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 THE CENTER FOR POLITICAL ACCOUNTABILITY AND THE CAROL AND LAWRENCE ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases (cont'd) **Page(s)**

Statutes and Regulations **Page(s)**

Statutes and Regulations (cont'd) **Page(s)**

Other Authorities and Sources **Page(s)**

Other Authorities and Sources (cont'd) Page(s)

STATEMENT OF INTEREST

The Center for Political Accountability ("CPA") and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania ("The Zicklin Center") submit this brief as *amici curiae* in support of the Appellee.[1]

CPA is a non-profit, non-partisan organization dedicated to ensuring transparency and accountability of corporate political spending for the benefit of shareholders, the public, and the political process. CPA seeks to create a business environment that promotes ethical behavior. Critical to its success are laws and regulations that foster rather than impede ethical decision-making. Since CPA was founded in 2003, it has worked with shareholders and companies to enable companies to pursue their political interests openly and responsibly. Drawing from the published practices of leading companies, CPA developed a model code for corporate political activity. Major corporations, including Intel, Merck, and Dell, subsequently modeled their codes on CPA's.

CPA also promotes corporate disclosure and oversight of company political spending. As a result of its efforts, more than fifty leading public companies, including forty S&P 100 companies, have

[1] CPA and The Zicklin Center submit this brief pursuant to the written consent of the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than CPA and The Zicklin Center has made a financial contribution to its preparation or submission.

made political disclosure and oversight an essential element of their political programs.

The Zicklin Center, established in 1997, sponsors and disseminates leading research on business ethics and corporate social responsibility. It provides students, educators, business leaders, and policymakers with tools to meet the ethical challenges that arise in complex business transactions. The Zicklin Center supports research that examines organizational incentives and disincentives to ethical business practices.

CPA and The Zicklin Center strongly support the electioneering communication ("EC") disclosure requirements embodied in § 201 of the Bipartisan Campaign Reform Act ("BCRA"). These requirements promote corporate best practices with respect to funding political activity and enable voters and shareholders to make informed political and investment decisions.

SUMMARY OF ARGUMENT

This Court held in *Federal Election Commission v. Wisconsin Right To Life, Inc.* ("*WRTL*") that § 203 of BCRA unconstitutionally restricted a nonprofit corporation's right to broadcast issue-oriented ECs before federal elections. 127 S. Ct. 2652, 2673 (2007). Appellant Citizens United seizes upon *WRTL* in an attempt to dismantle various BCRA provisions, including its disclosure requirements. These requirements are necessary to enforce the substantive provisions of campaign finance law. By eliminating them, Citizens United would achieve indirectly what it cannot achieve directly: cutting all restraints on corporate influence of elections.

Nothing in *WRTL* suggests that this Court intended to undo more than a century of legislative efforts to check the danger of corruption from corporate campaign spending. *See Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 152-53 (2003) (discussing the 1907 Tillman Act and other campaign finance laws). Citizens United overreaches in its use of *WRTL* and this Court should uphold the challenged BCRA provisions.

CPA and The Zicklin Center agree with the Federal Election Commission ("FEC") that *Hillary: The Movie* is "the functional equivalent of express advocacy" and should not receive financial support from corporations. Appellee Br. at 10. Regardless of whether the movie is determined to be express or issue advocacy, the fact that it mentioned a clearly identified candidate for public office within the specified time periods renders it an EC under BCRA § 201(a). As such, corporate spending on broadcasts promoting the movie is still subject to the disclosure requirements. These requirements serve important governmental interests and are constitutional as applied to Citizens United.

BCRA § 201 is indispensable to corporate compliance with campaign finance law and sound corporate governance practices. The Federal Election Campaign Act ("FECA") generally prohibits corporate political contributions and expenditures, 2 U.S.C. § 441b(a), a fact unchanged by *WRTL*. Thus, a corporation can easily cross the line into prohibited election activity even by funding an ostensibly issue-driven EC. For example:

- a corporation or the recipient of corporate funding may coordinate its spending with a

candidate, making the EC illegal, *see Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976); 11 C.F.R. § 109.21;

- the solicitation of corporate funding may violate federal law, *see Federal Election Comm'n v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995); 11 C.F.R. § 100.57; and
- a corporation may finance an EC that the courts or the FEC later determine to expressly advocate the election or defeat of a candidate. *See, e.g.*, *Federal Election Comm'n v. Citizens Club for Growth, Inc.*, No. CV 05-1851 (RMU) (D.D.C. filed Sept. 19, 2005); General Counsel's Report # 2, FEC MUR # 5365 (Club for Growth, Inc.) (July 5, 2005).

