

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITIZENS UNITED, :

4 Petitioner :

5 v. : No. 08-205

6 FEDERAL ELECTION :

7 COMMISSION. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, March 24, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:09 a.m.

15 APPEARANCES:

16 THEODORE B. OLSON, ESQ., Washington, D.C; on behalf of
17 the Petitioner.

18 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on
20 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument today in Case 08-205, Citizens United v. The
5 Federal Election Commission.

6 Mr. Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONER

9 MR. OLSON: Mr. Chief Justice, and may it
10 please the Court:

11 Participation in the political process is
12 the First Amendment's most fundamental guarantee. Yet
13 that freedom is being smothered by one of the most
14 complicated, expensive, and incomprehensible regulatory
15 regimes ever invented by the administrative state.

16 In the case that you consider today, it is a
17 felony for a small, nonprofit corporation to offer
18 interested viewers a 90-minute political documentary
19 about a candidate for the nation's highest office, that
20 General Electric, National Public Radio, or George Soros
21 may freely broadcast. Its film may be shown in
22 theaters, sold on DVDs, transmitted for downloading on
23 the Internet, and its message may be distributed in the
24 form of a book. But its producers face 5 years in
25 prison if they offer it in the home through the vehicle

1 of Video On Demand.

2 Because the limitation on speech, political
3 speech, is at the core of the First Amendment, the
4 government has a heavy burden to establish each
5 application of a restriction on that form of speech is a
6 narrowly tailored response to a compelling governmental
7 interest. The government cannot prove and has not
8 attempted to prove that a 90-minute documentary made
9 available to people who choose affirmatively to receive
10 it, to opt in, by an ideologically oriented small
11 corporation poses any threat of quid pro quo corruption
12 or its appearance. Indeed, this documentary is the very
13 definition of robust, uninhibited debate about a subject
14 of intense political interest that the First Amendment
15 is there to guarantee.

16 JUSTICE SOUTER: Mr. Olson, if the film were
17 distributed by General Motors, would your argument be
18 the same?

19 MR. OLSON: Well, it wouldn't -- definitely
20 would not be the same because there are several aspects
21 of the argument that we present. However, in one
22 respect, it would. A 90-minute documentary was not the
23 sort of thing that the -- the BCRA -- the Congress was
24 intended to prohibit. In fact, as the -- as the
25 Reporters Committee for -- for Freedom of Speech points

1 out, the documentary is indistinguishable from other
2 news media commentary --

3 JUSTICE SOUTER: But the -- the point, then,
4 of similarity is you would, whether it was offered by
5 General Motors or offered by -- by this Petitioner, in
6 effect call for some qualification of the -- the general
7 rule allowing limitations on corporate political
8 activity of the speech variety?

9 MR. OLSON: Yes, we would, although it is a
10 very important factor.

11 JUSTICE SOUTER: So how would we draw the
12 line?

13 MR. OLSON: Well, one of the reasons that --
14 one of the bases upon which you would draw the line is
15 to look at the documentary -- the voluminous documentary
16 record that the government cites and this Court cited in
17 the McConnell case as a justification for the
18 restrictions themselves. As --

19 JUSTICE SOUTER: Well, would every -- in
20 effect, every limitation on corporate speech or on
21 corporate expenditure and the nature of speech be
22 subject, then, to in effect this all-factor balancing
23 test?

24 MR. OLSON: Well, I think what I'm trying to
25 say is that what the -- what the Congress was concerned

1 with -- and Judge Kollar-Kotelly in the district court
2 opinion that you considered in McConnell discusses this
3 on page 646 of her opinion -- that this sort of
4 communication was not something that Congress intended
5 to prohibit. You would look at, if Congress intended to
6 prohibit 90-minutes --

7 JUSTICE SOUTER: So -- so your -- your
8 argument then is there's something distinct about the
9 speech, which could be considered regardless of the
10 corporate form?

11 MR. OLSON: Well, that's part of our
12 argument, yes. It's not --

13 JUSTICE SOUTER: If that is the case, what
14 is -- what is the answer to this? That -- that still is
15 going to involve a -- a fairly complicated set of
16 analyses, probably in a lot of cases. Why is that
17 necessary or worthwhile to preserve First Amendment
18 values when you could have done this with a PAC?

19 MR. OLSON: Well, as this Court said in the
20 Wisconsin Right to Life case just a couple years ago,
21 that the PAC vehicle is burdensome and difficult.

22 JUSTICE SOUTER: That's right. You've got
23 reporting. You've got limitations on -- on corporate
24 contributions and so on, but in this case, for example,
25 most of your contributions, as I understand from the

1 record, were individual. They weren't corporate. There
2 was one perhaps. There was some corporate contributions
3 --

4 MR. OLSON: Yes, on page 252 of the appendix
5 and 251, it points out -- you're absolutely correct --
6 that 1 percent of the contributions --

7 JUSTICE SOUTER: Okay.

8 MR. OLSON: -- were from corporations.

9 JUSTICE GINSBURG: Was that -- was that
10 established? I thought that the record was hardly made
11 of the contributors to this film. I think there was
12 something like \$200,000 accounted for, and the film cost
13 -- to get the Channel '08, whatever it was, to put it on
14 cost over a million dollars?

