No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant*
v.
FEDERAL ELECTION COMMISSION, *Appellee*

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

Brief of Amicus Curiae Committee for Truth in Politics, Inc. Supporting Appellant

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Statement of Interest[1]

The Committee for Truth in Politics, Inc. ("CTP") is a nonstock, nonprofit North Carolina corporation that advocates for limited government and honesty in government. Before the 2008 general election, it broadcast an electioneering communication about then-candidate Barack Obama's record on abortion. It was protected from the Prohibition[2] under *WRTL II*'s "appeal to vote" test, *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2667, 2670 (2007).[3] CTP complied with the Disclaimer Requirement but did not comply with the Reporting Requirement and challenged the Disclosure Requirements as applied to electioneering communications protected by *WRTL II*'s appeal-to-vote test. The district court denied a preliminary injunction. *See Koerber v. FEC*, No. 08-39 (E.D. N.C. Oct. 29, 2008), *appeal docketed*, No. 08-2257 (4th Cir. Nov. 13, 2008). CTP is at

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[1] No party counsel authored any of this brief (CTP counsel only represented Appellant until November 26, 2008), and no party, party counsel, or person other than CTP paid for brief preparation and submission. The parties consented to the filing of this brief.

[2] CTP follows the *Jurisdictional Statement* terminology, *id.* at 5, for Bipartisan Campaign Reform Act ("BCRA") **§ 201** ("Reporting Requirement"), **§ 311** ("Disclaimer Requirement") (these requirements together are the "Disclosure Requirements"), and **§ 203** ("Prohibition").

[3] This opinion ("*WRTL II*"), by Chief Justice Roberts joined by Justice Alito, states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (position in concurrences on narrowest grounds).

risk for an intrusive, burdensome, and unconstitutional investigation and enforcement proceeding.

CTP's counsel represented WRTL in *WRTL II*, and represented Citizens United in this case through November 26, 2008. Counsel respectfully refer the Court to their summary judgment briefing below (Docs. 52, 61), as well as the *Jurisdictional Statement* and *Brief Opposing Motion to Dismiss or Affirm* in this Court, for further arguments.

Summary of Argument

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court determined that campaign finance laws may only regulate communications "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Because *Buckley* applied this threshold requirement to disclosing expenditures for communications, *id.* at 80, it has direct application to the Disclosure Requirements, which are unconstitutional as applied to communications that are not unambiguously campaign related.

WRTL II's appeal-to-vote test, 127 S.Ct. at 2667, is the application of the unambiguously-campaign-related principle to electioneering communications. So whether an electioneering communication may be subjected to the Prohibition (at issue in *WRTL II*) or the Disclosure Requirements depends on whether an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.*

For an electioneering communication to be subject to interpretation "as an *appeal* to *vote*," it must contain a clear plea for action urging a vote. Since it must be assumed that the words of this test were chosen

carefully, it is decisive that the test is not whether an ad promotes, attacks, supports, or opposes a candidate —or whether it focuses on or criticizes a candidate— but whether it must be interpreted "as an *appeal* to *vote*." An ad cannot be interpreted as an *appeal* absent a clear plea for action, which requires some clear command or invitation to the hearer. And an ad cannot be interpreted as an appeal to *vote* unless the appeal somehow urges a vote.

Argument

I. Campaign-Finance Laws May Only Regulate Unambiguously-Campaign-Related Activity.[4]

Constitutional analysis should begin with the Constitution, which mandates that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I. This "'guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 15 (citation omitted). If "Congress shall make no law," how may government regulate election-related First

[4] Part I addresses the second of the *Jurisdictional Statement*'s Questions Presented. Citizens United makes the unambiguously-campaign-related argument. *See*, *e.g.*, *Brief for Appellant* at 46 (because ads "neither expressly nor impliedly advocate the election or defeat of that candidate," a disclaimer "would not provide viewers with relevant 'electora[l] . . . information'"), 48 n.3, 51 (interest in disclosure of donors for "campaign-related speech . . . . is inapplicable" to ads that neither "expressly nor impliedly advocate"). Because the unambiguously-campaign-related principle addresses a threshold requirement, *see infra*, the Court need go no further to decide this case.

