnell*, the Court confirmed that the same important interest "amply supports application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'" *McConnell*, 540 U.S. at 196.

Promoting that interest through disclosure serves important First Amendment values. "[I]ndividual citizens seeking to make informed choices in the political marketplace" have "First Amendment interests" in learning how electoral advocacy is funded. *McConnell*, 540 U.S. at 197 (citation omitted); accord *Buckley*, 424 U.S. at 82 (disclosure "further[s] First Amendment values by opening the basic processes of our federal election system to public view"). And the practical efficacy of disclosure requirements in furthering that interest has been enhanced by technological advances that make it possible for groups to disclose expenditures quickly, with minimum effort, and for the public to review and

even search the data with ease. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 408 (2000) (Kennedy, J., dissenting) (online disclosure now provides an "immediate way to assess the integrity and the performance of our leaders").

b. Appellant, joined by numerous amici, contends that, if a particular electioneering communication is not the functional equivalent of express advocacy under *WRTL*, then the communication must be treated as wholly unrelated to any federal election, and BCRA's reporting and disclaimer provisions for that reason cannot constitutionally be applied to that communication. See Br. 46-47, 51-52, 57; accord, *e.g.*, CCP Br. 21-22; FFE Br. 28-29. The lead opinion in *WRTL*, however, provides no support for that proposition. To the contrary, the guiding premise of that opinion is that some advertisements falling within the statutory definition of "electioneering communication" can reasonably be construed *either* as electoral appeals *or* as issue advocacy. See 127 S. Ct. at 2669. The lead opinion concluded that BCRA Section 203's financing restrictions cannot constitutionally be applied to such advertisements, on the ground that "the tie goes to the speaker, not the censor." *Ibid.* The necessary consequence of that holding is that particular electioneering communications may be constitutionally exempt from BCRA's corporate-financing prohibitions even though some reasonable observers will construe the advertisements as electoral advocacy and the advertisements will foreseeably affect electoral outcomes.

For that reason, the concession on which appellant relies—*i.e.*, that the advertisements at issue here were not the functional equivalent of express advocacy under *WRTL*—does not logically imply that the advertise-

ments were unrelated to any federal election. Appellant's "Questions" advertisement, for example, refers to Senator Clinton as a "European socialist." J.A. 197a n.4. Although the advertisement might be interpreted as simply promoting the film without unambiguously urging any particular electoral outcome, it could also reasonably be construed as electoral advocacy, and its airing within 30 days before a presidential primary would have an obvious potential to affect voting behavior.

Under *WRTL*, those potential consequences are an insufficient basis for barring the use of corporate treasury funds for advertisements that do not *unambiguously* appeal for a particular vote. Voters who perceive a connection between an advertisement and an upcoming election, however, retain a significant interest in identifying the advertisement's sponsor and underwriters, in order to assess the advertisement's credibility and the sponsor's motives. BCRA's reporting and disclaimer requirements help to vindicate that interest, and to ensure in particular that communications having potential electoral significance are not *mis*attributed to the identified candidate or her opponent. Cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 565 (2005); *id.* at 568 (Thomas, J., concurring).

c. There is nothing incongruous in recognizing that particular communications may properly be subject to *disclosure* requirements even though they are constitutionally exempt from restrictions such as spending or financing limits. In *McConnell*, for example, the Court held that BCRA's disclosure requirements could be applied to the "entire range of 'electioneering communications,'" 540 U.S. at 196, even though it upheld the corporate-financing prohibition only as to express advocacy and communications that are the functional equivalent

of such advocacy, *id.* at 206. And three additional Justices voted to uphold BCRA's disclosure requirements (with one exception that is not implicated in this case) even as they voted to invalidate the corporate-funding restriction on electioneering communications. See *id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part). Similarly, in *Buckley* the Court struck down FECA's dollar limits on independent expenditures but nevertheless sustained the statute's disclosure requirements applicable to such expenditures. See 424 U.S. at 75-82. While acknowledging that the disclosure requirements "would no longer serve any governmental purpose" if their sole function were to effectuate the invalid spending limits, *id.* at 76, the Court explained that the disclosure requirements served an additional "informational interest" by "increas[ing] the fund of information concerning those who support the candidates," *id.* at 81.[15]