Consequently, corporations must carefully adhere to the line separating protected speech from prohibited election activity. Many corporations have implemented internal compliance programs, but their success depends on support from a system of public disclosure and reporting. *See* William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (2008). Compliance with federal law requires that a corporation's officers, directors, and shareholders be able to track the flow of company funds to ECs. To foster compliance, organizations that solicit or accept corporate support for ECs must be obligated to disclose their contributors, just as corporations must disclose their direct payments for ECs.

Equally important is the role of disclosure in educating the public and promoting good corporate governance. This Court has long recognized the importance of disclosure in deterring corruption, informing the public, and facilitating enforcement of campaign finance laws. Corporations also derive value from disclosure because it strengthens a corporation's ability to monitor the use of its funds and supervise employees and agents for compliance with its internal policies. This enables accountability to shareholders and directors for political spending that may diverge from a company's values, damage its reputation, or expose it to civil and criminal penalties. In short, disclosure brings transparency to corporate political activity that would otherwise remain shielded from view, to the detriment of the voting public, shareholders, and corporations themselves.

ARGUMENT

I. Public Disclosure is Essential to an Effective Corporate Compliance Program

Corporations confront an ever-changing landscape of campaign finance law that requires diligent, sustained compliance efforts.[2] For example, this Court recently clarified that corporations may fund issue advertisements within a certain time period before a federal election, where such

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[2] *See generally* Center for Political Accountability, *Open Windows: How Codes of Conduct Regulate Corporate Political Spending and a Model Code to Protect Company Interests and Shareholder Value*, 2007.

advertisements were previously thought to be strictly prohibited. *WRTL*, 127 S. Ct. at 2667.

Appellant paints a deceptively simple post-*WRTL* world in which a corporation's rights displace all of its prior obligations under the federal campaign finance laws. In Appellant's view, the fact that some corporate-funded issue advertisements cannot constitutionally be *proscribed* means they cannot be regulated at all. *See* Appellant Br. at 12.

In reality, corporations continue to encounter legal pitfalls in the form of complex, interrelated rules on contributions and expenditures, coordination and solicitation of funds, and the content of ECs. Violations result in economic and reputational harms that most companies can ill afford and may even trigger criminal prosecution of officers or directors. *See generally* 2 U.S.C. § 437(d). Disclosure requirements remind corporations of their legal obligations when they engage with the public on political issues, and enable them to develop and sustain the compliance programs necessary to safely navigate the terrain of campaign finance law.

A. Federal Law Prohibits Direct Corporate Spending in Connection with a Federal Election

Congress' ban on corporate treasury contributions to campaigns has been in place for over a century and, as this Court has long recognized, is justified by the public's interest in preventing corruption or the appearance of corruption. *See Beaumont*, 539 U.S. at 154; *accord McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203 (2003); *Buckley*, 424 U.S. at 66-68. To that end, FECA prohibits corporations from using

their general treasury funds to make "a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . or any officer or any director of any corporation . . . to consent to any contribution or expenditure by the corporation . . . prohibited by this section." 2 U.S.C. § 441b(a).[3]

The concept of ECs was introduced to the campaign finance world with BCRA's enactment. In the context of a presidential election, BCRA defines an EC as a "broadcast, cable, or satellite communication" that refers to a clearly identified candidate and is made within sixty days before a general election or thirty days before a primary election or party nominating convention. 2 U.S.C. § 434(f)(3)(A)(i). BCRA prohibits corporations from using their treasuries to fund ECs. 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.2(b)(3).

WRTL invalidated the corporate funding restriction as applied to certain issue ads and clarified that companies may fund ECs with general treasury funds unless the communication is the functional equivalent of express advocacy. 127 S. Ct. at 2667. Thus, an EC can be either a permissible issue-oriented ad or an impermissible campaign ad. After *WRTL*, an EC that "is susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" is treated as issue advocacy. 127 S. Ct. at 2667.

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[3] A contribution or expenditure, broadly speaking, is "anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. §§ 431(8)(A)(i)-(ii) (defining "contribution"), 431(9)(A)(i)-(ii) (defining "expenditure"); 11 C.F.R. § 114.1(a)(1).

