

Citizens United v. Federal Election Commission: “Precisely What WRTL Sought to Avoid”

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In *Citizens United v. FEC*¹ the Supreme Court overturned both *Austin v. Michigan State Chamber of Commerce*,² which permitted the prohibition of corporate election-related speech, and the part of *McConnell v. FEC*³ that facially upheld the ban on corporate “electioneering communications.”⁴ *Citizens United* declared that the regime the Federal Election Commission created in implementing the “appeal to vote” test in *FEC v. Wisconsin Right to Life (WRTL)*⁵ was “precisely what WRTL sought to avoid.”⁶

Incorporated citizen groups and unions may now independently and expressly advocate candidates’ election or defeat like other groups. That is constitutionally correct. However, the Supreme Court’s reasoning in *Citizens United* causes problems in campaign-finance law. In this article, we analyze how the case was decided, what it means, and the problems it leaves in its wake.

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¹ 558 U.S. ____, 130 S. Ct. 876 (2010).

² 494 U.S. 652 (1990).

³ 540 U.S. 93 (2003).

⁴ *Citizens United*, 130 S. Ct. at 913. Electioneering communications are essentially targeted, broadcast ads naming federal candidates in 30- and 60-day periods before primaries and general elections, respectively. See 2 U.S.C. § 434(f)(3).

⁵ 551 U.S. 449, 470 (2007) (controlling opinion by Roberts, C.J., joined by Alito, J.). The appeal-to-vote test distinguished protected issue advocacy from regulable electioneering communications. *Id.* at 451–52.

⁶ *Citizens United*, 130 S. Ct. at 896.

We base our analysis on our role as counsel in *McConnell*, *WRTL*, and *Citizens United* and as petitioners for an FEC rule implementing *WRTL*. We served as *Citizens United*'s counsel in the lower court and prepared its jurisdictional statement—the equivalent of a petition for certiorari in cases with statutory rights of appeal. After *Citizens United* was accepted we hosted its amici curiae conference (attended by the editor of this journal, among many others). When *Citizens United* retained Theodore Olson as lead counsel, we withdrew. We approached the case differently than Olson did. The approaches are contrasted below.

I. *Buckley*: Foundational Protection for Political Speech

To understand the background and significance of *Citizens United*, we begin with the foundational *Buckley v. Valeo* decision.⁷ *Buckley* provided nine relevant principles:

1. "In a republic . . . the people are sovereign," and their "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."⁸

2. "The First Amendment affords the broadest protection to . . . political expression . . . 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'" and "'debate on public issues should be uninhibited, robust, and wide-open.'"⁹

3. If a law restricts speech before an upcoming election, it must have clear constitutional authority and be narrowly tailored to a compelling governmental interest.¹⁰

4. Congress's authority to enact campaign-finance laws stems from its constitutional authority to regulate federal elections. This authority is inherently self-limiting because unless the regulated activity is *clearly* election-related, the regulation is not constitutionally

⁷ 424 U.S. 1 (1976).

⁸ *Id.* at 14.

⁹ *Id.* (citations omitted).

¹⁰ *Buckley* imposed "exacting scrutiny," *id.* at 16, 44, 64, which means "[t]he strict test," *id.* at 66. Its requirements are debated for contribution limits and disclosure, but expenditure limits are always subject to strict scrutiny.

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authorized. A regulation may not be overbroad (*Buckley*-overbreadth¹¹) by reaching beyond this constitutional authority. In *Buckley*'s most specific description of the problem to avoid, it allowed campaign-finance regulation to reach only First Amendment activity “unambiguously related to the campaign of a particular federal candidate.”¹²

5. Regulation requires bright lines protecting issue advocacy because of a dissolving-distinction problem. As *Buckley* explained:

[T]he distinction between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.¹³

6. A bright line distinguishing ordinary political speech from electioneering is the “express advocacy” test, which permits the government to regulate only those communications with explicit words expressly advocating for or against federal candidates’ election, “such as ‘vote for.’”¹⁴ Such “magic words” communications are “unambiguously related to the campaign of a particular federal candidate.”¹⁵

¹¹ *Buckley* overbreadth concerns whether regulated First Amendment activity is unambiguously campaign related. The substantial-overbreadth doctrine, by contrast, requires *facial* invalidation of statutes sweeping in *too much* protected speech, as set forth in *Broadrick v. Oklahoma*, 413 U.S. 601, 611–14 (1973).

¹² 424 U.S. at 80 (emphasis added). See James Bopp Jr. and Richard E. Coleson, Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications) at 4–9 (Sept. 29, 2007) (explaining *Buckley*'s analysis), available at http://www.fec.gov/pdf/nprm/electioneering_comm/2007/james_madison_center_for_free_speech_eccomment16.pdf. See also James Bopp Jr. & Josiah Neeley, How Not to Reform Judicial Elections: *Davis, White*, and the Future of Judicial Campaign Financing, 86 *Denv. U. L. Rev.* 195, 222–25 (2008).

¹³ 424 U.S. at 42 (emphasis added).

¹⁴ *Id.* at 43–44 & n.52. See James Bopp Jr. & Richard E. Coleson, The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context, 28 *UWLA L. Rev.* 1, 9, 11–15 (1997) (explaining long-standing express-advocacy-test speech protection).

¹⁵ *Buckley*, 424 U.S. at 80.

7. The only cognizable interest justifying speech restriction is preventing quid pro quo corruption (political favors for campaign contributions) or the appearance thereof, and this interest justifies restricting only political contributions, not speech.¹⁶

8. Any equality (level-the-playing-field) justification for restricting speech is not cognizable.¹⁷

9. *Buckley* was not asked to address whether a federal prohibition on corporate “independent expenditures” (express advocacy) was constitutional, though it cited favorably a dissent (in another case) arguing that it was unconstitutional.¹⁸

Buckley’s express-advocacy test and issue-advocacy protection were reaffirmed in *FEC v. Massachusetts Citizens for Life*¹⁹ and widely recognized by lower federal courts in numerous cases that we brought.²⁰

II. *Austin* and *McConnell*: A Shaky Superstructure

Given *Buckley*’s rejection of speech-equalizing justifications, *Austin* was anomalous in approving a ban on corporate express advocacy with a new corporate-form corruption rationale that the dissent identified as the rejected equality rationale.²¹ But after *Austin*, corporations could still engage in issue advocacy that mentioned candidates because *Buckley* protected such speech.

That changed when the Bipartisan Campaign Reform Act (commonly known as McCain-Feingold) banned corporate electioneering communications.²² The line was bright but not speech-protective in that it subsumed formerly protected issue advocacy. But *McConnell*,

¹⁶ *Id.* at 26, 45.

¹⁷ *Id.* at 48–49.

¹⁸ *Id.* at 43 (citing *United States v. Auto. Workers*, 352 U.S. 567, 595–96, (1957) (Douglas, J., dissenting)).

¹⁹ 479 U.S. 238 (1986).

²⁰ See, e.g., *Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991); *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 329 (4th Cir. 2001); *North Carolina Right to Life v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003).

²¹ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 704–705 (1990) (Kennedy, J., joined by O’Connor & Scalia, JJ., dissenting).

²² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

which involved a challenge to much of McCain-Feingold, rejected the express-advocacy line as controlling and facially upheld the prohibition “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.”²³ *McConnell* failed to provide any test for functional equivalence and recognized that the opinion’s rationale might not apply to “genuine issue ads.”²⁴ It simply relied on *Austin* to uphold the corporate electioneering-communication ban.²⁵

McConnell’s facial upholding of the ban on corporate electioneering communications set the stage for a case challenging the ban as applied to particular ads—a case about how to distinguish “genuine” from so-called sham issue ads and what “functional equivalent” meant. That case was *WRTL*.

III. *WRTL*: Issue-Advocacy Protection Reasserted

In July 2004, Wisconsin Right to Life, a nonprofit, ideological corporation, broadcast ads challenging filibusters of President George W. Bush’s judicial nominees. The ads asked citizens to ask Senators Herb Kohl and Russ Feingold to oppose the filibusters. Since Senator Feingold was a candidate, *WRTL* had to stop the broadcasts before August 15 (30 days before Wisconsin’s primary), at which point the ads became illegal electioneering communications. Broadcasting the ads remained criminal through the November election under the 60-day pre-general-election prohibition.

We challenged the prohibition as applied to *WRTL*’s ads, noting that *McConnell* had left open the question of whether its rationale applied to “genuine issue ads” and asserting that *WRTL*’s ads were genuine issue ads. The *WRTL* district court agreed with the FEC and intervening McCain-Feingold sponsors that *McConnell* precluded as-applied challenges, but the Supreme Court unanimously rejected

²³ *McConnell v. FEC*, 540 U.S. 93, 206 (2003). See James Bopp Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. Ky. L. Rev. 289 (2004) (*McConnell* analysis).

²⁴ 540 U.S. at 206 n.88.

²⁵ *Id.* at 204–205.

that contention.²⁶ The district court then ruled in our favor,²⁷ and the FEC appealed.

We advised the Supreme Court of the burdensome litigation to which WRTL was subjected in its effort to vindicate its First Amendment rights and that the necessity of as-applied challenges functioned like a prior restraint. We asked the Court to overrule *McConnell*'s facial upholding of the electioneering-communication prohibition unless it provided a workable test to reduce the need for litigation and make as-applied challenges an adequate remedy.