Indeed, this Court has frequently explained, in invalidating particular spending or funding limits, that the relevant spending would still be subject to disclosure requirements. See, *e.g.*, *MCFL*, 479 U.S. at 262 (explaining that "MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures"); *ACLF*,

[15] The sponsor of the electioneering communications in *WRTL* likewise affirmatively disavowed any challenge to BCRA's disclosure requirements and invoked the public's access to information about the sources of its funding to support its challenge to the funding limitation. Appellee Br. at 49, *WRTL*, *supra* (No. 06-969).

525 U.S. at 202-203, 205 (upholding requirement to disclose donations made to organizations to pay ballot-initiative petition circulators); see also *Shrink Mo. Gov't*, 528 U.S. at 428-429 (Thomas, J., dissenting). That is so even in the context of ballot-issue campaigns, in which unrestricted campaign spending creates little risk of *quid pro quo* corruption because the elections do not involve candidates who may become beholden to their financial supporters. See *Bellotti*, 435 U.S. at 792 n.32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 n.4, 298-299 (1981) (noting that "contributors must make their identities known under * * * [an unchallenged provision of] the ordinance").

Similarly, although lobbying is protected by the First Amendment, this Court and several courts of appeals have upheld mandatory disclosure of lobbying expenditures on the basis of the government's interest in informing the public of who is attempting to sway the resolution of public issues and how they are attempting to do so. See *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954) (holding that "those who for hire attempt to influence legislation" may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities); accord, *e.g.*, *Florida League of Prof'l Lobbyists, Inc.* v. *Meggs*, 87 F.3d 457, 460 (11th Cir.) (upholding state lobbyist disclosure statutes in light of state interest in helping citizens "apprais[e] the integrity and performance of officeholders and candidates, in view of the pressures they face"), cert. denied, 519 U.S. 1010 (1996). The Court has thereby recognized

that legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence occurs outside the election context.

Against this line of cases, appellant invokes the Court's determination in *Buckley* that a prior FECA disclosure provision was limited to spending that is "unambiguously related to the campaign of a particular federal candidate." Br. 47 (quoting *Buckley*, 424 U.S. at 80). Appellant's reliance on that aspect of *Buckley* is misplaced. *Buckley* announced the express-advocacy test (for which the reference to "unambiguously campaign related" spending, 424 U.S. at 81, was shorthand) as a construction of the *statutory* phrase "for the purpose of . . . influencing [federal elections]." *Id.* at 78, 79; see *id.* at 78-81. This Court has since held that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192; see *WRTL*, 127 S. Ct. at 2670 n.7 (opinion of Roberts, C.J.).[16] With respect to disclosure requirements in particular, this Court's precedents squarely refute appellant's contention that Congress's power is limited to communications that are "unambiguously related" to an identified federal candidate's campaign. The decisions discussed above make clear that compelled disclosure of financing information is permissible in a number of situations in

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[16] Appellant's reliance (Br. 52) on *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008), is misplaced. In holding that legislatures' power to "establish campaign finance laws" is limited to regulating express advocacy and its functional equivalent, *id.* at 282-283, the Fourth Circuit was referring to regulation of expenditures, and did not consider reporting requirements standing alone, see *id.* at 280.

which the disbursements in question have *nothing* to do with a candidate election.

2. The government has an important interest in facilitating enforcement of funding regulations

In upholding BCRA's disclosure requirements, the Court in *McConnell* also relied on the government's interest in facilitating the enforcement of substantive regulation of contributions and funding sources. 540 U.S. at 196; see also *id.* at 200-201 (upholding compelled disclosure of executory contracts where to hold otherwise would "open a significant loophole" in disclosure requirements); *id.* at 237 (upholding broadcast station record-keeping provisions to "provide an independently compiled set of data for purposes of verifying candidates' compliance with the disclosure requirements and source limitations of BCRA and [FECA]"); *Buckley*, 424 U.S. at 67-68. Even in the context of independent campaign-related spending, the government's interest in disclosure "can be as strong as it is in coordinated spending." See *id.* at 81.

