

No. 08-205

IN THE  
Supreme Court of the United States

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CITIZENS UNITED,  
*Appellant,*

v.

FEDERAL ELECTIONS COMMISSION,  
*Appellee.*

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

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

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The American Civil Rights Union (ACRU) is a non-partisan, non-profit legal/educational policy organization dedicated to defending all constitutional rights, not just those which might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

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

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

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

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

## INTRODUCTION

This case involves core political speech protected by the First Amendment, long recognized as a fundamental foundation of our democracy. Such core political speech enjoys the maximum possible protection under our Constitution. Yet, a federal agency claims the legal authority to prohibit the broadcast of such core political speech. We submit that this Court should redouble its vigilance in protecting the fundamental freedom in this case so essential to our very democracy and self-governance, and our very nature as a free people.

At issue in this case is the production, advertising, display and broadcast of a feature-length (90 minutes), documentary film about a major political figure running for President over much of the past year – Hillary Clinton. Protection of core political speech regarding this subject consequently could not be more vital during this time.

The movie includes a mix of facts and opinion regarding Mrs. Clinton, both constitutionally protected. In particular, the movie primarily communicates facts regarding the conduct of Mrs. Clinton during past political campaigns, during the tenure of her husband as President, and during her service as a U.S. Senator from New York. The truthfulness of these facts has not been challenged. The communication of such facts is a valuable contribution to the political process and the democratic selection of the leader of our nation, regardless of one's opinion about the meaning and significance of such facts.

The movie is the cinematic equivalent of a book presenting a biography of a leading political figure, with both factual analysis and opinion. The author may openly express a political ideology or viewpoint, but that does not reduce constitutional protection for the book.

The movie and the expenditures behind it are not part of any political campaign, or coordinated in any way with any political campaign. The movie does not urge viewers to vote for or against Ms. Clinton. The movie was financed entirely by a non-profit, non-partisan, ideological corporation, with funds raised overwhelmingly from individuals across the country who share the organization's ideological perspective. The history of the corporation and its financing reflects citizens coming together to communicate their views to the general public, not commercial, special interests seeking to advance narrow financial goals.

We respectfully submit that this Court cannot allow the government to prohibit the broadcast of such core political speech during any election period, or at any other time, nor excessively burden its promotion by regulatory requirements. In seeking to prohibit broadcast of the movie and burden its promotion, the Federal Elections Commission (FEC) has strayed outside its constitutionally permissible zone of authority, which is to regulate campaign speech. As we will discuss below, the justification for allowing FEC regulation of campaign speech, preventing corruption or the appearance of corruption, does not apply to the core political speech at issue in this case. The FEC then has no constitutional authority to regulate such speech in contravention of the First Amendment.

To maintain the full constitutional protection that such core political speech deserves, this Court should reverse the court below and establish clear bright line standards that would prevent abuse of such political speech in the future.

## STATEMENT OF THE CASE

Appellant Citizens United is a non-profit, 501(c)(4) corporation founded in 1988. It was started by citizens who want to communicate and advance their viewpoint to the general public, and they have done so over the years through movies and other communications.

Funding for the corporation is raised predominantly from individuals across the country who share and want to advance the organization's ideological message. J.A. 244A, 251a-252a. A small portion of its funding comes from for-profit corporations. *Id.*

Citizens United has previously produced movies on the War on Terror, illegal immigration, the United Nations, and religion in public life. J.A. 11a-12a. Movie theaters across the country have shown these movies, and national retail chains have sold the DVD versions. J.A. 12a. One of these movies, *Rediscovering God in America*, ranked as the top selling historical documentary on Amazon.com for a period. *Id.*

In 2007, Citizens United produced *Hillary: The Movie* ("Movie"), a feature length (90 minutes) documentary. J.A. 12a-13a. Financing for the production and advertising budgets was devoted from the corporation's general treasury. Individuals and other non-corporate donors contributed over \$1 million specifically for the Movie. J.A. 244a, 251a-252a. Just two contributions, totaling \$2,000, came from for-profit corporations, less than 0.2% of the total. J.A. 252a.