WRTL's controlling opinion (by Chief Justice John Roberts, joined by Justice Samuel Alito) mandated that such as-applied challenges be conducted quickly, simply, and with little or no discovery; it also protected issue advocacy with the "appeal to vote" test.²⁸ Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, argued that only the express-advocacy test protected speech and the new appeal-to-vote test would lead to chilled political speech.²⁹ Justice Alito said that if a chill on issue advocacy became evident there would certainly be a request to reconsider *McConnell* and *WRTL*.³⁰ So if the problems we identified in *WRTL* were not fixed, reconsideration was expected.

Key to understanding our approach to *Citizens United* is how the Court decided *WRTL*. The controlling *WRTL* opinion chose between basing the holding on the nature of the *money*, the *speaker*, or the *speech*. That choice would guide how we litigated *Citizens United*.

In *WRTL* we argued—regarding the nature of the *money*—that WRTL would be willing to pay for the ads from a fund to which only individuals could donate (reducing the corporate-form corruption concern).³¹ This was set out last in the complaint as an alternative to our primary speech-based argument. Regarding the nature of the *speaker*, an amicus curiae argued that nonprofits did not fit *Austin's*

²⁶ *Wisc. Right to Life v. FEC*, 546 U.S. 410 (2006) (per curiam).

²⁷ *Wisc. Right to Life v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006).

²⁸ *FEC v. Wisc. Right to Life*, 551 U.S. 449, 469-70 (2007).

²⁹ *Id.* at 494-95 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring).

³⁰ *Id.* at 582-83.

³¹ See Brief of Appellee at 48, *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) (Nos. 06-969 & 06-970) (hereinafter "WRTL Brief"). WRTL briefs and complaints are available at <http://www.jamesmadisoncenter.org> under "Wisconsin Right to Life's McCain-Feingold Challenge."

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corporate-form corruption rationale.³² Regarding the nature of the *speech*, we argued for a test based on the grassroots-lobbying nature of the ads.³³

Our test was designed to distinguish “genuine” from “sham” issue ads, in keeping with the debate that ran through *McConnell*. A range of other tests to distinguish genuine from sham grassroots lobbying had been suggested by groups responding to a proposed FEC rule-making to allow genuine grassroots lobbying, which the FEC foolishly decided to forgo.³⁴ The *WRTL* district court had also established a test for distinguishing between genuine and sham grassroots lobbying.³⁵ We collected these tests in an appendix to an article that we published and cited in briefing to the Supreme Court.³⁶ In the same appendix we collected examples of genuine issue ads, including a grassroots-lobbying ad promoting a federal partial-birth abortion bill that was also targeted to Senators Feingold and Kohl. That “PBA Ad” had been recognized by the government’s own expert in *McConnell* as a “genuine issue ad.”³⁷ So we argued that when *McConnell* left open as-applied challenges as to “genuine issue ads” it had in mind just such an ad, which we used as a template for our proposed test.

Which of the three options did the *WRTL* Court choose? It based its holding on the nature of the *speech*. And it employed a test that protected all issue advocacy, not just the grassroots-lobbying

³² The brief was prepared by then-Dean of Stanford Law School Kathleen M. Sullivan and the Stanford Constitutional Law Center. See Brief of Family Research Council, Free Market Foundation, and Home School Legal Defense Association as Amici Curiae in Support of Appellee at 17–18, *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) (Nos. 06–969 & 06–970).

³³ *WRTL* Brief, *supra* note 31, at 55–57.

³⁴ The petition for rulemaking was filed by lawyers for OMB Watch (by Robert Bauer, President Obama’s present counsel), Chamber of Commerce of the United States, AFL-CIO, National Education Association, and Alliance for Justice. The petition is available at http://www.fec.gov/pdf/nprm/lobbying/orig_petition.pdf.

³⁵ *Wis. Right to Life v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006).

³⁶ See James Bopp Jr. & Richard E. Coleson, Distinguishing “Genuine” from “Sham” in Grassroots Lobbying: Protecting the Right to Petition during Elections, 29 *Campbell L. Rev.* 353, 406–412 (2007), available at <http://law.campbell.edu/lawreview/articles/29-3-353.pdf>.

³⁷ *McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.); *id.* at 905 (Leon, J.); *id.* at 748 (Kollar-Kotelly, J.).

subset.³⁸ It chose a test that was so broad and protective that corporations could engage in extensive issue advocacy naming candidates near elections. It was so broad that the *WRTL* dissent proclaimed *McConnell*'s facial upholding of the prohibition effectively overturned.³⁹ Consequently, after *WRTL*, there was little practical need to overturn *Austin* because, while corporations still could not expressly advocate for candidates, they could do most of the issue advocacy they had done before the electioneering-communication prohibition—the issue advocacy that *McConnell* said was preferred as more effective than express advocacy.⁴⁰ That choice and the language of the controlling opinion indicated that the *WRTL* Court was restoring *Buckley*'s strong protection for issue advocacy.⁴¹ It also indicated that the Court was interested in broad, speech-based protections, not narrow protections based on the nature of the money or speaker. That choice would guide our approach to *Citizens United*.

WRTL's test showed how the Court intended to protect issue advocacy. The test declared that no ad could be, in *McConnell*'s language, “the functional equivalent of express advocacy” (subject to the corporate prohibition) unless it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁴² Conversely, no ad may be prohibited that “may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate.”⁴³

This appeal-to-vote test was borrowed from prior campaign-finance jurisprudence. It is consistent with the *Buckley*-overbreadth principle on which the express-advocacy test was based, which principle required that regulated First Amendment activity be “unambiguously related to the campaign of a particular federal candidate.” The test’s focus on an actual “appeal” that can only be about voting parallels (in weaker form) the express-advocacy test’s requirement

³⁸ *WRTL*, 551 U.S. at 470.

³⁹ *Id.* at 525.

⁴⁰ 540 U.S. at 193 & n.77.

⁴¹ *WRTL* defined issue advocacy: “Issue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions.” 551 U.S. at 470.

⁴² *Id.*

⁴³ *Id.* at 476.

that there be “express words of *advocacy* of election or defeat, such as ‘vote for.’”⁴⁴ And most importantly, it is nearly identical to an express-advocacy test fashioned by the Ninth Circuit in *Furgatch*.⁴⁵

The *Furgatch* test was an attempt to craft a “non-magic-words” express-advocacy test. It is unconstitutional as an express-advocacy test because *Buckley* made clear that express advocacy requires “magic words”⁴⁶ and because *WRTL* explicitly held that its appeal-to-vote test—for “the functional equivalent of express advocacy”—would be unconstitutionally vague if applied to ads that did not already fit the electioneering-communication definition (i.e., targeted broadcast ads naming candidates shortly before elections).⁴⁷ But the *Furgatch* test was the basis of the backup electioneering-communication definition⁴⁸ and *WRTL*’s appeal-to-vote test. *Furgatch*’s language shows as much: An ad “must, when read as a whole, and with limited reference to external events, be *susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.*”⁴⁹ *WRTL* forbade all but the most general reliance on context,⁵⁰ but the rest of *WRTL*’s test was nearly verbatim: “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁵¹

Furgatch’s formula was significantly narrowed when the Ninth Circuit explained that “speech may only be termed ‘advocacy’ if it presents a *clear plea for action*, and . . . it must be clear what action is advocated[, *that is,*] . . . a *vote for or against a candidate . . .*.”⁵²

⁴⁴ *Buckley*, 424 U.S. at 44 n.52 (emphasis added).

⁴⁵ 807 F.2d 857 (9th Cir. 1987).

⁴⁶ See *supra*, as was reiterated in *McConnell*, 540 U.S. at 126, 191, 216–217, *WRTL*, 551 U.S. at 513 (Souter, J., dissenting) and *Citizens United* 130 S. Ct. at 935 n.8 (Stevens, J., dissenting).

⁴⁷ 551 U.S. at 474 n.7.

⁴⁸ See 2 U.S.C. § 434(f)(3)(A)(ii) (2010) (functional if primary definition held unconstitutional) (applicable if communication “promotes[,] . . . supports[,] . . . attacks[,] or opposes a candidate . . . and . . . is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate”).

⁴⁹ 807 F.2d at 864 (emphasis added).

⁵⁰ 551 U.S. at 473–74.

⁵¹ *Id.* at 470.

⁵² 807 F.2d at 864 (emphasis added).

Furgatch applied this to an anti-Carter ad that proclaimed “DON’T LET HIM DO IT!” where the only way not to “let him do it” was to vote against him.⁵³ The Ninth Circuit decided that there was a “clear plea for action” and the action solicited was “a vote for or against a candidate,” so the communication at issue failed the test.⁵⁴

Since *WRTL* and its appeal-to-vote test sought to protect issue advocacy, surely the test must require a “clear plea for action” where the “appeal to vote” meant what it said, that is, there must be an actual “appeal” (an invitation or exhortation) “to vote”; mere indications of support for or opposition to candidates will not suffice. That analysis would also guide our approach in *Citizens United*.