B. Distinguishing Prohibited Corporate Election Activity from Protected Speech Requires Care

Corporations walk a fine line between protected speech and prohibited political activity. To fully comply with federal law, corporations must insure that all of their officers, directors, and agents know the difference and conduct themselves accordingly.

This is no simple matter for a major corporation with tens of thousands of employees and a complex organizational structure including multiple subsidiaries, operating units, and affiliates. The safe harbor provisions of 11 C.F.R. § 114.15, which codified *WRTL*, do not otherwise alter the restrictions on corporate funding of ECs. *See generally*, *Electioneering Communications*, 72 Fed. Reg. 72,899 (Dec. 26, 2007). The company must still consider multiple variables, namely: whether it has coordinated its ECs, directly or indirectly, with a party or candidate; how the funds are solicited for ECs; and whether the content of its ECs amounts to express advocacy or its functional equivalent.

First, although corporations may fund issue-oriented ECs, in doing so they may not coordinate this activity with a candidate or a political party. *See* 11 C.F.R. § 109.21(a)-(c); *see also Buckley*, 424 U.S. at 42, 46-47 ("[C]ontrolled or coordinated expenditures are treated as contributions . . . under the Act."). Coordination terminates the EC's status as a permissible use of corporate funds and converts it to an illegal contribution. *See* 11 C.F.R. § 109.21.

> Thus, an EC that may be paid for with corporation or labor organization funds

> under the new exemption in section 114.15 may nevertheless be a prohibited corporate or labor organization in-kind contribution to a candidate or political party if that EC is coordinated with a candidate or party under the coordinated communications rules.

Electioneering Communications, 72 Fed. Reg. 72,899, at *72,901 (Dec. 26, 2007).

Second, if a person or entity gives funds in response to a solicitation that "indicates that *any portion* of the funds received will be used to support or oppose the election of a clearly identified Federal candidate," that person or entity has made a "contribution." 11 C.F.R. § 100.57(a) (emphasis added); *see also* 2 U.S.C. § 431(8)(A)(i)-(ii); *Survival Educ. Fund*, 65 F.3d at 295; 11 C.F.R. § 114.1(a)(1). For example, a 501(c)(6) trade association or a 501(c)(4) social welfare organization requests donations for an issue advertisement and explains that the ad's purpose is to generate opposition to a specific candidate. A corporation that funds an EC in response to such a solicitation violates FECA's prohibition against corporate contributions to influence elections. *See* 2 U.S.C. § 441b(b)(2). This is an independent restriction on corporate contributions that does not depend on the ultimate content of the EC in question. The violation occurs at the time of the contribution, even if the EC ultimately produced what might reasonably be interpreted as something other than a call to vote for

or against a particular candidate.[4] *See WRTL*, 127 S. Ct. at 2667.

Third, the content of an EC may trigger a violation. Corporations can no longer rely on *Buckley*'s "magic words"[5] to determine when a political message veers toward express advocacy. *See WRTL*, 127 S. Ct. at 2667; *McConnell*, 540 U.S. at 193; 11 C.F.R. § 114.15. The line separating permissible issue advocacy and impermissible express advocacy is thus imprecise, and a message skirting that line risks significant legal and economic repercussions for the funding corporation.[6]

In most cases, a corporation will not know the EC's ultimate content at the time of its contribution. The organization producing the EC may promise not to use the funds in a manner that violates the EC content rules, but this is precious little assurance given the potential costs of a violation.

A corporation exposes itself to each of these risks each time it authorizes spending for political activity. Minimizing that exposure requires that the corporation exercise control over the issuance of political funds and the ultimate use of those funds.

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[4] It should be noted that corporations are barred from contributing to partisan voter registration, absentee ballot, and get-out-the-vote campaigns even if there is no express advocacy in the speech that accompanies the campaign.

[5] *Buckley*, 424 U.S. at 44 n.52 (restricting definition of express advocacy to use of words such as '"vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

[6] *See* 2 U.S.C. § 437g(a)(6) & (d) (providing for civil and criminal penalties for violating federal campaign finance laws).

Absent disclosure requirements, however, a large corporation cannot establish the necessary control to carry out an effective compliance program.