The Movie focuses primarily on presenting the facts regarding five prominent episodes in Senator Clinton's life:

--Her role in the firing of the staff of the White House Travel Office, apparently to provide contract opportunities to

cronies, with the office director fired after 30 years of service criminally prosecuted by the Clinton Justice Department, but acquitted in full, J.A. 43a-54a;

--Her role in official retaliation against a woman who accused President Clinton of sexual harassment, J.A. 57a;

-- Her role in violations of federal campaign finance laws during her Senate campaign and her husband's Presidential campaigns, J.A. 65a-87a;

--Her sometimes inconsistent record and views on the issues of health care, job creation, and national security, showing in regard to the latter her shift from voting to authorize the Iraq war to opposing the war once the Democrat Presidential primaries started, J.A. 90a-112a;

--President Clinton's pardon of a Puerto Rican independence activist who murdered four people and wounded 50 others in a 1975 terrorist bombing in New York City, at the same time that Mrs. Clinton was seeking endorsement from Puerto Rican community activists for her 2000 Senate campaign, J.A. 130a-142a.

These are important, substantive matters and communicating the facts regarding them represents a valuable contribution to the public debate.

Citizens United has no connection with any candidate, campaign, campaign committee, political committee or political party. No aspect of the production and promotion of the Movie was coordinated with any such political entity either. Moreover, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any office, or the election or defeat of any other candidate. J.A. 13a. It does not contain an appeal to vote for or against Hillary Clinton. *Id.*

The Movie was planned for release in January, 2008, with full standard modern promotional efforts, including a website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs to be sold by prominent retailers. J.A. 13a, 212a-213a. Citizens United also received an offer to make the Movie available to households subscribing to digital cable television through a service called Video on Demand. J.A. 255a. The Movie would have been listed as one of many movie options on the service, under an *Elections '08* heading covering political movies. J.A. 258a. To view the Movie, the cable subscriber would have to specifically order it, and a compressed data electronic signal including the Movie would be sent only to that subscriber's TV for viewing.

But under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Movie would be considered an "electioneering communication" because it mentioned a federal presidential candidate and it would be broadcast during the 30-day periods before the primaries, caucuses and conventions occurring throughout 2008, and during the 60 days before the 2008 general election. The broadcast ads for the Movie would also be electioneering communications for these same reasons.

Consequently, the FEC took the position that broadcast of the Movie was prohibited under the BCRA until the 2008 election was over. Moreover, even ads promoting the Movie would be subject to regulation requiring Citizens United to publicly disclose its donors, which would likely reduce the number of donors and the amounts donated. Citizens United would also be required to report the ads in FEC filings as campaign speech when they are not. Mandatory FEC disclaimers would also have to be included in the ads. J.A. 18a-19a.

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

### **SUMMARY OF ARGUMENT**

Appellant Citizens United has produced a movie that communicates facts and opinion regarding a top candidate for President of the United States. As such, it involves core political speech entitled to the highest protection under the First Amendment. Such speech cannot be subject to any restriction unless the restriction is justified by a compelling interest and it is narrowly tailored to the least restrictive means to serve that interest, as required by the standard of strict scrutiny.

The compelling interest that has been recognized as justifying the restrictions of the BCRA has been to prevent corruption or the appearance of corruption. But this Court has also recognized that to protect core political speech, such restrictions must be narrowly applied only to express advocacy or the functional equivalent of express advocacy. The Movie at issue in this case does not involve such advocacy.

The Movie does not not expressly advocate the election or defeat of Hillary Clinton for any office, or urge viewers to vote for or against her. It primarily recounts the factual history of critical episodes in Hillary Clinton's past, providing important information relevant to the public debate in an election season.

Moreover, the Movie does not involve the compelling interest against corruption because it was overwhelmingly financed by individual contributions from donors motivated to advance their ideological views, not commercial interests seeking a *quid pro quo* for their financial benefit. None of Hillary Clinton's Democratic presidential primary rivals would feel obligated to reward the ideologically conservative individual donors to the Movie with any favors because of the Movie and its broadcast.