The tensions within the *WRTL* majority and the probationary nature of the holding revealed that the FEC would need to exercise care in implementing the appeal-to-vote test. The majority clearly opposed any FEC rule chilling political speech.

IV. FEC Rule: How to Invite Reconsideration

The appeal-to-vote test might have worked, but the FEC seemed intent on ensuring that it did not. As *WRTL*’s successful counsel, we petitioned for a rule implementing the appeal-to-vote test.⁵⁵ We filed extensive comments on the FEC’s proposals for a rulemaking, explaining what the FEC needed to do to comply with *WRTL*. When the FEC was going astray with the flawed final rule it was about to adopt, we filed two letters objecting to that rule. In our comments, we advised the FEC that in *WRTL* we had

expressly asked the Supreme Court to overrule its facial upholding of the electioneering communication restrictions in *McConnell* unless the Court provided the relief of both (a) stating a generally-applicable test to reduce the need for

⁵³ *Id.* at 864–85.

⁵⁴ *Id.* The *Furgatch* test was also narrowed in *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (which we litigated), which made clear that context was subordinate to the actual words used and that “a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy (emphasis in original).”

⁵⁵ See James Madison Center for Free Speech, Petition for Rulemaking Protecting “Genuine Issue Ads” From the “Electioneering Communication” Prohibition & Repealing 11 C.F.R. § 100.22(b) (2007), http://www.fec.gov/pdf/nprm/electioneer-ing_comm/2007/petition_center_for_free_speech.pdf (last visited June 11, 2010).

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litigation and (b) making as-applied challenges an adequate remedy for protecting the First Amendment liberties of groups seeking to broadcast genuine issue ads by limiting the burdens of litigation.⁵⁶

So, we said, the rule needed to remain protective and workable. We warned:

[I]mplicit in the Chief Justice’s opinion and explicit in Justice Alito’s concurring opinion is the position that if the as-applied remedy remains inadequate to protect the First Amendment rights of groups seeking to broadcast genuine issue ads trapped by the electioneering communication restrictions, then *McConnell*’s facial upholding of the restrictions will need to be reconsidered.⁵⁷

Ignoring our warnings, the FEC subverted the Court’s simple, objective, protective test into a complex, subjective, unprotective rule. It reduced the Court’s own test to a mere *part* of the FEC’s “two-part, 11-factor balancing test,” as *Citizens United* described it.⁵⁸ Any time a constitutional test is reduced to merely being *part* of an administrative agency’s test, the latter test is clearly unconstitutional. Against our advice, the FEC made details of the *application* of the appeal-to-vote test to particular grassroots lobbying ads a part of its test. Ignoring *WRTL*’s declaration of liberty for issue advocacy, the FEC imposed maximum control over it. It made a rule so prolix and vague that *Citizens United* declared it akin to a prior restraint because it compelled speakers to seek FEC advisory opinions to know whether they could speak.⁵⁹ And *Citizens United* noted that many citizen groups could not afford the protracted litigation necessary to dispute the FEC’s de facto licensing scheme (including the discovery that the FEC insisted on in *Citizens United* despite *WRTL*’s mandate of “minimal if any discovery, to allow parties to resolve

⁵⁶ James Bopp Jr. & Richard E. Coleson, Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications) 2 (2007), <http://www.jamesmadisoncenter.org/Finance/MadisonCenterCommentsReWRTLII.pdf> (last visited June 11, 2010). See also *WRTL* Brief, *supra* note 31, at i, 62, 65–70.

⁵⁷ Bopp & Coleson, *supra* note 56, at 3–4.

⁵⁸ 130 S. Ct. at 895.

⁵⁹ *Id.* at 895–96.

disputes quickly without chilling speech through the threat of burdensome litigation”).⁶⁰ The FEC became the arbiter of what citizens could say and thus did “precisely what *WRTL* sought to avoid.”⁶¹ That is, it chilled political speech.

Of course, the Supreme Court’s repudiation of the FEC’s rule lay in the future when *Citizens United* sought our help. But it was clear after the rulemaking that the appeal-to-vote test required rehabilitation to avoid reconsideration. We would show the Court how its rule had become unworkable in application and offer a way to fix it in *Citizens United* based on the Court’s own analysis in *WRTL*.

V. *Citizens United*: Different Approaches

In framing the case initially, we approached the case differently than Olson would later. Our approach was dictated by (1) *Citizens United*’s goal and concern in bringing the suit, (2) how the Court decided *WRTL*, and (3) the need for a broad, speech-protective rule protecting issue advocacy from all regulation for all speakers.

What was *Citizens United*’s original goal in bringing this suit? That may be seen from the original complaint, filed December 13, 2007, which only challenged the *reporting* (requiring disclosure of donors) and *disclaimer* requirements as applied to three ads that fit the electioneering-communication definition.⁶² They were ads for *Hillary: The Movie* and then-Senator Hillary Clinton was a presidential candidate. We did not challenge the electioneering-communication prohibition because we considered the ads permitted under FEC rules and *WRTL*’s appeal-to-vote test. *Citizens United* stated its concern about retaliation:

One of the chief concerns with the Reporting Requirement is the disclosure of donors who may then be subject to various forms of retaliation by political opponents. On information and belief, the Clinton White House had in its possession over 1,000 FBI files on political opponents.⁶³

⁶⁰ *Id.*

⁶¹ *Id.* at 896.

⁶² Complaint at 1, *Citizens United v. FEC*, No. 1:07-CV-02240, 2008 WL 2788753 (D.D.C. Dec. 13, 2007).

⁶³ *Id.* at 8. See also Neil A. Lewis, *White House Got More Files Than Disclosed*, N.Y. Times, June 26, 1996, at 1.

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Citizens United stated that disclosure “will, in Citizens United’s belief based on long experience, substantially reduce the number of donors and amount of donations to Citizens United because many potential donors do not wish to be publicly so identified for a variety of legitimate reasons.”⁶⁴

Did Citizens United ever get this requested protection from disclosing donors? Not from *Citizens United*, perhaps for reasons of changed focus and altered strategy in the case.⁶⁵

How does one pursue an as-applied challenge to the disclosure requirements facially upheld in *McConnell*? We had developed a constitutional analysis, based on *Buckley* and adopted by federal

⁶⁴ Compl., *supra* note 62, at 9.

⁶⁵ Citizens United subsequently filed an FEC advisory opinion request seeking an exemption for media and commercial activity, which would free it from disclosure requirements. See Op. Request Fed. Election Comm’n 2010-08 (Mar. 29, 2010), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3053>. The FEC denied an earlier similar request. See Op. Fed. Election Comm’n 2004-30, at 8 (Sept. 10, 2004), available at <http://ao.nictusa.com/ao/no/030012.html>. On June 11, 2010, the FEC “conclude[d] that Citizens United’s costs of producing and distributing its films, in addition to related marketing activities, are covered by the press exemption,” making its movies and ads not subject to the disclosure requirements. Op. FEC 2010-08, available at http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1. This was based on the facts that (a) Citizens United had made 12 more documentaries since its first advisory-opinion request (comprising 25 percent of its budget), *id.* at 5, and (b) “Citizens United will not pay to air its documentaries on television; instead it will receive compensation from the broadcasters,” *id.* at 7. That Citizens United planned to pay broadcasters to air its materials was a key factor in its denial of the press exemption earlier. FEC Op. 2004-30 at 7. Of course, in *Citizens United*, that Citizens United planned to pay to broadcast *Hillary* on video-on-demand was a central fact, 130 S. Ct. at 887, and the second advisory opinion request says that more video-on-demand broadcasting is in negotiation, but the request does not say that video-on-demand broadcast would *not* be paid for by Citizens United. See Citizens United Op. Request 2010-08 at 3, available at http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1. How far the FEC will go in extending the press exemption to other organizations, especially those with fewer such activities to their credit, remains to be seen, but the government’s asserted interest in “disclosure” for nonprofit advocacy groups has been undermined by the FEC’s decision that there will be no disclosure for this advocacy group but full disclosure for similar activity, such as an editorial, by another. And recent disclosure that traditional journalists have been operating as advocates will further enhance this underinclusiveness and undercut the government’s disclosure interest. See Jonathon Strong, Documents Show Media Plotting to Kill Stories about Rev. Jeremiah Wright, *The Daily Caller*, July 20, 2010, <http://dailycaller.com/2010/07/20/documents-show-media-plotting-to-kill-stories-about-rev-jeremiah-wright/print/>.

courts, that provided a way. We noted in the fourth *Buckley* foundational principle above that *Buckley* required that campaign-finance regulations be closely tied to congressional authority to regulate federal elections. In that case, the Court said that campaign-finance regulation may only reach First Amendment activity that is “unambiguously related to the campaign of a particular federal candidate.”⁶⁶ *Buckley* imposed this requirement precisely in the context of a *reporting* requirement to be sure that reporting did not reach communications that were “too remote,” that is, not “unambiguously campaign related.”⁶⁷

The Fourth Circuit, in *North Carolina Right to Life, Inc. v. Leake*,⁶⁸ had expressly recognized this unambiguously-campaign-related requirement as *Buckley*’s means of cabining Congress to its sole authority to regulate in this area:

The *Buckley* Court . . . recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are “unambiguously related to the campaign of a particular . . . candidate.” . . . This is because only *unambiguously campaign related* communications have a sufficiently close relationship to the government’s acknowledged interest in preventing corruption to be constitutionally regulable.⁶⁹

Leake reiterated this *Buckley*-overbreadth principle:

Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are *unambiguously campaign related*. The Supreme Court has identified two categories of communication as being *unambiguously campaign related*. First, “express advocacy,” defined as a communication that uses specific election-related words. Second, “the functional equivalent of express advocacy,” defined as an

⁶⁶ 424 U.S. at 80.