C. To Assure Compliance, a Corporation Must be Aware of Electioneering Communications Paid in Whole or in Part with Corporate Funds

Large corporations often struggle to comply with campaign finance laws because of a basic problem: they do not know where their donations end up. A recent example well illustrates this point.

> In the money-laundering investigation of former House Majority Leader Tom DeLay, for instance, eight corporations were indicted for making donations to a Texas political group associated with Mr. DeLay. In Texas, donations by companies to political candidates are illegal; the firms say they weren't aware that their contributions might be directed to candidates.

Jeanne Cummings, *Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations,* WALL STREET JOURNAL, April 5, 2006, at A4.

Corporations regularly pass through funding to other entities – sometimes unwittingly, sometimes intentionally – that make the actual ECs for which the corporation is ultimately responsible. In some cases, corporations donate funds to trade associations or other organizations that spend on candidates or causes that directly conflict with

company policies. Cummings, *supra*. Absent disclosure, corporations have inadequate means to monitor how these funds are spent. Recently, Merck and other companies faced backlash for donating to a state judicial candidate who made racially charged remarks to an all-white audience, contradicting the ethos the company espouses in its employee diversity training. Bruce F. Freed & Karl J. Sandstrom, *Political Money: The Need for Director Oversight*, THE CONFERENCE BOARD, EXECUTIVE ACTION SERIES NO. 263, April 2008. Public disclosure reinforces compliance by alerting the company to the spending and forces the company to accept responsibility for how the money is used.

"Corporations have long been able to make their voices heard – and their identities concealed – on Capitol Hill by having their trade associations take the lead, and these groups often closely guard donor lists and finances." Cummings, *supra*. This Court addressed this issue in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which upheld Michigan's restriction on corporations funding independent expenditures with general treasury funds. The Michigan Chamber of Commerce ("Michigan Chamber") argued that the prohibition should not apply because of its non-profit status, citing *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). *Austin*, 494 U.S. at 661. This Court rejected the Michigan Chamber's argument, holding that corporations otherwise prohibited from making direct general treasury contributions could contribute to campaigns indirectly through the Michigan Chamber. *Id.* at 664. Without the restriction, the Michigan Chamber could "serve as a

conduit for corporate political spending." *Id*. This Court concluded that restricting the Michigan Chamber itself from making contributions out of its general treasury funds served the compelling state interest of preventing corruption or the appearance of corruption, and did not offend the First Amendment. *Id*. at 658-59, 664-65.

Appellant argues that political spending by corporations is no different than such spending by individuals, commenting that, "[t]he for-profit corporations, at least, must respond to their shareholders through their boards of directors." Appellant Br. at 31. This is misleading on two accounts. First, for the reasons addressed above, there is greater risk of illegality with political spending by a corporation. Second, shareholders can exercise their important oversight function only if they are aware of the corporation's political activities. Eliminating disclosure requirements is tantamount to asking shareholders to conduct oversight while blindfolded.

Shareholders play a critical role in the success of compliance programs by providing an independent check on officers and directors. More than fifty leading public companies have voluntarily made political disclosure and oversight a key element of their political programs. *See* Center for Political Accountability, *Political Disclosure Tops 50 Companies*, May 28, 2008. Many of these corporations adopted these rules in response to shareholder resolutions. Aaron Bernstein, *When Political Giving Doesn't Pay: Investor Groups Want Greater Board Oversight & Disclosure of the Political Contribution Proces*s, DIRECTORSHIP, June 1, 2008.

Mandatory disclosure empowers corporate officers, directors and shareholders to make these programs viable and exerts market pressure for other corporations to follow suit.

II. In Addition to Compliance with Federal Law, Public Disclosure Serves Other Important Governmental Interests

Disclosure is not only the law, it is necessary for the law to be effective. More than three decades of this Court's jurisprudence firmly establish the importance of mandatory disclosure:

> [T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of "electioneering communications."

McConnell, 540 U.S. at 196 (footnote omitted). In addition, this Court has recognized that disclosure helps secure the rights of shareholders and promote corporate governance standards that respect those rights. *See Beaumont*, 539 U.S. at 153; *Austin*, 494 U.S. at 673 (Brennan, J., concurring).