Contrary to appellant's contention (Br. 48, 52-53, 57), that interest can be implicated even where, as here, the spending in question is constitutionally exempt from statutory financing restrictions. The classic example is the *MCFL* organization, which is permitted to spend unlimited amounts on independent express advocacy. See *MCFL*, 479 U.S. at 262-263. This Court held that the government's anticorruption interest in limiting corporate express advocacy does not apply to corporations that possess the three essential characteristics of *MCFL* organizations. *Id.* at 263-264; see p. 3, *supra*. The Court observed, however, that an *MCFL* organization must report the amounts used for its constitutionally pro-

tected independent expenditures. 479 U.S. at 262. The Court explained that "MCFL will be required to identify all contributors who annually provide * * * funds intended to influence elections * * * [or] who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." *Ibid.* The Court thus recognized that, although an *MCFL* organization is constitutionally entitled to finance independent expenditures with its general treasury funds, FECA's disclosure provisions advance an important governmental interest by enabling the Commission to determine whether a particular organization has crossed the line from exempt to regulable activity.

BCRA's reporting and disclaimer requirements serve an analogous anti-circumvention purpose. Even when a corporate speaker believes that a particular electioneering communication does not contain the functional equivalent of express advocacy, and therefore may be financed with corporate treasury funds under *WRTL*, the FEC is entitled to make its own assessment of the communication's content to determine whether the *WRTL* exemption applies. The Commission's ability to enforce BCRA Section 203's financing restrictions with respect to electioneering communications that *are* the functional equivalent of express advocacy would be impeded if the agency lacked knowledge that such communications had been aired, or if it could not readily determine whether particular advertisements were sponsored by corporations. Requiring disclosure of *all* corporate electioneering communications, even those that the corporate speaker believes should qualify for the *WRTL* exemption, thus furthers a valid governmental interest.

That continuing enforcement interest distinguishes this case from *Davis*, in which the Court invalidated both a contribution-limit provision and an associated disclosure requirement. In *Davis*, the Court invalidated the challenged contribution regulations *in their entirety*, leaving the government with no remaining enforcement interest in receiving the information contained in the associated reports. See 128 S. Ct. at 2775. Here, by contrast, Section 203 remains facially valid and enforceable. The government therefore retains a valid interest in obtaining the information necessary to enforce it, including disclosure reports filed by organizations whose as-applied exemption from the substantive regulation depends on whether they can qualify for "the benefit of the doubt" under *WRTL*.

C. Appellant Demonstrates No First Amendment Burden Arising From The Disclosure Provisions

1. Appellant presents no evidence that the disclosure requirements would cause appellant or its donors to suffer reprisals

At least since *Buckley*, this Court has recognized that in some rare cases, involvement in political activity can be so controversial that disclosing that involvement to the public can be a genuine burden. See *Buckley*, 424 U.S. at 69. But the existence and extent of such a burden requires substantiation, with the kind of evidence that can be presented in an as-applied challenge. For that reason, this Court upheld BCRA's disclosure requirements against a facial challenge, explaining that the plaintiffs (which included appellant) had not made a sufficient evidentiary showing as to the likelihood of reprisals. *McConnell*, 540 U.S. at 199.

The Court in *McConnell* made clear that its "rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. The Court further explained that, to succeed in such an as-applied challenge, a plaintiff must demonstrate a "reasonable probability" that the forced disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *Id.* at 198-199 (quoting *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). As in *McConnell*, however, appellant has failed to present *any* evidence beyond "bald assertion" (J.A. 209a) that it, or any of its contributors, faces any particularized risk of "threats, harassment, and reprisals" if it is linked to electioneering communications.