⁶⁷ *Id.* at 80, 81.

⁶⁸ 525 F.3d 274 (4th Cir. 2008).

⁶⁹ *Id.* at 281 (emphasis added).

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“electioneering communication” that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁷⁰

The Fourth Circuit’s recognition of *Buckley*-overbreadth analysis was not anomalous. Other federal courts had employed it to decide cases.⁷¹ The primary sponsors of McCain-Feingold and the rest of the campaign “reform” lobby expressly endorsed the unambiguously-campaign-related requirement to support the electioneering-communication definition in *McConnell*.⁷² They argued that the definition was constitutional under *Buckley* because it is not vague or overbroad, that is, an electioneering communication was “unambiguously related to the campaign of a particular federal candidate.”⁷³ And they insisted that this was the analysis that Congress employed in enacting McCain-Feingold.⁷⁴ *McConnell* held that the electioneering communication definition was constitutional because it was neither vague nor overbroad, citing the very part of *Buckley* that the reform lobby cited, which stated the unambiguously-campaign-related requirement.⁷⁵ For everyone to use the requirement to facially *uphold* the electioneering communication but to deny us the use of the same requirement, especially after *WRTL* clearly used the same sort of analysis to *narrow* the scope of regulable electioneering communications, would be an intolerable bait-and-switch. Chief Justice Roberts had decried just such a bait-and-switch in *WRTL*.⁷⁶

Because *Buckley* mandated the unambiguously-campaign-related requirement precisely in the *disclosure* context, and *Leake* expressly identified *WRTL*’s appeal-to-vote test as the implementation of the requirement in the *electioneering-communication* context, we hoped that the justices who decided *WRTL* would hold that Citizens United’s ads were subject to neither prohibition nor disclosure because

⁷⁰ *Id.* at 282–83 (emphasis added).

⁷¹ See, e.g., *N.M. Youth Organized v. Herrera*, ___ F.3d ___, 2010 WL 2598314 (10th Cir. June 30, 2010).

⁷² Brief for Intervenor-Defendants Senator John McCain et al. at 57–62, *McConnell v. FEC*, 540 U.S. 93 (2003).

⁷³ *Id.* at 62 (quoting *Buckley*, 424 U.S. at 80).

⁷⁴ *Id.*

⁷⁵ 540 U.S. at 191 (quoting *Buckley*, 424 U.S. at 80).

⁷⁶ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 480 (2007).

they were not unambiguously campaign related under *WRTL*'s appeal-to-vote test.⁷⁷ Citizens United challenged the reporting, disclosure, and disclaimer requirements as applied to "(a) communications that may not be prohibited as electioneering communications under *WRTL* . . . and (b) Citizens United's Ads . . . because the activity is not 'unambiguously related to the campaign of a particular federal candidate'" and because the provisions "are unconstitutional under the First Amendment guarantees of free expression and association."⁷⁸

On December 20, 2007, two important events occurred that affected the nature of the case. First, Citizens United was invited to broadcast *Hillary* on video-on-demand, making the movie itself an electioneering communication. It would thus be subject to reporting, disclosure, and disclaimer requirements and, if it contained an "appeal to vote" under *WRTL*'s test, it would be prohibited from airing. Second, the FEC filed its opposition to preliminary injunction, stating, "Although plaintiff's first two proposed ads appear to come within the *WRTL* exemption . . . [a third ad entitled] 'Questions' poses a closer question that the Commission has not had an adequate opportunity to address."⁷⁹

The next day, we filed an amended complaint. It included a challenge to both the electioneering-communication prohibition and the reporting, disclosure, and disclaimer requirements as applied to the movie. It also included a *facial* challenge to the prohibition, "because it has not proven workable in application, as required by [*WRTL*]" and so was unconstitutional under the First Amendment.

⁷⁷ The controlling *WRTL* opinion had also been extraordinarily careful to distinguish protected "issue advocacy" or "political speech" from "electioneering" or "campaign speech." This indicated a determination to permit regulation of *campaign* speech ("unambiguously campaign related"), not ordinary political speech.

⁷⁸ A benefit of the unambiguously-campaign-related requirement is that it is employed before a court subjects the provision to the appropriate level of scrutiny. There is substantial confusion on the appropriate level of scrutiny for disclosure requirements. Compare *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (strict scrutiny) with *Citizens United*, 130 S. Ct. at 914 (intermediate scrutiny). The intermediate scrutiny trap is thus avoided if the provision is deemed not to be unambiguously campaign related.

⁷⁹ Defendant's Memorandum in Opposition to Plaintiff's Motion for Consolidation at 8-9, *Citizens United v. FEC*, No. 1:07-CV-02240, 2008 WL 2788753 (D.D.C. Dec. 20, 2007).

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This facial challenge was based on the fact that the FEC could not “tell by looking at an ad whether it meets the FEC’s own [rule].” The FEC had reviewed the ad for seven days and still had not figured out whether it was prohibited. When the FEC conceded that the ad could not be prohibited, 17 days later, we dismissed the facial challenge. In our opinion, *WRTL*’s reluctance to overrule *McConnell*—though three justices in the *WRTL* majority argued for a return to the express-advocacy line—indicated a disinterest in a facial challenge, likely for reasons of judicial restraint and respecting precedent. Chief Justice Roberts and Justice Alito had invested in the appeal-to-vote test despite strong pressure from both sides on the Court, so if it could be made to work it should be allowed to do so. And there were sound arguments for how *WRTL*’s rule could be made workable, employing *Furgatch*’s “clear plea for action” that can only be about voting. But the FEC’s rule and tardy confession that the ads passed the appeal-to-vote test demonstrated the unworkability of the appeal-to-vote test, placing the reconsideration of *McConnell* and even *Austin* squarely before the Court.⁸⁰ So we dismissed the facial challenge.

Our as-applied challenges remained, as to both the ads and the movie, as to both disclosure and prohibition. In press reports, the issue of whether the movie could be prohibited was becoming the central focus, with the disclosure issue being pushed to the background. To keep the vital disclosure issue from getting lost, we consistently placed it first in briefing. It was important to *Citizens United* and, as will be discussed, disclosure is causing serious intimidation problems that result in chilled speech.

Regarding the movie, we argued that it could not be regulated as an electioneering communication because it was not unambiguously related to the campaign of a federal candidate. After all, under *WRTL*’s appeal-to-vote test, the movie contained no clear plea for action. Mere criticism of Hillary Clinton was insufficient, absent an appeal involving voting. We made an additional argument that eventually would capture the attention of the Supreme Court and

⁸⁰ Reconsideration of a precedent is always appropriate if the Court is being asked to apply it. See James Bopp Jr., Richard E. Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule Roe v. Wade?*, 1 *Seton Hall Const. L.J.* 55 (1990) (discussing principles governing whether judicial review is appropriate).

the press: full-length movies are like books—which may not be banned. We argued:

Hillary also “may reasonably be interpreted as *something other* than as an appeal to vote,” *WRTL II*, 127 S. Ct. at 2670 (emphasis added). A reasonable interpretation is that it is a full-length, documentary movie about Senator Clinton, and such a movie enjoys all the protection historically afforded to any book about a public figure. *Hillary* is the functional equivalent of a book, not of the 30- or 60-second ads that were the target of Congress in BCRA and at issue in *McConnell*. . . . If the difference in medium matters when it comes to First Amendment protection . . . , then the government could freely engage in high-tech “book burnings” without restriction.⁸¹

These were the arguments in our jurisdictional statement, upon which the Supreme Court accepted the appeal for full briefing and argument. With these arguments, we were confident of victory on the disclosure and prohibition provisions that applied to the ads and movie. The arguments sought incremental remedies; we did not explicitly ask the Court to overrule *McConnell*, but we provided it the opportunity to do so if it thought it appropriate. Our arguments were based on the sort of analysis employed in *WRTL* and showed the Court how to rule in our favor under its own appeal-to-vote test by improving the test to make it more workable and protective. Our arguments did not rely on the nature of the *speaker* or the nature of the *money* used (following *WRTL*’s focus on the nature of the *speech*) both because of *WRTL*’s focus and because the result would be a broad, speech-protective ruling—not a narrow one of limited applicability. We anticipated a rule distinguishing regulable “campaign speech” from unregulable “issue advocacy” or “political speech” that would protect all speakers and bring considerable clarity to campaign finance law. The need for a bright line was vital because the FEC was asserting that its interest in compelling disclosure extended “beyond speech about candidate elections and encompass[ed] activity that attempts to sway public opinions on issues[.]”⁸²

⁸¹ Plaintiff’s Summary Judgment Motion at 39, *Citizens United v. FEC*, No. 1:07-CV-02240 (D.D.C. May 16, 2008).

⁸² Defendant FEC’s Motion for Summary Judgment at 22, *Citizens United v. FEC*, No. 1:07-CV-02240 (D.D.C. June 6, 2008).