In addition, the compelling interest in preventing corruption does not apply here because the feature length Movie was distributed and broadcast through DVDs, movie theater screenings, and Video on Demand broadcasts. The viewers consequently must individually each select and pay to see the Movie, and choose to devote the 90 minutes of time to watch it. These viewers each have their own constitutionally protected free speech rights in maintaining the freedom to choose what political communications to see and hear. There is no corruption interest in preventing these viewers from exercising their own free speech rights to make these choices. This is quite different from the broadcast of short political ads that *interrupt* other broadcasts that the viewers have chosen to see, where they are not exercising their own free speech rights in choosing to endure such brief interruptions.

Finally, this Court should revisit its precedents regarding the regulation of core political speech involved in campaign speech, and conclude that the only restriction that is sufficiently narrowly tailored to protect the fundamental interest in the freedom of such speech is to require the disclosure of the identity of each campaign donor and the amounts donated.

## ARGUMENT

### **I. THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT DOES NOT INVOLVE EXPRESS ADVOCACY OR ITS FUNCTIONAL EQUIVALENT.**

Appellant Citizens United is a non-profit, 501(c)(4) corporation founded in 1988 by citizens who want to communicate and advance their ideological viewpoints to the general public. In 2007, Citizens United financed from its own corporate treasury the production of the Movie at issue in this case, a feature-length (90 minutes), documentary film about a major political figure running for President over much of the past year – Hillary Clinton.

The Movie includes a mix of facts and opinion regarding Mrs. Clinton. In particular, the movie primarily communicates facts regarding the conduct of Mrs. Clinton during past political campaigns, during the tenure of her husband as President, and during her service as a U.S. Senator from New York. The truthfulness of these facts has not been challenged. The communication of such facts is a valuable contribution to the political process and the democratic selection of the leader of our nation, regardless of one's opinion about the meaning and significance of such facts.

The Movie is the cinematic equivalent of a book presenting a biography of a leading political figure, with both factual analysis and opinion. The author may openly express a political ideology or viewpoint, but that does not reduce constitutional protection for the book.

The Movie was planned for release in January, 2008, with full standard modern promotional efforts, including a

website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs to be sold by prominent retailers. Citizens United also received an offer to make the Movie available to households subscribing to digital cable television through a service called Video on Demand.

The Movie is consequently core political speech fully protected under the First Amendment. The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007)(*WRTLII*); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)(Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment Freedoms); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8<sup>th</sup> Cir. 1999)(Discussion of public candidates and debate on the qualifications of candidates are integral to the Federal Constitution, and the First Amendment affords the broadest protection to such political expression in order to assure the unfettered exchange of ideas); *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11<sup>th</sup> Cir. 2004)(Political speech enjoys the highest level of First Amendment protection); *Wiggins v. Lowndes County*, 363 F.3d 387 (5<sup>th</sup> Cir. 2004)(Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment).

Any restriction on such speech must satisfy the standard of strict scrutiny, which requires that the restriction must serve a compelling interest and must be narrowly

tailored to achieve that interest. *WRTLII* (“the *Government* must prove that [the restriction] furthers a compelling interest and is narrowly tailored to achieve that interest,” 127 S. Ct. at 2664) (a court must “ensure that a compelling interest supports *each application* of a statute restricting speech,” *Id.* at 2671); *Buckley*; *Mass. Citizens for Life*; *McIntyre*.

In order to uphold the protection to core political speech that it deserves, this Court has held that the restrictions of the BCRA could only apply to express advocacy or the functional equivalent of express advocacy. *WRTLII*; *Buckley*. Chief Justice John Roberts wrote for the Court in *WRTLII*, “[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S. Ct. at 2667.

The Movie at issue in this case does not involve express advocacy or the functional equivalent of express advocacy. Again, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any office, or urge viewers to vote for or against her. Contrary to the decision of the court below, while viewers may find that the facts presented in the movie about Hillary Clinton’s past conduct may influence their vote and political support, that is no basis for imposing restrictions on such valid and vital discussion of Clinton’s record. Quite to the contrary, that only shows how important maintaining the protection of such speech is. As this Court explained in *WRTLII*, such speech is protected “advocacy [that] conveys information and educates.” 127 S. Ct. at 2667. If after “voters hear the information” they “choose—uninvited by the [Movie]—to factor it into their voting decisions,” that does not transform it into express advocacy that may be regulated or prohibited. *Id.*

Moreover, the Movie and the expenditures behind it are not part of any political campaign, or coordinated in any way with any political campaign. Citizens United has no connection with any candidate, campaign, campaign committee, political committee or political party. No aspect of the production and promotion of the Movie was coordinated with any such political entity either.