Amendment activities? *Buckley* identified the answer as "[t]he constitutional power of Congress to *regulate federal elections*." *Id.* at 13 (footnote omitted) (emphasis added) (*citing* U.S. Const. art. I, § 4).

This authority is self-limiting. If government regulates speech and association not clearly related to elections, it exceeds its authority. Key to *Buckley*'s analysis in the expenditure-disclosure context is its question of whether "the *relation* of the information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*," *id.* at 80 (emphasis added). So this Court requires that government may only regulate First Amendment activity where the activity is "*unambiguously related* to the campaign of a particular federal candidate," *id.* at 80 (emphasis added), i.e., "unambiguously campaign related," *id.* at 81.[5] After this first-principle threshold is

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[5] The Fourth Circuit also identified this need to "cabin" campaign-finance regulations:

> *Buckley* . . . recognized that legislatures have . . . power to regulate elections . . . and . . . may establish standards that govern the financing of political campaigns. In particular, the Court identified "limit-[ing] the actuality and appearance of corruption" as an important governmental interest served by campaign finance regulation. . . . The Court simultaneously noted, however, that campaign finance restrictions "operate in an area of the most fundamental First Amendment activities," and thus threaten to limit ordinary "political expression." . . . *Buckley* . . . recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by

met, any regulation must still survive "exacting scrutiny." *See id.* at 44-48 (imposing express-advocacy construction to protect ordinary political speech, then applying exacting scrutiny), 64 (requiring "exacting scrutiny" and "*also* . . . 'substantial relation' between the governmental interest and the information required to be disclosed" (emphasis added) (citations omitted)), 80-81 (employing express-advocacy construction to satisfy unambiguously-campaign-related principle, then applying exacting scrutiny).

> 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.

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008).

The need to cabin congressional and FEC authority to regulate ordinary political speech is especially evident in the present case, where the Federal *Election* Commission argued below that, under the Federal *Election Campaign* Act and the Bipartisan *Campaign* Reform Act, "the government's interest in providing information to the public extends *beyond speech about candidate election campaigns* to encompass activity that *attempts to sway public opinion or action on the specified issues*." *See* Doc. 61 (*quoting* Doc. 55) (emphasis added).

Buckley employed two tests to implement the unambiguously-campaign-related principle. First, to implement the requirement for PAC status, this Court created the major-purpose test for "political committees":

> To fulfill the purposes of the Act [i.e., regulating elections] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*.

Id. at 79 (emphasis added). Second, to implement the unambiguously-campaign-related requirement as to non-PAC expenditures, this Court imposed the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate, *id.* at 44, 80. "This reading is directed precisely to that spending that is *unambiguously related to the campaign* of a particular federal candidate." *Id.* at 80 (emphasis added). "[A]s construed, [the disclosure requirement] bears a sufficient relationship to a substantial governmental interest. As narrowed, [it] does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Id.* It "shed[s] the light of publicity on spending that is *unambiguously campaign related*." *Id.* at 81 (emphasis added).

Because *Buckley* expressly applied this first principle to *expenditure disclosure*, *id.* at 80, it has direct

application here. But *Buckley* applied the unambiguously-campaign-related principle in four contexts: (a) "expenditure" limitations, *id.* at 42-44; (b) "political committee" ("PAC") status and disclosure, *id.* at 79; (c) non-PAC *disclosure* of "contributions" and independent "expenditures," *id.* at 79-81; and (d) "contributions," *id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

Buckley also anchored the need for the unambiguously-campaign-related principle in another constitutional first principle, i.e., the fact that "[i]n a republic . . . the people are sovereign" and "[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," *id.* at 14. *Buckley* noted a dissolving-distinction problem that threatens to interfere with the People's debate in their sovereign, self-governing role, which problem requires a bright line—between (a) "discussion of issues and candidates" and (b) "advocacy of election or defeat of candidates"—to protect ordinary political speech:

> [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.