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When Olson took over representation of Citizens United at the merits stage, the emphasis and arguments changed. His opening brief addressed the movie first.⁸³ *Buckley's* unambiguously-campaign-related requirement was only mentioned in passing.⁸⁴ The argument that the appeal-to-vote test required an actual "appeal" was made without any discussion of the analytical underpinnings of the requirement of "a clear plea for action."⁸⁵ Moreover, whether there was an appeal was said to "depend frequently on the context in which it arises,"⁸⁶ even though *WRTL* had expressly eschewed context for employing its test.

In addition, the brief made several arguments for narrower rulings that we had not proposed to the Court in our jurisdictional statement. These served to urge the Court to avoid overruling both *Austin* and *McConnell* and later became the focus of attacks on the Court's majority decision. The brief made a *statutory* argument that the electioneering-communication definition did not encompass video-on-demand, asserting that the movie therefore could not be prohibited.⁸⁷ We did not make this argument because it would have been of no practical benefit to Citizens United; they wanted to broadcast the movie on commercial television, not just on video-on-demand. Furthermore, such a narrow ground for relief would not have been of practical benefit to anyone else. Such a ruling would have prevented the Court from providing broad protection from the electioneering-communication prohibition, thereby failing to safeguard free expression in a meaningful way.

The brief also made money-based and speaker-based arguments, arguing that since most of the funds (99 percent) used for the movie were donated by individuals, the movie constituted speech from an organization like Massachusetts Citizens for Life, which the Court in *McConnell* had exempted from the electioneering-communication prohibition.⁸⁸ This exemption was first recognized in *Massachusetts*

⁸³ Brief for Appellant at 16, *Citizens*, 130 S. Ct. 876 (No. 08-205).

⁸⁴ *Id.* at 52. *Buckley's* unambiguously-campaign-related quote was only mentioned in a parenthetical for a cite to *Leake* (which was only mentioned as to the public's informational interest in disclosure, which was not central to *Leake's* analysis). *Id.*

⁸⁵ *Id.* at 36–37.

⁸⁶ *Id.* at 38.

⁸⁷ *Id.* at 26 n.2.

⁸⁸ *Id.* at 29–34.

*Citizens for Life*⁸⁹ (from the independent-expenditure prohibition) for ideological, non-stock, nonprofit corporations neither engaging in business activity nor accepting corporate or union contributions.⁹⁰ *Citizens United*, however, did not qualify for the *MCFL* exemption because it both engaged in business activities and received corporate donations, and thus did not seek the *MCFL* exemption in its complaint. The exemption is based on the nature of the *corporation*, and, if the Court had based its ruling on this ground, the decision would have only benefited corporations with a tiny bit of business income or business corporation contributions. Analytically, this would be a slight expansion of the *MCFL* exemption, but in order to claim it organizations would have to expose themselves to very intrusive investigations by the FEC regarding all their activities. Consequently, while this expanded version of the *MCFL* exemption has already been recognized by several circuits,⁹¹ few organizations have sought it.

The brief then turned to a speech-based argument, asserting that the movie was not the functional equivalent of express advocacy because it was “not remotely an ‘appeal to vote’”⁹² but rather “similar to the numerous critical candidate biographies found in bookstores” and the government could prove no corruption interest in such movies.⁹³ This was the best and most appropriate argument, but, as noted above, it was made without the necessary analytical foundation from *Furgatch* and *Buckley*-overbreadth that an “appeal to vote” required a call to action.

Finally, the brief made an argument that took the form of an assertion: “*Austin* was wrongly decided and should be overruled.”⁹⁴ The brief noted that *Austin*’s equality rationale was inconsistent with other precedent and briefly addressed flaws in *Austin*’s analysis, but

⁸⁹ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986) [hereinafter *MCFL*].

⁹⁰ See 11 C.F.R. § 114.10(c) (2010) (FEC rule defining *MCFL*-corporations and disallowing even *de minimis* proscribed activity or contributions).

⁹¹ See *FEC v. NRA of Am.*, 254 F.3d 173, 192 (D.C. Cir. 2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999); *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130 (8th Cir. 1997); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1364 (8th Cir. 1994).

⁹² Brief for Appellant at 35, *Citizens*, 130 S. Ct. 876 (No. 08-205).

⁹³ *Id.* at 36.

⁹⁴ *Id.* at 30.

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then drew the Court back to one of its narrow-ruling arguments: “But whatever the continuing vitality of *Austin*, its rationales clearly do not support a ban on speech that . . . is funded predominantly by individuals.”⁹⁵

Despite mentioning in his brief, that *Austin* should be overturned, at oral argument Olson essentially waived any facial challenge to the prohibition and any overruling of *Austin* and *McConnell* by, “conceding that [the prohibition] could be applied to General Motors . . . [and] stating that ‘we accept the Court’s decision in *Wisconsin Right to Life*.’”⁹⁶ The only way that GM could be subject to the prohibition was if *Austin* were *not* overruled; *WRTL*’s appeal-to-vote test was an effort to *prevent* overruling *Austin* and *McConnell*.

A decision in *Citizens United* was expected at the end of the Supreme Court’s 2008–09 term. Instead, surprisingly, the Court ordered briefing and argument on this question: “For the proper disposition of this case, should the Court overrule either or both *Austin* . . . and the part of *McConnell*. . . which addresses the facial validity of [the electioneering-communication prohibition]?”

Our response, in an amici curiae brief for seven former FEC chairmen and one former FEC commissioner, was that

“proper disposition” of this case d[id] not *require* overruling *Austin* . . . or . . . *McConnell* . . . because this case may be decided for Appellant on other grounds. The application of this Court’s unambiguously-campaign-related (“UCR”) principle would resolve the challenges to both the Prohibition and Disclosure Requirements.⁹⁷

We rejected the notion that a precedent could only be overruled when it is *necessary* for the decision because it can and should be done when *appropriate*. We continued:

⁹⁵ *Id.* at 31. We made our arguments in an amicus curiae brief for the Center for Truth in Politics, which was directly affected by the outcome of the challenge to the disclosure requirements. But absent party reiteration, the Court does not typically employ dispositive analyses advanced only by amici.

⁹⁶ 130 S. Ct. at 932.

⁹⁷ Brief Amici Curiae of Seven Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Appellant on Supplemental Question at 2, *Citizens United*, 130 S. Ct. 876 (No. 08-205) (emphasis in original).

However, it would be appropriate, and in fact desirable, for the Court to overrule these troublesome precedents because (1) both are properly implicated for reconsideration, (2) “Congress shall make no law . . . abridging the freedom of speech” has special force in protecting political speech, (3) *Austin* and *McConnell* have proven to be unworkable, having spawned many complex, multi-factor tests, and (4) the FEC and lower courts have made the appeal-to-vote test in [WRTL] unworkable. *Austin* and its progeny *should* be overruled.⁹⁸

So our position was that wherever a precedent controls it is always inherently at issue and thus the Court may reconsider it without any analytical “necessity” and without being explicitly requested to do so.

Given the unworkability of WRTL’s test, *Austin* and *McConnell* could still be overruled. To that end, we explained the unworkability of the appeal-to-vote test. We explained the prolix and complex federal laws, regulations, and advisory opinions spawned by *Austin* and *McConnell* and how the federal courts and the FEC could not even agree on whether an ad in one of our cases was covered by WRTL’s appeal-to-vote test.⁹⁹ We also explained that the FEC had taken more than two months to respond to an advisory opinion request filed on behalf of the National Right to Life Committee that asked for approval for two ads under the FEC’s own “WRTL” test, only ultimately to get approval for one (long after the election) and receive a notice that the FEC commissioners could not agree on the other. Clearly the appeal-to-vote test had proved unworkable unless the Court required a “clear plea for action” that entails voting, affirmed its unambiguously-campaign-related requirement, and made it clear that the FEC had gotten the rule wrong. But, we said, overruling the anomalous *Austin* decision would certainly be proper because the prohibition at issue originated in it, and *Austin should* be overruled because it was constitutionally flawed.

In contrast, Olson not only *expressly* requested that *Austin* be overruled, but argued that “a reexamination of *Austin*’s . . . rationale

⁹⁸ *Id* (emphasis in original).

⁹⁹ See *The Real Truth About Obama v. FEC*, No. 08-483, 2008 WL 4416282, at *7 (E.D. Va., Sept. 24, 2008) (order denying preliminary injunction). The FEC said the ad contained no appeal to vote, but the court decided that the ad was express advocacy.

[wa]s *essential* to the proper disposition of this case” and was “necessary.”¹⁰⁰ The problem here was not the overruling of *Austin* but the erroneous assumption that overruling can only be done when “necessary” and “essential” to the ruling.

VI. *Citizens United*: Why and How *Austin* Was Overruled

Austin was clearly anomalous and deserved overruling, but two events particularly motivated the Court’s decision to overrule it here.