Consequently, the FEC cannot prohibit broadcast of the Movie at any time. Moreover, since the FEC has already held that the broadcast advertising developed by Citizens United does not involve express advocacy or its equivalent, the FEC cannot impose the BCRA's burdens on that advertising either.

**II. THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT IS FINANCED BY INDIVIDUAL CONTRIBUTORS SEEKING TO ADVANCE THEIR VIEWPOINT RATHER THAN COMMERCIAL INTERESTS.**

This Court has found preventing corruption or the appearance of corruption as a compelling government interest justifying some restrictions on core political speech. *WRTLII; Buckley; McConnell v. FEC*, 540 U.S. 93 (2003). As the Court said in *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985),

“The only legitimate and compelling government interests thus far identified for restricting campaign finances” [are] “preventing corruption or the appearance of corruption. [The] hallmark [of such corruption] is the financial *quid pro quo*: dollars for political favors.”

470 U.S. at 496-497.

Citizens United, which financed the production, promotion and potential broadcast of the Movie at issue in this case, is a non-profit, non-partisan, ideological corporation, with funds raised overwhelmingly from individuals across the country who share and want to advance the organization's ideological perspective and message. J.A. 244A, 251a-252a. Only a small portion of its funding comes from for-profit corporations. *Id.* The history of the corporation and its financing reflects citizens coming together to communicate their views to the general public, not commercial, special interests seeking to advance narrow, self-interested, financial goals.

Individuals and other non-corporate donors contributed over \$1 million to Citizens United specifically for the Movie. J.A. 244a, 251a-252a. Just two contributions, totaling \$2,000, came from for-profit corporations, less than 0.2% of the total. J.A. 252a.

The compelling interest against corruption or the appearance of corruption does not apply here because the individual donors overwhelmingly financing the Movie transparently are not looking for political favors in return. Rather, they are looking to advance their conservative viewpoint and message. *Mass. Citizens for Life*. Moreover, Hillary Clinton's Democratic primary Presidential rivals would not feel obligated in any way to serve the interests of such conservative individual donors.

These facts are quite the opposite of the facts in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where the organization was the Michigan Chamber of Commerce, composed of and financed entirely of for profit corporations, and precisely looking for political favors, or at least favorable policies, that would exactly advance their commercial financial interests.

Consequently, there is no compelling interest in this case that would justify the FEC in prohibiting broadcast of the Movie at any time, or burdening the speech in the Movie's broadcast advertising with BCRA regulation.

**III. THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT IS ONLY BROADCAST TO INDIVIDUALS EXERCISING THEIR OWN FIRST AMENDMENT RIGHTS TO CHOOSE TO SEE IT.**

To see the Movie, individual viewers would have to seek it out, separately pay for it, and choose to devote the 90 minutes of time necessary to watch it.

If they were going to watch it in a movie theater, they would have to research what theaters were showing it and when, go to the theater, pay to get in, and choose to sit through it for 90 minutes to get its message.

If they were going to watch it on DVD, they would have to research where they could buy it, go there, whether online or in a store, pay for it, and again choose to sit through it for 90 minutes to get its message.

If they were going to watch it through Video on Demand on their cable TV service, they would have to search through the Video on Demand lists of available movies, select the Movie, pay any additional fee for it in addition to the fee they are paying for the cable TV service, and again choose to sit through it for 90 minutes to get its message. The Movie is only broadcast to an individual viewer's TV by electronic signal when the viewer specifically requests the signal bearing the Movie. This is functionally indistinguishable from choosing to watch the Movie on

DVD. Indeed, this is functionally indistinguishable from downloading video content from the Internet to watch, which the District Court in *McConnell* found to be a “form[] of media...completely different [from] television and radio advertising.” *McConnell v. FEC*, 251 F. Supp. 2d. 176, 571 (D.D.C. 2003).