Id. at 42 (emphasis added). The Court elaborated on the necessity of a bright line between (a) "discussion, laudation, [and] general advocacy" and (b) "solicitation":

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between *discussion, laudation, general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (emphasis added).[6] *Buckley* cited this dissolving-distinction problem immediately before its first imposition of the express-advocacy construction, 424 U.S. at 42-44, so in its reference to the "vagueness" of the "expenditure" definition, *id.*, it also had in mind the overbreadth that results from violation of the unambiguously-campaign-related principle. *Buckley* expressly articulated the overbreadth concern when it

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[6] *WRTL II* reiterated the need for bright-line speech protection based on this dissolving-distinction problem. *See* 127 S.Ct. at 2659, 2669.

imposed the express-advocacy construction a second time "[t]o insure that the reach of [the expenditure disclosure provision] [wa]s not *impermissibly broad*." *Id.* at 80 (emphasis added).

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court again recognized and applied the unambiguously-campaign-related principle. *MCFL* applied this first principle to the prohibition on corporate and union independent expenditures[7] at 2 U.S.C. § 441b. 479 U.S. at 249. The Court made clear that it was imposing the construction because of the dissolving-distinction overbreadth problem, *id.*, and the consequent need for a bright line "to distinguish *discussion of issues and candidates* from more pointed *exhortations to vote* for particular persons," *id.* (emphasis added). *MCFL* also reiterated the major-purpose test, which implements the unambiguously-campaign-related principle as to PAC status. *Id.* at 253, 262.

McConnell declared "the express advocacy restriction . . . an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell v. FEC*, 540 U.S. 93, 190 (2003). But the express-advocacy construction was created to implement the unambiguously-campaign-related principle, which *is* a first principle of constitutional law. *McConnell* recognized this by quoting *Buckley*'s explanation that the express-advocacy construction was done "'[t]o insure that the reach' of the disclosure requirement was 'not *impermissibly broad*.'" 540 U.S. at 191 (emphasis added) (*quoting*

[7] An "independent expenditure" is now an express-advocacy communication not coordinated with a candidate. 2 U.S.C. § 431(17).

Buckley, 424 U.S. at 80). *McConnell* also recognized the unambiguously-campaign-related principle when it stated that "[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and *overbreadth*, we nowhere suggested that a statute that was neither vague nor *overbroad* would be required to toe the same express advocacy line." *Id.* at 192 (emphasis added). So where a restriction on First Amendment liberties *is* vague or overbroad (e.g., for regulating activity not unambiguously campaign related), it must toe the express advocacy line,[8] or its functional equivalent in the electioneering communication context as established by *WRTL II*'s appeal-to-vote test. 127 S.Ct. at 2667. *McConnell*'s facial upholding of the

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[8] Since *McConnell*, several courts have embraced the express advocacy construction as an indispensable tool in dealing with vague or overbroad provisions. For example, the Ninth Circuit in *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004), followed the Sixth Circuit in endorsing the express advocacy test as the appropriate tool where a provision is vague and overbroad:

> Nevertheless, as stated recently by the Sixth Circuit, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

See also Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006).

electioneering communication Prohibition only "to the extent that [an ad is] the functional equivalent of express advocacy," 540 U.S. at 206, also reaffirms the unambiguously-campaign-related principle because it recognizes that only *true* equivalents to strictly-defined express advocacy may be regulated.[9] *McConnell* also expressly recognized the existence of "issue advocacy," which it described as "'discussion of political policy generally or advocacy of the passage or defeat of legislation,'" *id.* at 205 (*quoting Buckley,* 424 U.S. at 48), and of "genuine issue ads" that likely lay beyond Congress' ability to regulate. *Id.* at 206 n.88.

WRTL II applied the unambiguously-campaign-related principle to eliminate overbreadth in the regulation of electioneering communications when it stated its test for functional equivalence[10]: "[A]n 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

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[9] *McConnell* unequivocally recognized that express advocacy itself requires "magic words." *See id.* at 217 (requiring political parties to choose between coordinated expenditures and express-advocacy independent expenditures "forced [them] to forgo only . . . magic words").