First, the FEC had subverted *WRTL*’s appeal-to-vote test, which was intended to protect ordinary “political speech” (or “issue advocacy”). The FEC reduced *WRTL*’s “objective” test to a mere *part* of the FEC’s “two-part, 11-factor balancing test.”¹⁰¹ The outcome of *Citizens United* may thus be largely explained by this subversion of *WRTL*’s rule. The Court’s indignation was clear: “This is precisely what *WRTL* sought to avoid.”¹⁰² *WRTL* “refrained from holding the statute invalid,” the Court said, “except as applied to the facts then before the Court, [and it] was a careful attempt to accept the essential elements of the Court’s opinion in *McConnell*, while vindicating the First Amendment arguments made by the *WRTL* parties.”¹⁰³ Having attempted a protective test focused on the nature of the *speech* at issue, only to see that test subverted, the Court found it “necessary” to decide *Citizens United* because the prohibition of that speech was based on the nature of the *speaker*. *Citizens United* overturned *Austin*’s holding that the corporate form poses a corruption risk. The FEC and the reform lobby had underestimated the tenuous probationary status of the electioneering-communication prohibition and had tried to limit the appeal-to-vote test instead of embracing it.

Second, at the first oral argument, the government asserted that the rationale of *Austin* would permit banning corporate-published books. The reaction on the bench was predictable, and the fact that the government apparently did not anticipate it shows how diluted free speech rights have become. At the second oral argument—the first for then-Solicitor General Elena Kagan—the government sought

¹⁰⁰ Supplemental Brief for Appellant at 15, 21, *Citizens United*, 130 S. Ct. 876 (No. 08-205) (emphasis added).

¹⁰¹ *Citizens United*, 130 S. Ct. at 895.

¹⁰² *Id.* at 896.

¹⁰³ *Id.* at 894.

to backtrack, asserting that although the statute would prohibit such books, the FEC had never done so. Chief Justice Roberts responded, “[W]e don’t put our First Amendment rights in the hands of FEC bureaucrats”¹⁰⁴

Given FEC subversion of the protective ruling in *WRTL* and the book-banning specter, the Court felt compelled to reexamine the foundation to this censorship regime and overturned *Austin* and *McConnell*. But the Court’s analysis of why overturning was “necessary” has created problems in campaign-finance law requiring repair. Having entertained the suggestion of overruling *Austin*, the Court apparently felt constrained to find it “necessary” to overrule *Austin*. The notion that an absolute *necessity* was the only appropriate situation for reconsidering *Austin* should have been resisted, even at the risk of not having *Austin* overruled, because framing the issue in that fashion drove the analysis in the wrong direction on analytical points crucial for First Amendment protection.

In that analysis, the Court examined whether there were “narrower grounds” for deciding the case. *Citizens United* rejected Olson’s arguments that “electioneering communication” does not include video-on-demand and that video-on-demand poses insufficient risks based on its nature—arguments the Court was able to reject without causing any analytical harm.¹⁰⁵ It likewise rejected Olson’s invitation to decide the case based on the amount of business corporation contributions *Citizens United* received, which caused no analytical harm.¹⁰⁶ But the decision did cause analytical harm to free speech when the Court decided that the movie was the functional equivalent of express advocacy under the appeal-to-vote test,¹⁰⁷ as discussed next. The fact that this harm was done in service to proving it “necessary” to overrule *Austin* demonstrates the twin errors of expressly seeking *Austin*’s reversal in this case and the notion that overruling may happen only when there is no other way to decide a case—an approach that values institutional concerns over the Court’s constitutional mandate. In any event, the strong backlash from the Court’s dissenters, the executive and legislative

¹⁰⁴ Transcript of Oral Argument at 61, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

¹⁰⁵ 130 S. Ct. at 888–91.

¹⁰⁶ *Id.* at 891–92.

¹⁰⁷ *Id.* at 889–90.

branches, and the general public—even though most critics misunderstand *Citizens United's* holding—indicates that institutional concerns may not have been well served by the appeal to necessity, since it served little purpose and was unconvincing in its key application. A constitutional speech-based rationale for the decision would have been more consistent with *WRTL* and would have better protected free speech.

The harm caused by *Citizens United* in finding that it was “necessary” to reconsider *Austin* is immense. After *Buckley*, the primary protection for issue advocacy has been a bright, protective line based on the *nature* of the speech. The express-advocacy test long protected robust issue advocacy, in which corporations were as free to engage as everyone else. So long as speakers avoided expressly advocating the election or defeat of candidates, they were free to talk about candidates and issues as much as they desired without having to put disclaimers on their speech, file reports, or disclose donors because *Buckley* expressly excluded any reporting of “expenditures” for issue advocacy. Instead, *Buckley* limited such disclosures to expenditures for express advocacy—that is, for “spending that is unambiguously related to the campaign of a particular federal candidate.”¹⁰⁸ This was the robust, wide-open debate on public issues that the First Amendment was designed to protect. No one had to hire a lawyer to decipher complex campaign-finance laws, as long as a simple, bright line was observed. No one had to hire staff to comply with burdensome recordkeeping and reporting requirements for issue advocacy. People of ordinary means could pool their resources for effective advocacy. Groups advocating their positions on issues such as abortion, gun control, the environment, immigration, health care, taxation, war, and so on could form as the need arose and speak their minds without the advance planning and significant funding necessary for both FEC compliance and effective advocacy. Issue advocacy was unburdened and unchilled.

McConnell's upholding of McCain-Feingold disrupted the liberty of issue advocacy. *WRTL* partially restored bright-line protection to it. And the logic of *WRTL's* line should have extended to disclosure, just as the express-advocacy line had protected against disclosure as to issue advocacy. That was what we asked the Court to do in

¹⁰⁸ 424 U.S. at 80.

Citizens United, and that was what was shoved aside, inadequately argued, and ultimately rejected by the Court. So *Citizens United* and American citizens alike remain burdened and chilled in their issue advocacy. That corporations and unions may engage in express advocacy in addition to the issue advocacy they already could pursue after *WRTL* hardly compensates for this loss of liberty.

The way that the *Citizens United* Court decided that it was “necessary” to reach *Austin* was to fail to give plain meaning to the words “appeal to vote” in its appeal-to-vote test. There was no such “appeal” (such as *Furgatch’s* “DON’T LET HIM DO IT!”) in the movie, so the Court could only point to many criticisms of Senator Clinton and statements such as, “Could [Senator Clinton] become the first female President?” and “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.” But criticism is essential to robust issue advocacy and does not by itself constitute an “appeal.” One could fully support a senator’s reelection yet fervently assail her positions on certain issues. Nonetheless, from such criticisms and statements the Court concluded that “there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton.”¹⁰⁹ That is an appalling departure from the protection afforded by the express-advocacy test and even the *Furgatch* version of that test. The appeal-to-vote test was fatally wounded instead of being strengthened, as it should have been. Consequently, the appeal-to-vote test slipped into the dustbin of history.

The Court also held that the disclosure requirements could not be limited to communications that were the functional equivalent of express advocacy (containing an “appeal to vote”) but applied to all electioneering communications.¹¹⁰ The Court was compelled to do this by the gutting of the “appeal to vote” test itself and the failure to argue a solid analytical basis for it—the unambiguously-campaign-related requirement. Without these bases, there was no sensible analytic line to be drawn, and the Court was left to apply “exacting scrutiny” without any evidence of real disclosure harm. So, ironically, a case originally brought to restrain disclosure—for

¹⁰⁹ *Citizens United*, 130 S. Ct. at 890.

¹¹⁰ *Id.* at 915.

all the good the eventual Supreme Court decision did—has now become the proffered justification for a new round of disclosure requirements. It did not have to be this way.

VII. *Citizens United*: Its Meaning for Campaign-Finance Law Generally

Beside the obvious facts that corporations and unions may now spend independently to engage in express advocacy, what does *Citizens United* mean to campaign-finance law? In a coincidence with our *Buckley* analysis above, *Citizens United* made nine vital points controlling future legislation and litigation:

1. It powerfully reaffirmed the strong protection for, and necessity of, political speech as “an essential mechanism of democracy.”¹¹¹ This extends to speech by associations choosing to incorporate. Concern over “factions” is addressed by “permitting them all to speak, . . . and by entrusting the people to judge what is true and what is false.”¹¹²

2. It stressed the need to avoid chilling political speech by giving it “breathing space.”¹¹³ It proscribed complex rules: “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech”¹¹⁴ The decision prohibited subjective, “intricate case-by-case determinations” in favor of bright-line, “objective” tests.¹¹⁵ It further decried restrictions that prevented organizing and speaking on short notice with little expense, deciding that such “onerous restrictions . . . function as the equivalent of prior restraint”¹¹⁶

3. It noted that the First Amendment is “[p]remised on mistrust of governmental power” and that the “FEC’s business is to censor.”¹¹⁷ So government efforts to chill speech by, for example, turning the

¹¹¹ *Id.* at 898.

¹¹² *Id.* at 907.

¹¹³ *Id.* at 892 (quoting *WRTL*, 551 U.S. at 469).

¹¹⁴ *Id.* at 889.

¹¹⁵ *Id.* at 889, 892, 895.

¹¹⁶ *Id.* at 895–96.

¹¹⁷ *Id.* at 896, 898.