Appellant strains the meaning of *WRTL* in an attempt to erase what this Court has already said

about disclosure in *McConnell*. If *WRTL* narrowed the range of ECs subject to spending restrictions, the logic goes, so too must it have narrowed the range of ECs subject to disclosure requirements. In this revisionist view, disclosure requirements are *derivative of* the contribution restrictions and therefore do not apply to unrestricted spending. *See* Appellant Br. at 12, 42, 48-49. With this sleight of hand, Appellant attempts to make the government's interests in disclosure disappear. *See id.* at 42.[7]

Appellant cannot, however, erase the extensive body of law rejecting its view. In case after case, this Court has upheld disclosure requirements even while rejecting spending restrictions and even when candidate funding was not at issue. *See MCFL*, 479 U.S. at 262 (noting benefits of disclosure even when underlying expenditure restrictions were unconstitutional); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (upholding

[7] On this basis, Appellant implores this Court to apply strict scrutiny to all the regulations at issue. *See* Appellant Br. at 12, 42, 48. This Court and lower courts have repeatedly held that disclosure requirements are subject to "exacting," or intermediate, scrutiny. *See, e.g.*, *McConnell*, 540 U.S. at 196; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (noting that *Buckley v. Valeo* upheld FECA's recordkeeping, reporting and disclosure provisions as substantially related to important government interests); *Buckley*, 424 U.S. at 64, 66; *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) (citing *Buckley v. Valeo* and *McConnell* in rejecting argument that strict scrutiny should apply to state election disclosure requirements); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 788 (9th Cir. 2006) (describing standard applied in *McConnell*). This issue was undisputed in *WRTL*.

requirement that contributors to ballot initiatives disclose their identities); *Buckley,* 424 U.S. at 44, 80 (striking expenditure limits but upholding disclosure).[8] Simply speaking, disclosure contributes to an informed debate on issues of public importance.

In addition, disclosure requirements facilitate enforcement of much more than contribution limits with respect to corporations. Gathering data on corporate political spending facilitates enforcement against all the categories of potential violations described above, including the restrictions on coordination, solicitation, and the content of ECs.

Thus, even assuming Appellant is correct that *Hillary: The Movie* is not the functional equivalent of express advocacy and not subject to BCRA's funding restrictions, the disclosure requirements remain constitutionally valid in this case because they support important governmental interests.

A. Disclosure Provides the Public with Valuable Information to Assess Corporate Political Involvement

Disclosure requirements inform members of the voting public about the economic interests behind certain political messages so that they can assess those messages in that light. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the

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[8] *See also R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Begin*, 431 F. Supp. 2d 227, 236, 238 (D.R.I. 2006) (citing *MCFL* and *Berkeley* as holding funding restrictions unnecessary in light of disclosure requirements).

people will be able to evaluate the arguments to which they are being subjected."); *accord McConnell*, 540 U.S. at 231 (Rehnquist, C.J.) (holding that disclosure "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing") (citation omitted); *id*. at 321 (Kennedy, J., concurring) (finding § 201's disclosure requirements substantially related to the public's informational interest).

Further, such exposure tends to discourage corporate misconduct with respect to political spending. "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election." *Buckley*, 424 U.S. at 67. The *Buckley* court said the disclosure mandates reflect the wisdom of Justice Louis Brandeis, who observed that, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id*. (citation omitted).[9]

[9] Disclosure requirements also facilitate enforcement of campaign finance restrictions after the fact. *See McConnell*, 540 U.S. at 195 (disclosure serves the government's interest in "gathering the data necessary to enforce more substantive electioneering restrictions"); *MCFL*, 479 U.S. at 262 (rejecting independent expenditure restrictions on certain non-profit organizations partly because "reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity"); *Buckley*, 424 U.S. at 67-68 ("Disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations.").

Citizens United and the United States Chamber of Commerce ("Chamber"), writing as *Amicus Curiae*, contend that disclosure rules are "content-based restrictions on political speech" (Appellant Br. at 43, 53) that "force" corporations "into silence" (Ch. of Comm. Br. at 6-8). The Chamber laments that it could have spent much more than the $15.7 million it spent on ECs in 2008 if its corporate members were able to spend anonymously, without exposing themselves to "risk." *Id*. at 6, 12.[10] The risk the Chamber fears is not the "threat of physical coercion, and other manifestations of public hostility," such as that faced by members of the NAACP in the 1950s American South. *See NAACP v. Alabama*, 357 U.S. 449, 451, 462-63 (1958). Nor is it the "reasonable probability" of "threats, harassment, or reprisals from either Government officials or private parties" faced by members of minor political parties. *See McConnell*, 540 U.S. at 197-99, 201 (except in rare cases, "[FECA's] disclosure requirements are constitutional because they 'd[o] not prevent anyone from speaking'") (quoting *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)). The "risk," quite plainly, is that consumers and shareholders may hold corporations accountable for the political views they espouse. *See* Ch. of Comm. Br. at 13 n.8.