[10] The "functional equivalent of express advocacy" is not a *type* of express advocacy, so a functional-equivalence test may not be used to define express advocacy. Nor is there any free-floating functional-equivalence test in campaign-finance law because *McConnell* used the concept only in the electioneering-communication context. 540 U.S. at 206. Even in that context, it is replaced by *WRTL II*'s appeal-to-vote test, which now decides what is "the functional equivalent of express advocacy." 127 S.Ct. at 2667.

candidate." 127 S.Ct. at 2667. This appeal-to-vote test, is the application of the unambiguously-campaign-related principle to electioneering communications because the test mandates (a) no ambiguity (an ad must be "susceptible of no reasonable interpretation other than," *id.*, and "in a debatable case, the tie is resolved in favor of protecting speech," *id.* at 2669 n.7), and (b) a candidate-campaign-related message ("as an appeal to vote for or against a specific candidate," *id.* at 2667).[11, 12]

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[11] That the appeal-to-vote test is the implementation of the unambiguously-campaign-related principle is also clear from *WRTL II*'s reaffirmation that the dissolving-distinction problem, *see supra*, requires speech protection, not restriction, 127 S.Ct. at 2659, 2669. *WRTL II* similarly reaffirmed that "'[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" *Id.* at 2670 (citation omitted). Doing otherwise "'turns the First Amendment upside down.'" *Id.* (citation omitted).

[12] The Fourth Circuit has recognized that the unambiguously-campaign-related principle was applied in *WRTL II*, and that only two types of communications are recognized as meeting this first 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. Sec-

WRTL II used its appeal-to-vote test to determine which electioneering communications may be subjected to the Prohibition, but since the test determines which electioneering communications are unambiguously campaign related, it should also determine which electioneering communications may be subjected to the Disclosure Requirements. The unambiguously-campaign-related principle was articulated and applied in the expenditure-disclosure context in *Buckley*. 424 U.S. at 80.

Moreover, *WRTL II*'s analysis turned on the nature of the communication (which has broad ramifications), not the nature of WRTL (which would apply only in the Prohibition context). This Court could have ruled for WRTL based on (1) the nature of WRTL, (2) the nature of the funds used, or (3) the nature of the ads.[13] A

> ond, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This latter category . . . has the potential to trammel vital political speech, and . . . warrants careful judicial scrutiny.

Leake, 525 F.3d at 282-83. Only these carefully-defined categories "struck [the proper] balance" and "ensured that potential speakers would have clear notice as to what communications could be regulated, ensuring that political expression would not be chilled." *Id.* at 284.

[13] All three bases were argued. The nature of WRTL was argued in the *Brief of Family Research Council, Free Market Foundation, and Home School Legal Defense Association as Amici Curiae in Support of Appellee*, *WRTL II*, 127 S.Ct. 2652, prepared by the Stanford Constitutional Law Center,

decision based on the nature of WRTL or of its funds would necessarily have addressed the applicability of the corporate-form interest, i.e., whether there could be a *prohibition*.[14] *WRTL II*'s decision based on the nature of the ads addresses the proper *scope* of the electioneering communication, i.e., are these ads the functional equivalent of express advocacy, which is unambiguously campaign related? WRTL argued that its ads were not the functional equivalent of express advocacy. This Court agreed. Even when *WRTL II* addressed the corporate-form interest, it did so based on the nature of WRTL's ads, not the nature of WRTL: "We hold that the interest recognized in *Austin* [*v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990),] as justifying regulation of corporate campaign speech and ex-

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which argued that all nonprofits should be exempted from the electioneering communication prohibition because the government had no corporate-form interest as applied to nonprofits. The nature of the funds that WRTL proposed to use for its ads, if necessary to obtain judicial relief, was raised in Count II of WRTL's complaint, which offered to use funds from a separate bank account containing only funds raised for the purpose from individuals, which option would have eliminated the corporate-form interest.

WRTL II did not provide a narrow test limited to these options or the special context of grassroots lobbying, although that is what WRTL proposed. The Court should provide similarly comprehensive guidance in the present case in light of the core speech, association, and self-governance liberties and principles at issue.

[14] Only corporations (and unions for parity) are *prohibited* from making electioneering communications, based on the corporate-form interest. *See McConnell*, 540 U.S. at 205.

tended in *McConnell* to the functional equivalent of such speech *has no application to issue advocacy* of the sort engaged in by WRTL." *WRTL II*, 127 S.Ct. at 2673 (emphasis added). So although *WRTL II* never construed the electioneering-communication *definition* (2 U.S.C. § 434(f)(3)), its analysis went to the permissible *scope* of regulable electioneering communications, employing the unambiguously-campaign-related principle.[15] Since that first principle is not limited to the Prohibition context, and governs the expenditure-disclosure context, *Buckley*, 424 U.S. at 80, there is no justification for limiting *WRTL II*'s appeal-to-vote test for regulable electioneering communications to the Prohibition context. All electioneering-communication regulation must be limited to that permissible scope.