Court's objective appeal-to-vote test into "a two-part, 11-factor balancing test,"¹¹⁸ must be viewed with skepticism, not deference, and subjected to strict scrutiny.¹¹⁹

4. It pronounced the death (again) of the equality rationale, the true basis of the corporate-form corruption interest recognized in *Austin*.¹²⁰ This was facilitated by Solicitor General Kagan's abandonment of that rationale as a basis for defending *Austin* in *Citizens United*.¹²¹ The equality rationale was rejected in *Buckley*, *Davis*, and now *Citizens United*, and should play no further role. Campaign-finance laws seeking to regulate corporations based on their corporate form will encounter strict scrutiny to ensure that this phoenix-like asserted interest does not rise again.

5. It held that the only cognizable anti-corruption interest is in preventing quid pro quo corruption.¹²² This interest does not permit the restriction of independent expenditures, but it does permit restrictions on "large direct contributions."¹²³ The emphasis on *large* contributions cites *Buckley* and precludes low contribution limits.¹²⁴ There is no risk of corruption or its appearance with low contributions, and the Court held that this interest did not justify the corporate prohibition on independent expenditures. It said, "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt[.]"¹²⁵ Such a "generic favoritism or influence theory . . . is unbounded and susceptible to no limiting principle," it added, and "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."¹²⁶ The Court held that "there is only scant evidence that independent expenditures even ingratiate," but "[i]ngratiation and access, in any event, are not corruption."¹²⁷

¹¹⁸ *Id.* at 895.

¹¹⁹ *Id.* at 898.

¹²⁰ *Id.* at 922–23.

¹²¹ *Id.* at 923–24.

¹²² *Id.* at 909–10.

¹²³ *Id.* 908–909.

¹²⁴ See *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (striking down contribution limits as too low).

¹²⁵ *Id.* at 910.

¹²⁶ *Id.*

¹²⁷ *Id.*

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The Court distinguished *McConnell*'s upholding of the ban on so-called soft-money donations to political parties because soft money, not independent expenditures, was involved.¹²⁸ But because the soft-money ban was based on access and gratitude as corruption,¹²⁹ the *Citizens United* holding—that those are not corruptive influences—undercuts the soft-money ban. Nonetheless, the Supreme Court has summarily affirmed the D.C. Circuit in rejecting an as-applied challenge to the ban in *Republican National Committee v. FEC*.¹³⁰ The Court also discounted any interest in preventing the “circumvention” of contribution limits; an interest that has been used to justify limits on political party expenditures coordinated with party candidates (and is at issue in *Cao v. FEC*).¹³¹ The Court said that “[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws,” but that “informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights.”¹³² Political parties’ voices are just as “informative” as corporations’.¹³³

And since there is no longer any anti-corruption interest in restricting corporate speech, corporations must be free to contribute to political action committees (PACs) that only make independent expenditures (i.e., no political contributions). Lower courts have already held that noncorporate contributions to independent-expenditure PACs may not be limited since there is no quid pro quo corruption.¹³⁴ With *Austin*'s corporate-form corruption interest now gone, corporate contributions to such PACs must also be unlimited.¹³⁵

¹²⁸ *Id.* at 910–11.

¹²⁹ *McConnell*, 540 U.S. at 125, 129, 145, 169.

¹³⁰ *Republican Nat'l Comm. v. FEC*, 130 S.Ct. 3544 (2010), *aff'g* 698 F.Supp. 2d 150 (D.D.C. 2010) (3-judge district court).

¹³¹ *Cao v. FEC*, 2010 U.S. Dist. LEXIS 12846 (E.D. La. Jan. 27, 2010), appeal docketed, Nos. 10-30080 (5th Cir. Jan. 29, 2010) & 10-30146 (5th Cir. Feb. 22, 2010).

¹³² *Citizens United*, 130 S. Ct. at 912.

¹³³ *Id.* *WRTL* also rejected a circumvention argument, declaring that “[e]nough is enough” and rejecting “a prophylaxis-upon-prophylaxis approach to regulating expression.” 551 U.S. at 478–79.

¹³⁴ See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008). The FEC has now recognized that independent-expenditure PACs may receive unlimited contributions from both corporations and noncorporate entities. See *FEC Ops. 2010-09 (Club for Growth)* (unlimited contributions solely from individuals),

6. It overruled the portion of *McConnell* facially upholding the electioneering-communication prohibition.¹³⁶ As a result, the language about government being able to prohibit the “functional equivalent of express advocacy” is gone, just as *WRTL’s* appeal-to-vote test (stating what constitutes a “functional equivalent”) is gone. Until now, the FEC and states have justified speech restrictions based on the notion that functional equivalence is a permissible test or that appeal-to-vote-test language applies beyond the electioneering-communication context. One immediate application of *Citizens United* is to the FEC’s regulation at 11 C.F.R. § 100.22, which defines “expressly advocating” in two ways. The first essentially follows *Buckley’s* “express words of advocacy” definition, but the second employs a *Furgatch*-style definition that the FEC has justified as consistent with *WRTL’s* appeal-to-vote test. That justification is now gone, and the *Citizens United* dissent reaffirmed what the justices said in *WRTL* and *McConnell*—that the express-advocacy test requires so-called magic words, such as “vote for.”¹³⁷ So *Citizens United* again makes clear that any “express advocacy” or “independent expenditure” definition not requiring magic words is unconstitutional. The FEC’s definition is at issue in *The Real Truth About Obama v. FEC*,¹³⁸ in which the Supreme Court granted certiorari to vacate a Fourth Circuit opinion upholding the definition and remanded the case for consideration in light of *Citizens United*.

7. It made several important statements regarding PACs. For one, *Citizens United* applied strict scrutiny to the government’s limitation of corporate speech to the PAC option.¹³⁹ The Court held that having a PAC option does not allow a corporation itself to speak, so the

2010-11 (Commonsense Ten) (unlimited contributions from individuals, PACs, corporations, and labor unions). And *SpeechNow.org* has filed a petition for certiorari (No. 09A1212) asking the Supreme Court to determine the issue it lost in *SpeechNow.org*, whether PAC-status disclosure must apply to such groups receiving such contributions to make only independent expenditures or if ordinary independent-expenditure disclosure satisfies any interest the government may have.

¹³⁵ See *Thalheimer v. City of San Diego*, No. 09-CV-2862-IEG, 2010 WL 596397, at *6-9 (S.D. Cal. Feb. 16, 2010) (preliminary injunction opinion) (enjoining ban on corporate contributions to independent-expenditure PACs).

¹³⁶ *Citizens United*, 130 S. Ct. at 913.

¹³⁷ *Id.* at 935 n.8.

¹³⁸ 130 S.Ct. 2371 (2010).

¹³⁹ *Citizens United*, 130 S. Ct. at 898.

corporate ban was in fact a speech ban.¹⁴⁰ And even if the PAC option did allow corporations to speak, PAC status imposes such “onerous” burdens that it is inadequate to satisfy corporations’ right to political speech.¹⁴¹ This holding as to the onerous, insufficient nature of PAC options was decided without mentioning the federal source-and-amount limitations on contributions to PACs. In other words, the *other* PAC burdens (registration, recordkeeping, periodic reporting of all receipts and disbursements, and mandatory organization before speaking) were sufficient to make PAC burdens onerous and inadequate means of speech. This means that cases such as *Alaska Right to Life Committee v. Miles*,¹⁴² which relied on the absence of source-and-amount restrictions to hold that Alaska’s PAC-style requirements were not particularly onerous and therefore constitutional, are no longer viable.

8. Its express endorsement of bright-line, protective, objective tests, its rejection of subjective, “intricate case-by-case determinations,” and its pronouncement that PAC burdens are onerous all doom the FEC’s current method of determining PAC status. Declining to make a bright-line rule, the FEC opted to make no rule, instead stating that determining an organization’s “major purpose” (which *Buckley* said must be to nominate or elect candidates before PAC status may be imposed¹⁴³) would be a case-by-case determination based on ambiguously defined, subjective criteria.¹⁴⁴ The FEC must now make an objective, easily determined rule or enforcement policy. For example, it may apply PAC status only to groups that spend more than 50 percent of their annual budget on regulable, election-related speech (and meet the statutory threshold of \$1,000 in regulable expenditures or contributions per year). The FEC’s PAC-status enforcement policy is at issue in *The Real Truth About Obama*, remanded for reconsideration in light of *Citizens United*.¹⁴⁵

9. It held that facial invalidation was required because of “the primary importance of speech itself to the integrity of the election

¹⁴⁰ *Id.* at 897–98.

¹⁴¹ *Id.*

¹⁴² 441 F.3d 773 (9th Cir. 2006).

¹⁴³ 424 U.S. at 79.

¹⁴⁴ Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007).

¹⁴⁵ 130 S.Ct. 2371.

process,” and the necessity of protecting speakers from the substantial burdens required to clarify the law through multiple as-applied challenges.¹⁴⁶ This is an important recognition that courts must lighten the litigation burden of challenges to campaign-finance restrictions. With *WRTL* and *Citizens United*, it is clear that *McConnell* was the highwater mark of a rapidly receding “reform” flood. *Citizens United*, despite its faults, is a robust reassertion of the First Amendment and the rights of citizens to participate in the political speech essential to self-governance. Apparently, liberty is coming back into fashion.