These are the only means for any viewer to watch the Movie, for the Movie was only distributed through these three alternatives -- theater screenings, DVD, and Video on Demand cable broadcasts. This is quite different from the viewers of 30 and 60 second political ads on free broadcast TV or even on standard cable TV. Viewers of those ads do not choose them for viewing. Rather, the ads *interrupt* other broadcasts that the viewers have chosen to watch, and the viewers generally sit through the ads because they are short interruptions of the chosen broadcasts. The viewers also devote no significant time commitment to watch these short political ads.

Viewers of the Movie through the means described above hold their own constitutionally protected, freedom of speech rights to watch and to listen to the Movie and its speech. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000)(Under First Amendment’s free speech clause, the citizen is entitled to seek out or reject certain ideas or influences without government interference or control); *Pacific Gas and Elec. Co. v. Public Utilities Com’n of California*, 475 U.S. 1 (1986)(Constitutional guarantee of free speech serves significant societal interests wholly apart from speaker’s interest in self-expression; First Amendment also protects the public’s interest in receiving information); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3<sup>rd</sup> Cir. 1992)(Speech component of First Amendment includes freedom to receive speech); *Rossignol v. Voorhaar*, 316 F.3d 516 (4<sup>th</sup> Cir.), *cert. denied* 540 U.S. 822 (2003)(First Amendment protects both a speaker’s right to communicate

information and ideas to a broad audience and the intended recipients' right to receive that information and those ideas); *Willis v. Town of Marshall*, 426 F.3d 251 (4<sup>th</sup> Cir. 2005) (First Amendment protects right to receive speech of others); *de la O v. Housing Authority of City of El Paso*, 417 F.3d 495 (5<sup>th</sup> Cir.) *cert. denied* 126 S. Ct. 808 (2005) (Right to receive information is as equally protected under the First Amendment as is right to convey it); *Banks v. Wolfe County Bd. of Educ.* 330 F.3d 888 (6<sup>th</sup> Cir. 2003) (The First Amendment is concerned not only with a speaker's interest in speaking, but also with the public's interest in receiving information); *Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F. 3d 585 (6<sup>th</sup> Cir.) *cert. denied* 541 U.S. 990 (2003) (First Amendment protects the right to receive information); *Clement v. California Dept. of Corrections*, 364 F. 3d 1148 (9<sup>th</sup> Cir. 2004) (First Amendment embraces the right to distribute literature, and necessarily protects the right to receive it; First Amendment right to receive publication is a fundamental right); *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224 (10<sup>th</sup> Cir.) *cert. denied* 530 U.S. 1213 (1999) (The two components of effective speech are a speaker and an audience, and a restriction on either of these components is a restriction on speech); *Johnson v. County of Los Angeles Fire Dept.*, 865 F.Supp. 1430 (C.D.Cal. 1994) (Freedom of expression includes right to receive as well as right to communicate ideas).

There is no compelling interest in restricting the freedom of speech rights of viewers to watch and to listen to the Movie and its speech, whether preventing corruption or the appearance of corruption or anything else. There is no potential for corruption when individuals seek out, select, pay for, and commit themselves to watch the Movie, thereby receiving the information and facts conveyed in the Movie. These viewers are not buying influence with the Democratic Presidential primary rivals of Hillary Clinton. They are merely seeking out and obtaining information they think is

relevant to the political process and debate, which is constitutionally protected conduct.

When the broadcast or distribution of the Movie is limited to these viewers, as through the above means, prohibiting such broadcast or distribution would violate the free speech rights of these viewers to watch and to listen, without justification. Moreover, when the Movie broadcast is limited to those who are seeking out the message and information presented by the Movie, the potential for corruption by the producer of the Movie is sharply constrained. The producer is then only communicating to those who are already seeking out the message and information, rather than the general public, which is not nearly as likely to win influence or political favors in return. When the free speech rights of the viewers are weighed in with the free speech rights of the producers in this situation, along with the more limited opportunity for corruption, the balance overwhelmingly favors freedom of speech, rather than a speculative interest in preventing corruption. The FEC would then not have the constitutional authority to prohibit broadcast of the Movie through Video on Demand, or screening of the Movie in theaters, or distribution for viewing through DVDs.