Finally, it must be noted that what *WRTL II* called constitutionally-protected "political speech" or "issue advocacy," *see*, *e.g.*, 127 S.Ct. at 2659, does not require focus on current legislative or administrative branch issues. The appeal-to-vote test contains no requirement that the communication focus on legislative issues in order to be protected, only that it "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," *id.* at 2670. *WRTL II* did observe, in *applying* its appeal-to-vote

[15] *WRTL II* did not construe phrases of the "electioneering communication" definition because *McConnell* decided that the "'electioneering communication' [definition] raises none of the vagueness concerns that drove our analysis in Buckley," 540 U.S. at 194, and upheld the provisions facially, *id.* at 201-02, 207, and because there were no vague phrases such as *Buckley* construed to require express advocacy, as *McConnell* noted, *id.* at 191 (citations omitted).

test to grassroots lobbying, that WRTL's communications focused on legislative issues. *Id.* at 2667. But making that a requirement for the appeal-to-vote test or for qualifying as protected "political speech" confuses a *test* with the fact-bound *application* of the test.[16] To qualify as protected "political speech," a communication needs only to be "speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office," *id.* at 2659, or to "convey[] information and educate[]," *id.* at 2667, or to be a "discussion of issues and candidates" that falls short of express "advocacy of election or defeat of candidates," *id.* at 2669 (*quoting Buckley*, 424 U.S. at 42). Since *WRTL II* reaffirmed "'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his

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[16] Moreover, *WRTL II*'s discussion applying its test was responding to arguments made by the parties and amici, showing that even under various rejected tests WRTL's ads would be protected. In James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007) (published contemporaneously with *WRTL II* briefing), present counsel argued, as they did in WRTL's briefing before this Court, for a test specific to *grassroots lobbying*. That test *did* require focus on a legislative or executive branch issue, excluded mention of an election, candidacy, a candidate's character, and so on. *See id.* at 385-89 ("PBA Ad Test"). *See also id.* at 406-12 (setting out other proposed tests). But *WRTL II* rejected all tests and criteria but one: whether an 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.

own message,'" *id.* at 2671 (citation omitted), no restriction may be imposed on what constitutes ordinary "political speech." The speaker is free to engage in speech without restriction *unless* there is a constitutionally-cognizable reason and means to restrict it, which there is not if the speech is not unambiguously campaign related under this Court's tests applying that requirement. In effect, then, ordinary "political speech" or "issue advocacy" is defined by the *absence* of either express advocacy or *WRTL II*'s "appeal to vote," not the *presence* of some topic.

In sum, all campaign-finance regulation is subject to the unambiguously-campaign-related principle and *WRTL II*'s appeal-to-vote test is the application of that principle in the electioneering communication context, so any electioneering communication protected by the appeal-to-vote test may neither be prohibited nor otherwise regulated. It is protected as ordinary "political speech" or "issue advocacy." Since Citizens United's ads are protected by the appeal-to-vote test, as the FEC concedes, they are not subject to the Disclosure Requirements. *Hillary: The Movie* is also protected from all regulation by the appeal-to-vote test because it contains no clear plea for action urging a vote.

II. *WRTL II*'s Appeal-to-Vote Test Requires a Clear Plea for Action Urging a Vote.[17]

WRTL II's appeal-to-vote test permits regulation of an electioneering-communication ad only if it "is susceptible of no reasonable interpretation other than *as*

[17] Part II addresses the third of the *Jurisdictional Statement*'s Questions Presented. Citizens United also makes the present argument. *See Brief for Appellant* at 14, 36-37.

an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667 (emphasis added). For an ad to be unmistakably subject to interpretation "as an appeal to vote," it must necessarily contain a clear plea for action urging a vote.