These nine transferable analyses are positive developments for liberty, the First Amendment, citizen self-governance, and the Republic. For example, their application has already led to *Speech-now.org*, which cited *Citizens United* in an important ruling protecting citizens’ rights to organize and engage in core political speech.¹⁴⁷

VIII. *Citizens United*: Its Meaning for Disclosure

Still, it should be noted that the way *Citizens United* was decided has caused some damage to citizens’ speech, association, and self-government rights with regard to imposed disclosure (including mandated disclaimers, reporting, and donor disclosure). Can this damage be limited? To evaluate this we must answer further questions:

What did Buckley hold regarding disclosure? *Buckley* expressly excluded genuine issue advocacy from the required reporting of “expenditures,” defined as disbursements “for the purpose of influencing’ the nomination or election of candidates for federal office.” *Buckley* noted that the definition had “potential for encompassing both issue discussion and advocacy of a political result.”¹⁴⁸ To “ensure that the reach” of the disclosure statute was not “impermissibly broad,” the Court construed “expenditure” to reach only express advocacy.¹⁴⁹ “This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular

¹⁴⁶ *Citizens United*, 130 S. Ct. at 895.

¹⁴⁷ See *supra*, note 134.

¹⁴⁸ 424 U.S. at 79.

¹⁴⁹ *Id.* at 80.

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federal candidate,” the Court stated.¹⁵⁰ It continued, “As narrowed, [it] does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.”¹⁵¹ In short, issue advocacy was not subject to disclosure, only “spending that is unambiguously related to the campaign of a particular federal candidate.”

What disclosure line did Citizens United reject? The *McConnell* Court had already rejected express advocacy as the disclosure line by holding that disclosure could also be required for electioneering communications.¹⁵² While *WRTL* drew the *prohibition* line for electioneering communications at its appeal-to-vote test, *Citizens United* declined to draw the electioneering-communication *disclosure* line at the same place.¹⁵³ This means, at present, that any communication merely meeting the express-advocacy *definition* is subject to disclosure.

Can a new electioneering-communication disclosure line (other than the mere electioneering-communication definition) be drawn that is consistent with Citizens United and Buckley? In other words, could the federal courts narrow the disclosure requirement in a way that protects the *issue* advocacy protected by *Buckley*, in a manner similar to *WRTL*’s narrowing of the scope of the electioneering-communication prohibition to protect genuine issue ads, but without drawing the line at the appeal-to-vote test? Stated yet another way, is there room for a new disclosure line (faithful to *Buckley*’s issue-advocacy protection) between a disclosure line at the appeal-to-vote test (now rejected) and a disclosure line at the bare electioneering-communication definition?

This analysis begins by asking what sort of communications were actually at issue in the as-applied challenge to the electioneering-communication disclosure requirements in *Citizens United*. The Court only considered the disclosure requirement as applied to two types of communications, a movie and ads. The *Citizens United* Court held that the movie at issue “would be understood by most viewers as an extended criticism of Senator Clinton’s character and her fitness

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² 540 U.S. at 194–99.

¹⁵³ 130 S. Ct. at 915.

for the office of the Presidency.”¹⁵⁴ It noted references to candidacy, the election, and voting, and it declared the movie “the functional equivalent of express advocacy” under *WRTL*’s appeal-to-vote test.¹⁵⁵

What did Citizens United argue about the ads and what did the Court say about them? Citizens United did not claim that the ads contained issue advocacy, arguing instead that there should be no disclosure because the ads were about commercial activity.¹⁵⁶ To this the Court countered, “Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.”¹⁵⁷ Moreover, the Court twice described the ads as “pejorative.”¹⁵⁸

Are either of these relevant to the hunt for a new disclosure line lying below the appeal-to-vote test and the bare electioneering-communication definition? The movie is not analytically helpful because it was subject to disclosure *even if* the disclosure line were drawn at the appeal-to-vote test. But the ads were *not* deemed to contain an appeal to vote, so what the Court said and held concerning them *is* analytically relevant to a possible new line. What the Court actually held is this: As applied to pejorative ads about commercial transactions (with no allegation that they advocated any public issue), the electioneering-communication disclosure regime is constitutional, in part because the disclosure trigger is not the appeal-to-vote test.

But would the disclosure regime be constitutional as applied to a communication that was about a public issue, not about a commercial transaction, and not pejorative toward a candidate? What if it were a genuine issue ad of the sort at issue in *WRTL*? *WRTL* described *WRTL*’s ads as follows:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political

¹⁵⁴ *Id.* at 890.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 915.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 887, 915.

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party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.¹⁵⁹

To be consistent with *Buckley*, such a genuine issue ad would have to be protected from disclosure.¹⁶⁰ That would mean that government could not require disclosure as to issue-advocacy electioneering communications that do not contain an appeal to vote; do not mention elections, candidacies, or political parties; do not address character, qualifications, or fitness of candidates; and are not pejorative.

That would be a new disclosure line between the appeal-to-vote test and the bare electioneering-communication definition. Such an as-applied challenge was not addressed in *Citizens United*, and would have to be successful unless *Buckley's* holding as to permissible disclosure is to be entirely overturned. Only time will tell if such a challenge succeeds.

In any event, this analysis shows that *Buckley's* unambiguously-campaign-related requirement remains viable, but damaged by not being argued and embraced in *Citizens United*. There must, after all, be some line cabining what Congress and the FEC may regulate under their congressional authority to regulate elections. Congress has acknowledged by its definitions that it may only regulate "contributions" and "expenditures" made "for the purpose of influencing" federal election campaigns.¹⁶¹ The FEC has acknowledged the same in various explanations and justifications of its rules.¹⁶² But it is not enough to say that disclosure may be required for disbursements made "for the purpose of influencing" because that is precisely the language that *Buckley* found vague and overbroad, and narrowed using the unambiguously-campaign-related requirement to protect issue advocacy. That there must be such a constitutionally mandated line is imperative in light of the FEC's assertion that it is authorized to regulate "beyond speech about candidate elections" to reach

¹⁵⁹ 551 U.S. 449, 470 (2007).

¹⁶⁰ Even *McConnell* "assume[d] that the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206 n.88.

¹⁶¹ See 2 U.S.C. §§ 431(8)(A)(i) ("contribution" definition) and (9)(A)(i) ("expenditure" definition).

¹⁶² See, e.g., Coordinated Communications, 71 Fed. Reg. 33190, 33197 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109) (investigations as to expenditures for coordinated party communications must not be for "activity . . . unlikely to be for the purpose of influencing Federal elections").

“attempts to sway public opinion on issues.”¹⁶³ That is *not* the line that the Supreme Court drew in *Citizens United* and cannot be the constitutional line if *Buckley* and the First Amendment remain viable.

The unambiguously-campaign-related line is necessary if there is to be adequate protection from unwarranted disclosure because the Court applies “exacting scrutiny” to disclosure requirements. That scrutiny, while high in *Buckley*, is often watered down in application. The unambiguously-campaign-related requirement mandates that as a threshold matter the regulated speech must be shown to be unambiguously campaign related before scrutiny is applied. That was what *Buckley* did. Applying this threshold requirement restricts the regulatory scope before the appropriate level of scrutiny is applied. It fixes the analysis as to disclosure so that lowered intermediate scrutiny does not simply sanction whatever disclosure the government wants to impose.

So why was *Citizens United* not more protective as to electioneering-communication disclosure? Justice Thomas’s dissent outlined the problems that developed in California following the disclosure of persons donating in support of a ballot initiative (Proposition 8) prohibiting gay marriage. Similar problems arose surrounding the public release of petitions to put a similar referendum on the ballot in Washington State. The Court was familiar with such problems because it had issued a stay protecting against release of the petitions until it had a chance to consider the case.¹⁶⁴ The social costs of disclosing citizens’ political activities have clearly risen since 1976, when *Buckley* was decided. The ability to post individuals’ names, addresses, places of employment, and even maps to individuals’ homes on the Internet has facilitated vandalism, harassment, and threats of physical harm and death. Despite this growing problem, *Citizens United* seemed unconcerned about providing a high level of protection.

¹⁶³ Defendant FEC’s Motion for Summary Judgment at 22, *Citizens United v. FEC*, No. 1:07-CV-02240, 2008 WL 2788753 (D.D.C. June 6, 2008).

¹⁶⁴ *Doe v. Reed*, 561 U.S. ____, 130 S.Ct.2811 (2010) (signatories of referendum petitions generally do not have a constitutional right to keep their identities private but courts should consider in any given case whether a particular referendum presents sufficiently unique circumstances that anonymity is required). For a larger discussion of *Doe*, see, elsewhere in this volume, Steve Simpson, *Doe v. Reed* and the Future of Disclosure Requirements 2009-2010 *Cato Sup. Ct. Rev.* 139 (2010).

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What are some possible explanations? For one, the push to reverse *Austin*, which the public would (and did) consider a huge step, may have created pressure to balance that decision with strong disclosure requirements. Also, the unambiguously-campaign-related requirement, which *Buckley* employed to protect issue advocacy, was not argued to the Court by a party.

When confronted with a challenge to the electioneering-communication disclosure regime in a case dealing with ads like those at issue in *WRTL*, where briefing focuses on *Buckley's* protection from disclosure for issue ads, and where there is no counterpressure from a major overruling in a different aspect of the case, the Court should recognize the need to protect issue advocacy and remove government-facilitated intimidation from the political toolbox.