But even broadcast on general cable TV or even free TV of a feature length documentary film still retains quite similar self-selection and choice aspects for the viewers as for the broadcast and distribution of the Movie through the above means. The viewers still must seek out when the Movie is going to be broadcast, and choose to devote themselves to sitting through it for 90 minutes to obtain the information and hear the message the Movie provides. They only do not have to pay separately for it. This is still quite different from short political ads that *interrupt* broadcasts that the viewers have chosen to see, which does not involve a

real choice by the viewer to watch the ad, but just a toleration of the interruption.

This is why the BCRA should not be allowed to apply constitutionally to feature length films, which are the cinematic equivalent of books, rather than short political ads, which were the actual focus of the legislation in the first place.

**IV. THE ONLY RESTRICTION THAT IS SUFFICIENTLY NARROWLY TAILORED TO PROTECT VITAL CORE POLITICAL SPEECH IS DISCLOSURE OF CAMPAIGN DONATIONS AND AMOUNTS.**

The core political speech protected by the First Amendment has long been recognized as a fundamental foundation of our democracy. This freedom is essential to our very democracy and self-governance, and self-defining to our very nature as a free people. That is why such core political speech is meant to enjoy the maximum possible protection under our Constitution. *Republican Party of Minnesota, supra* (Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms); *Rossignol, supra* (4<sup>th</sup> Cir.) (First Amendment affords the broadest free speech protection to political expression in order to assure the unfettered exchange of ideas, since in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential); *Day v. Holohan*, 34 F.3d 1356 (8<sup>th</sup> Cir.), *cert. denied* 513 U.S. 1127 (1994) (Discussion of public issues and debate on the qualifications of political candidates is integral to the operation of our democratic system of government; the First Amendment affords the broadest protection to such political expression); *Iowa Right to Life Committee, Inc., supra* (Discussion of public issues and debate on the qualifications

of candidates are integral to the Federal Constitution, and the First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas); *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002 (9<sup>th</sup> Cir. 2003)(The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open); *Perry v. Bartlett*, 231 F.3d 155 (4<sup>th</sup> Cir.) *cert. denied* 532 U.S. 905 (2000)(First Amendment affords the broadest protection to political expression to assure unfettered interchange of ideas to bring about political and social changes desired by the people); *Wiggins, supra* (5<sup>th</sup> Cir.)(Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment); *Coral Springs Street Systems, supra* (11<sup>th</sup> Cir.)(Political speech enjoys the highest level of First Amendment protection); *Phelan v. Laramie County Community College Bd. of Trustees*, 235 F.3d 1243 (11<sup>th</sup> Cir.) *cert. denied* 532 U.S. 1020 (2000)(Under First Amendment, political speech is entitled to the broadest protection).

But are these grand statements of principle still even valid law? In *Austin, supra*, this Court approved restrictions on freedom of political speech to promote the chimera of equality of speech rather than freedom of speech. Promoting equality as a compelling interest over freedom will result in more and more severe restrictions on freedom in chasing the rainbow of equality. Kurt Vonnegut, "Harrison Bergeron," *Welcome to the Monkey House* (New York: Dell Publishing, 1950). That is not what our founders intended in the First Amendment.

Moreover, the concept of the "functional equivalent" of express advocacy is also rather slippery, and not a firm foundation on which to place such a fundamental right as freedom of speech. Allowing freedom of political speech to

be restricted based on such a malleable concept does not seem to live up to the grandness of the principles stated in the cases cited above.

We respectfully submit that implementing those grand statements of principle requires a renewed focus on freedom with a standard holding that the only restriction on core political speech that is sufficiently narrowly tailored to maintain the central role that such speech is supposed to hold in our jurisprudence would be a simple requirement that all political campaign donations be rapidly disclosed as to the identity of the donor and amount of the contribution. This requirement would apply to all contributions to political campaigns, parties, and independent expenditures coordinated with campaigns or involving express advocacy. Voters can then decide for themselves what involves corruption or the appearance of corruption, and vote accordingly. The BCRA itself would no longer be necessary or constitutional under this standard. The same would be true for any contribution limits, which are simply limits on freedom of speech.

## CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should reverse the decision of the court below, and grant the preliminary injunction requested by Citizens United.

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