Since it must be assumed that the words of the appeal-to-vote test were chosen carefully, it is decisive that the test is not whether an ad promotes, attacks, supports, or opposes a candidate—or whether it focuses on or criticizes a candidate—but whether the ad must be interpreted "as an *appeal* to *vote*." An *appeal* is "[a]n earnest or urgent request, entreaty, or supplication." *The American Heritage Dictionary of the English Language* (4th ed. 2000). So to constitute an *appeal* to vote, an ad must clearly ask or command the hearer to do some action. And the ad cannot be interpreted as an appeal to *vote* unless the action solicited has to do with voting for or against a candidate.

This necessary focus on an *appeal* to *vote* is derived from the precedents. The dissolving-distinction problem that *Buckley* and *WRTL II* recognized as requiring a bright, speech-protective line, *see supra* at 7-8, 12 n.11, is about how to distinguish (a) "discussion of issues and candidates" from "*advocacy of election or defeat of candidates*," *Buckley*, 424 U.S. at 42 (emphasis added); (b) "discussion, laudation, [and] general advocacy" from "*solicitation*," *id.* at 43; and (c) "discussion of issues and candidates from more pointed *exhortations to vote* for particular persons," *MCFL*, 479 U.S. at 249. As the italicized terms indicate, what had to be isolated was express advocacy/solicitation/exhortation for a vote for or against a candidate. Candidates and issues could be freely discussed together, and candi-

dates could be focused on and lauded or criticized, so long as there was no appeal to vote. So when *WRTL II* required that an electioneering communication could only be regulated if it must be interpreted "as an appeal to vote," *WRTL II*, 127 S.Ct. at 2667, 2670, *WRTL II* was following precedent and recognizing that only an unmistakable appeal to vote would be unambiguously campaign related.

WRTL II expressly held that this dissolving-distinction problem may not be used to quash the very intermingled discussion of issues and candidates that is at issue in *Hillary*: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *Id.* at 2669. And it elaborated the point that the dissolving-distinction is a reason to protect, not restrict, free speech: "'The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" *Id.* at 2670 (citation omitted).

The fact that the appeal-to-vote test requires a clear plea for action urging a vote is also evident from the manner in which the test was to be applied. *WRTL II* required that the search for this unmistakable "appeal to vote" must focus on the *language of the communication* itself, i.e., the test "must be objective, focusing on the *substance of the communication* rather than amorphous considerations of intent and effect." *Id.* at 2666 (emphasis added). This focus on the actual words of the communication is also required by *WRTL II*'s rejection of reliance on "contextual factors," *id.* at 2669. This objective determination focused on the actual words

used is only possible where normal rules of grammar are applied to determine if there is in the words used a clear plea for action that urges a vote for or against a candidate.[18]

This understanding of the appeal-to-vote test does not make the test a "magic words" test. It is instructive to compare and contrast the appeal-to-vote test with the Ninth Circuit's attempt, in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), to frame an express-advocacy test that went beyond the magic words. Of course, *McConnell* made it clear that express advocacy requires "magic words," so no other express-advocacy test is permissible and *Furgatch* is a dead letter for that purpose.[19] But *Furgatch* represents an effort to permit government regulation beyond magic words. *WRTL II* does not go beyond *Furgatch* and differs at several points. *Furgatch* dealt with a newspaper ad that concluded with these words concerning President and candidate Jimmy Carter: "It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies,

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[18] This analysis is supported by *WRTL II*'s repeated requirement that where there is *any doubt* as to whether the necessary unmistakable "appeal to vote" is present in the words of the communication then there is *not* an "appeal to vote" because all doubts and debatable words are to be resolved in favor of the speaker. *See id.* at 2667, 2669 & n.7, 2674. The elimination of borderline language requires that ads contain a clear plea for action that urges a vote for or against a candidate in order to be subject to regulation.

[19] S*ee infra* at n.9 (express advocacy requires "magic words").

ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT." *Id.* at 858. The Ninth Circuit adopted the following express-advocacy test:

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy . . . , but it 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. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and *unambiguous*, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a *clear plea for action*, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. at 863-64 (emphasis added). The *Furgatch* test may fairly be called the exhortation-to-vote test because that is precisely what it requires—albeit without any particular magic words. And the test made clear that no communication could be considered "*as* an exhortation to vote" absent a clear plea for action that involved voting.