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[10] Biannual EC reports filed with the FEC show total corporate EC expenditures of $119.5 million in 2008. The Chamber was the largest spender with $24.3 million, including $8.6 million for a Chamber sub-entity called "Americans for Job Security." These figures were compiled by the FEC at the request of the CPA and The Zicklin Center.

That corporations have a First Amendment right to express those views does not diminish the public need for information about them. That an EC might reasonably be interpreted as something other than a call to vote for or against a particular candidate under *WRTL* does not mean the EC does not have the purpose or effect of influencing the electoral process. *See WRTL*, 127 S. Ct. at 2667. Coincidence cannot explain Citizens United's eagerness to run its ads promoting *Hillary: The Movie* just before the Democratic primary.[11] The Chamber pointedly notes its desire to spend more on corporate-supported ECs prior to elections because "both candidates and the American public are most receptive and attuned to such communications during pre-election periods." Ch. of Comm. Br. at 6. The public should not be denied the benefit of knowing who paid for an EC that is clearly intended to shape its opinion of a candidate immediately prior to an election.

This Court has repeatedly sustained disclosure requirements against First Amendment challenges in the context of issue speech, even when speech lacks any reference to a candidate. *See, e.g.*, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202-03 (1999) (Colorado requirement that sponsors of ballot initiatives disclose their names and expenditures serves a substantial state interest in checking "domination of the initiative process by affluent special interest groups"); *Citizens Against*

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[11] Indeed, Citizens United believed running its ads before the primary election was so urgent that it sought, and was denied, preliminary injunctive relief. *See Citizens United v. Federal Election Comm'n*, 530 F. Supp. 2d 274 (D.D.C. 2008), *appeal dismissed for lack of jurisdiction*, 128 S. Ct. 1732 (2008).

Rent Control/Coalition for Fair Housing, 454 U.S. at 298-99 (requirement that contributors to ballot initiatives disclose their identities serves to inform voters "whose money supports or opposes a given ballot measure"). *WRTL* did not alter this Court's approval of disclosure requirements.[12]

Appellant asserts a First Amendment interest in airing its issue speech – regardless of the source of funding – but "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *See McConnell*, 540 U.S. at 197 (quoting *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d at 237). The application of long-standing, constitutionally firm disclosure requirements here imposes no significant or unique burden on Appellant that outweighs the important interests in informing the public, facilitating enforcement, and preventing corruption.

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[12] This Court recently declined review of a case in which the Supreme Court of Washington rejected a First Amendment challenge to Washington's disclosure requirements for political committees. *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 166 P.3d 1174, 1186 (Wash. 2007), *cert. denied*, 128 S. Ct. 2898 (2008). In that case, a corporation paid for a television advertisement criticizing the state's former insurance commissioner, who was running for attorney general. *Id.* at 1177. Like *Hillary: The Movie*, the Voter Education Committee's advertisement focused on the candidate's record in her prior position without mentioning her candidacy for higher office. *Id.* at 1177-78. Nevertheless, the Washington court held that the advertisement was in "opposition to" the candidate because the ad sharply criticized her record as insurance commissioner while she was a candidate for another office. *Id.* at 1185-86.

B. Disclosure Discourages Use of Corporate Funds for Political Causes Not Approved by Shareholders

Mandatory disclosure enables shareholders to monitor the use of corporate funds for political activity and to exercise their right to object to uses of which they disapprove. The government has a significant interest in protecting shareholders' rights because it provides the legal framework that enables corporations to operate and to generate wealth. *See Austin*, 494 U.S. at 660 (upholding Michigan's restriction on corporations' independent expenditures from general treasury funds as justified by "state-conferred corporate structure that facilitates the amassing of large treasuries," which may be used to influence elections).

Justice Brennan's concurring opinion in *Austin* noted that Michigan's law protects dissenting shareholders – in that case, dues-paying members of the Michigan Chamber of Commerce – who object to the funneling of their money to political campaigns. *Id*. at 673 (Brennan, J., concurring).