Appellant asserts that disclosure "*can* have grave consequences" and "*can* expose contributors to harassment." Br. 53 (emphasis added and internal quotation marks omitted). Several amici similarly contend that disclosure can *sometimes* lead to reprisals. Appellant, however, points to no record evidence that *it* would reasonably fear reprisals.[17] And this Court has consistently rejected the proposition that the mere theoretical possibility of reprisals, unconnected to any particularized showing of likely harm to specific speakers or donors, is sufficient to render disclosure requirements unconstitu-

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[17] Indeed, appellant has disclosed the identity of approximately 1000 contributors during the 18 years it has maintained a PAC. See *FEC Disclosure Reports—Filer ID C00295527* (visited Feb. 17, 2009) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527>; FEC, *Individuals Who Gave to This Committee: Citizens United Political Victory Fund* (visited Feb. 17, 2009) <http://query.nictusa.com/cgi-bin/com_ind/C00295527/>.

tional. See, *e.g.*, *Buckley*, 424 U.S. at 68 (holding disclosure requirements constitutional even though "[i]t is undoubtedly true that public disclosure of contributions * * * will deter some individuals who otherwise might contribute").

2. Appellant presents no evidence that the reporting requirements would chill speech

Appellant speculates (Br. 54) that the reporting requirements might cause donors not to contribute to appellant, which would reduce appellant's "ability to continue communicating" and "chill the constitutionally protected political speech of Citizens United's supporters." To the extent appellant argues that some potential donors would not contribute because of a fear of reprisal (or some other constitutionally cognizable fear), the argument fails for lack of evidence, as discussed above.

To the extent appellant claims that the disclosure requirements would chill its own speech directly, that argument has been explicitly rejected in *McConnell* and numerous other cases holding that financial reporting relating to speech is, as a matter of law, too removed in time and space from the speech act to constitute an unconstitutional hindrance. See *McConnell*, 540 U.S. at 197-199, 201 ("[FECA's] disclosure requirements are constitutional because they 'd[o] not prevent anyone from speaking.'") (quoting *McConnell*, 251 F. Supp. 2d at 241); see also *ACLF*, 525 U.S. at 198 (rejecting challenge to requirement that petition circulators file affidavits); cf. *Harriss*, 347 U.S. at 626 (rejecting First Amendment challenge to lobbyist-disclosure statute because "hazard" of speech being silenced by financial disclosure was "too remote" to outweigh government's interest in protecting legislative process). The Court's

decisions provide no support for the proposition that financial-disclosure requirements impose an unconstitutional chill on First Amendment activity. To the contrary, because disclosure increases the range of information available to citizens, it furthers First Amendment values. See pp. 40-41, *supra*.

3. The disclaimer requirements impose no constitutionally significant burdens

BCRA requires the following disclaimers to be included in televised electioneering communications: (1) an oral statement that the entity funding the communication "is responsible for the content of this advertising"; and (2) a written statement on the screen, with the name and contact information of the entity responsible for funding the communication, stating "that the communication is not authorized by any candidate or candidate's committee." See pp. 5-6, *supra*. Appellant argues that it should not be forced to disclose its identity (Br. 45, 47 (citing *McIntyre*, 514 U.S. at 348)), but appellant already discloses its identity at the website referred to in the advertisements and at the beginning and end of its film. See Citizens United, *Hillary: The Movie* (visited Feb. 17, 2009) <http://www.hillarythemovie.com>; J.A. 26a-27a; Am. Compl. Exh. 2 (DVD version). Truly anonymous speech therefore is not at issue in this case. In any event, *McIntyre*'s holding regarding in-person distribution of handbills unrelated to candidate elections is inapposite here. See p. 38, *supra*.