In its appeal-to-vote test, *WRTL II* rejected any reliance on "external events," requiring that the objective words of the communication itself must be the focus. 127 S.Ct. at 2666. Of course, an electioneering communication by definition is broadcast near an election, identifies a candidate, and targets the candidate's constituents, so there is a built-in relevant context. Like *WRTL II*, *Furgatch* mandated that the message must be "unambiguous" and that all doubts are resolved in favor of the speaker. And just as *WRTL II* requires an unmistakable "appeal to vote," *Furgatch* mandated "an exhortation to vote," which must be a "clear plea for action" that "encourages a vote."[20] *Furgatch* decided that "Don't let him do it!" was just such a clear plea for action that constituted an unambiguous exhortation to vote without saying "vote against." *WRTL II* was not endorsing a test going *beyond Furgatch*'s now-rejected express-advocacy test, so the "appeal to vote" requirement of *WRTL II*'s test must be taken at least as seriously as the Ninth Circuit took its "exhortation to vote" or "clear plea for action" requirement. Consequently, the *WRTL II* test requires some clear plea for action urging a vote for or against a candidate for an ad to be unmistakably interpreted *as* an appeal to vote.

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[20] Even before *McConnell* and *WRTL II* effectively overruled *Furgatch*'s express-advocacy test for "independent expenditures," the Ninth Circuit made clear that context was subordinate to the actual words and that some express words of advocacy were required under the *Furgatch* test: "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003).

Hillary contained no clear plea for action urging a vote for or against then-candidate Clinton. In summary-judgment briefing the FEC made no attempt to identify any such plea for action. *See* Doc.56 at 44-46 (PDF pagination). Instead, the FEC argued a flawed version of *WRTL II*'s appeal-to-vote test. First, it argued that *Hillary* "mentions an election and candidacy." *Id.* at 44. Second, it argued that *Hillary* "takes a position on a candidate's character, qualifications, or fitness for office." *Id.* Third, the FEC argued that "the movie fails to qualify for an exemption under *WRTL* because it 'does not focus on legislative issues, or otherwise constitute issue advocacy.'" *Id.* at 45. From these criteria, the FEC concluded that "because *Hillary* . . . is nothing but an extensive critique of Senator Clinton's 'character, qualifications, and fitness for office,' and lacks indicia of genuine issue advocacy, the film is . . . susceptible of no reasonable interpretation other than as an appeal to vote against her." *Id.* at 46. So, the FEC concluded, "[i]t is . . . the functional equivalent of express advocacy . . . ." *Id.*

This argument is flawed. As to the first assertion, the appeal-to-vote test does not turn on mentioning an election or candidacy. The FEC attempts to substitute an *application* of the test—in which *WRTL II* addressed proposed (but rejected) tests that did turn on the presence or absence of such a criterion, *see infra* at 16 n.16—for the test itself. Such prestidigitation is impermissible. *See infra* at 15-17.

As to the second assertion, the argument that criticism constitutes the functional equivalent of express advocacy was argued and rejected in *WRTL*

II.[21] And the FEC has already settled two cases post-*WRTL II* about electioneering communications that set out candidates' positions on an issue and praised or criticized them for that position, which was a concession that non-criticism is not part of the appeal-to-vote test. *See* Doc. 52 at 16-17, 43-44. Moreover, the FEC has conceded that the ads at issue in this case meet the appeal-to-vote test, but the *Questions* Ad is clearly critical of Senator Clinton, *see Jurisdictional Statement* at 8 n.3, so the FEC's argument lacks credibility.

As to the third assertion, protected ordinary "political speech," or "issue advocacy," does not require focus on a particular issue. *See infra* at 15-17.

What the FEC was unable to do, and studiously evaded, was to point to any clear plea for action urging a vote for or against Senator Clinton. *Hillary* did not even contain something like "Don't let her do it!" So *Hillary* was protected from both the Prohibition and the Disclosure Requirements by the appeal-to-vote test because it was not unambiguously related to the *campaign* of Senator Clinton.

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[21] *See Brief for Appellee*, *WRTL II*, 127 S.Ct. 2652 (quoting and citing FEC and Intervenors' arguments that WRTL's ads were sham ads for criticizing candidate). In the present case, this issue was briefed and the *WRTL II* brief is quoted in Doc. 52 (summary judgment memo) at 44.

Conclusion

The judgment of the district court should be reversed.

Respectfully submitted,

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