> While the State may have no constitutional *duty* to protect the objecting Chamber member and corporate shareholder in the absence of state action, the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message. . . . We have long recognized the importance of state corporate law in

> "protect[ing] the shareholders" of corporations chartered within the State.

Id. at 675 (citations omitted); *cf*. *Beaumont*, 539 U.S. at 163. ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure.").

The federal government likewise has a substantial interest in protecting dissenting shareholders of companies engaged in interstate commerce. These corporations collect and use shareholders' funds under the auspices of federal law, and the government has an interest, if not an obligation, to hold them accountable to their shareholders under those same laws.

Disclosure provides shareholders with the information necessary to make informed decisions, without restricting the corporation from engaging in political activity. Shareholders can choose to use this information as they see fit – for example, they may divest, or they may seek change from within. *See Austin*, 494 U.S. at 710 (Kennedy, J., dissenting). Without disclosure requirements, however, shareholders lack the means to make that choice.

C. Disclosure Enables Shareholders and Directors to Oversee a Company's Political Involvement

Just as disclosure requirements provide the electorate with information to assess candidates and issues, so too do they provide information to

corporate shareholders and directors to assess a corporation's internal governance. The government lacks the capacity to monitor the vast majority of corporate political activity, and therefore has an abiding interest in supporting the strong corporate governance that characterizes healthy corporations.

Corporate donations do not always reach the purpose or destination intended by the corporation. "In recent years, some institutional investors have argued that political contributions could come back to haunt companies. . . . [T]hese investors have argued that corporate donations should be disclosed publicly so shareholders can assess any investment risks they may pose." Bernstein, *supra*. Political spending can be especially damaging if it ensnares the corporation in a political scandal. *See* Cummings, *supra* (discussing Tom DeLay).

Further, a large corporation has many employees and agents with different personal and political agendas. In a 2006 survey by Mason-Dixon Polling & Research, nearly three-quarters of shareholder respondents agreed that corporate giving advances the private interests of executives rather than the interests of the company and its shareholders. Cummings, *supra*. Studies show that corporate managers do engage in such "rent-seeking behavior," particularly by spending corporate funds to influence taxation changes that benefit them personally. *See* Sanjay Gupta and Charles W. Swenson, *Rent-Seeking by Agents of the Firm*, 46 JOURNAL OF LAW AND ECONOMICS 253 at 254-56, 266 (April 2001).

The growing concern among shareholders, institutional investors, and the general public over corporate political spending has alerted the attention

of such companies as Freddie Mac, Westar Energy, Sears Roebuck, and PepsiCo. Center for Political Accountability, *Open Windows: How Codes of Conduct Regulate Corporate Political Spending and a Model Code to Protect Company Interests and Shareholder Value*, at 1. "Companies not only have paid record fines, run up hefty legal bills and faced reputational knocks over the past few years because of political expenditures, but prosecutors are now taking a harder look at contributions as possible bribes." *Id*.

More corporations are adopting disclosure rules to address these risks, often in response to pressure from shareholders. Freed & Sandstrom, *supra*. Mandatory public disclosure by both corporations and those who receive corporate funds supports voluntary compliance and enables corporate directors and shareholders to detect potentially troublesome donations.[13] Without disclosure requirements, corporations lose one of the strongest tools for effective internal governance.

Appellant imagines a campaign finance landscape in which corporations, relieved of the suddenly heavy burdens of disclosure, are free to engage in "uninhibited, robust, and wide-open" speech. *See McConnell*, 540 U.S. at 196-97 (citation omitted). The plaintiffs in *McConnell* sought permission for organizations such as "Citizens for Better Medicare," funded by the pharmaceutical industry, to run advertisements without disclosing their funding

[13] Compliance programs also invite leniency by enforcement agencies in the event that an officer or director is found to have committed a violation. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2008).

sources. Much like those plaintiffs, Appellant "never satisfactorily answer[s] the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public." *See id.* at 197.

Corporations are coming to understand that members of the public demand greater transparency from companies that receive their investment and consumer dollars. Disclosure requirements cast light on the risks that secret political spending pose to our economy and our democracy, before they can become scandals that further erode the public trust.

CONCLUSION

This Court should affirm the judgment of the United States District Court for the District of Columbia.

Respectfully submitted,

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