Because appellant is not seeking to keep its identity secret, it contends that the disclaimer requirement burdens it in two other ways. First, appellant argues that the disclaimer would "distort the message of [appellant's] advertisements by suggesting to viewers—most

of whom are undoubtedly familiar with the disclaimers from the ubiquitous campaign advertisements aired preceding every election—that those advertisements convey a campaign-related message." Br. 50. That argument lacks merit. Appellant has provided no evidence that any person has ever been misled or confused by an electioneering communication disclaimer. Cf. *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1193-1194 (2008) (rejecting facial challenge to statute governing ballot listings where evidence did not show that any voter would be misled by listings). And the danger of such confusion is slight. The disclaimer requirements are precisely worded so that the advertiser need only take responsibility "for the content of *this advertising*," with no additional characterization or definition. 11 C.F.R. 110.11(c)(4)(i) (emphasis added). If a viewer does not otherwise regard the advertisements as campaign-related, a disclaimer that identifies the sponsor as someone other than a candidate or candidate committee is unlikely to produce that impression.[18]

Second, appellant also contends that the disclaimer requirements are unconstitutional because they are analogous to "restriction[s] on the *quantity* of political expression," such as expenditure limits. Br. 49 (quoting *Buckley*, 424 U.S. at 55) (brackets in original). Specifically, appellant argues that the oral disclaimer would preclude appellant from airing ten-second advertise-

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[18] Appellant further argues that BCRA's disclosure requirements are "fatally underinclusive because [they] do[ ] not reach advertisements in nonbroadcast formats." Br. 52; see *id.* at 47. The Court explicitly rejected an analogous argument in *McConnell*. See pp. 25-26, *supra* (citing *McConnell*, 540 U.S. at 208).

ments, thereby requiring it "to pay for a longer advertisement." Br. 50.[19]

The government is not aware of any authority—and appellant cites none—holding that an advertiser's constitutional rights are impermissibly burdened by a requirement to use some of the time in its commercial to convey important information relevant to that commercial. The Court in *McConnell* explained that similar disclaimer requirements had previously been imposed with respect to other campaign-related advertising, 540 U.S. at 230, and it upheld BCRA's "inclusion of electioneering communications in the [pre-existing] disclosure regime," *id.* at 231. More generally, federal and state governments often require extensive oral and written information to be included in various communications, such as advertising for pharmaceuticals, attorneys, securities, etc. As the Second Circuit stated in rejecting a First Amendment challenge to a state labeling law:

> [W]e note the potentially wide-ranging implications of [plaintiff's] First Amendment complaint. Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. *See*, *e.g.*, 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 78*l* (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C.

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[19] Although appellant challenges both the spoken and written disclaimer requirements, the latter has little effect on an advertiser's ability to use its time as it wishes, because the disclaimer may be as small as four percent of the television screen's vertical height. 11 C.F.R. 110.11(c)(4)(iii)(A).

> § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.

National Elec. Mfrs. Ass'n v. *Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001), cert. denied, 536 U.S. 905 (2002).

In each of those areas, the advertiser undoubtedly would prefer to use its time and space for content other than a disclaimer. But that preference does not state a constitutional claim, for the disclaimer requirements do not prevent anyone from advertising. They simply may have the effect of causing appellant (like numerous other regulated advertisers) to devote a portion of an advertisement to the disclaimer or to purchase a few more seconds of broadcast time than its message would otherwise call for. There is no warrant in this Court's precedents for treating those seconds as a burden of constitutional dimension.[20]

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[20] Appellant's assertion (Br. 54) that BCRA's disclosure requirements are unconstitutional because they impose "substantial administrative costs" is similarly unsupported. The Court in *McConnell* upheld the disclosure requirements on their face, noting that they "are actually somewhat less intrusive than the comparable requirements that have long applied to persons making independent expenditures." 540 U.S. at 196 n.81; cf. *id.* at 235-237 (upholding BCRA's broadcaster record-

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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keeping requirement against administrative-burden challenge). Disclosure regarding independent expenditures, in turn, requires fewer resources than disclosure by a corporation's separate segregated fund. See *MCFL*, 479 U.S. at 252-254 (comparing requirements); *id.* at 262 (noting that MCFL was not exempt from independent-expenditure disclosures). Appellant presents no evidence to demonstrate that its $12 million budget would not permit the absorption of the administrative costs associated with filing the electioneering communications forms, or to distinguish the burdens at issue in this case from those advanced by appellant and others in the facial challenge rejected in *McConnell*. These costs do not rise to the level of a First Amendment burden, much less a burden sufficient to outweigh the important governmental interests that underlie BCRA's disclosure requirements.