15 MR. OLSON: The government sent an
16 interrogatory, Justice Ginsburg, asking for the major
17 contributions with respect to this project, and the ones
18 that they sought -- the government sought what they
19 thought was important; the answer to that interrogatory
20 is at page 251a and 252a -- that the government was
21 seeking information with respect to contributions at a
22 \$1,000 or more; 198,000 came from individuals. And, by
23 the way, the three largest contributors that are listed
24 on page 252 of the Joint Appendix are given credit in
25 the film itself. So there's no effort to -- to conceal

1 those individuals.

2 So that it's possible -- it's possible that
3 corporations throughout America were giving small
4 amounts of money to this. That record doesn't establish
5 one way or the other. What it does establish is what
6 the government felt was necessary for its case that the
7 major contributors were individuals and not
8 corporations.

9 JUSTICE BREYER: You have answered Justice
10 Souter. I took your answer to be the following: That
11 if the corporation had paid -- paid for a program and
12 the program was 90 minutes which said vote for Smith,
13 vote for Smith over and over -- that's the program --
14 that you concede that the government could ban this
15 under the Act.

16 MR. OLSON: Well, it is difficult --

17 JUSTICE BREYER: I don't think they would.
18 We agree. It's an imaginary hypothetical. But, in
19 fact, if they did have 90 minutes of vote for Smith or
20 vote against Jones, you concede for purposes of this
21 argument that the government can ban it. Is that bright
22 or not?

23 MR. OLSON: If -- not by this organization.
24 We think that if it's a small, nonprofit organization,
25 which is very much like the Massachusetts --

1 JUSTICE BREYER: Okay, okay. So one of your
2 arguments is this is a special corporation. You can't.
3 Now suppose it's General Motors. Can they?

4 MR. OLSON: Well, General Motors may be
5 smaller than the client that we are representing.

6 (Laughter.)

7 JUSTICE BREYER: I would just like to get --
8 I want to get an answer to the question.

9 MR. OLSON: Yes, I think that's a big step.

10 JUSTICE BREYER: Okay. Now, in my question
11 that I'm driving towards is: Since General Motors can
12 in your view be forbidden to have our film of 90 minutes
13 vote for Smith, vote for Smith, vote for Smith, or vote
14 against Jones, vote against Jones, vote against Jones,
15 how is this film, which I saw -- it is not a musical
16 comedy. What --

17 (Laughter.)

18 JUSTICE BREYER: What -- how does this film
19 vary from my example, and why does the variance make a
20 difference?

21 MR. OLSON: The difference is: It's exactly
22 what the Court was describing in Wisconsin Right To
23 Life. It is a 90 -- it is -- it informs and educates,
24 which is what the Court said, or the Chief Justice's
25 opinion, the controlling opinion said, was the mark of

1 an issue communication. And as this Court said --

2 JUSTICE GINSBURG: Mr. Olson, I thought you
3 conceded in the -- at least as I read your reply brief,
4 that you were no longer saying this is about an issue
5 unrelated to any election. I thought you said that this
6 was a 90-minute movie "concerning the qualifications,
7 character, and fitness of a candidate for the Nation's
8 highest office." And that's just what Wisconsin Right
9 to Life was not. It was not about the character,
10 qualifications, and fitness of either of the Senators.

11 MR. OLSON: What the -- what the Court said
12 in Wisconsin Right to Life was that the distinction
13 between an issue -- issue advocacy and campaign advocacy
14 dissolves upon practical application. This is exactly
15 what the Court was talking about there. And --

16 JUSTICE GINSBURG: But didn't the Court
17 there say this is not about character, qualifications,
18 and fitness?

19 MR. OLSON: Yes, it did, Justice Ginsburg,
20 but what my point is: That there isn't just two boxes
21 in the world of communications about public issues, one
22 box for so-called issues and one box for campaign
23 advocacy. That's what I think the Court meant when it
24 said, not just in Wisconsin Right to Life but in earlier
25 cases, that the distinction dissolves upon application.

1 JUSTICE SOUTER: -- how many boxes we have?
2 Doesn't this one fall into campaign advocacy? I mean
3 I've got the government's brief open at -- open at pages
4 18 and 19 with the quotations: She will lie about
5 anything. She is deceitful. She is ruthless, cunning,
6 dishonest, do anything for power, will speak
7 dishonestly, reckless, a congenital liar, sorely lacking
8 in qualifications, not qualified as commander in chief.
9 I mean, this sounds to me like campaign advocacy.

10 MR. OLSON: It -- what -- what the court was
11 talking about and as Justice Kollar-Kotelly talked about
12 is broadcast advertising, these 10-minute -- 10-second,
13 30-second, 60-second bursts of communication that are --
14 that are the influence in elections.

15 JUSTICE BREYER: I want to get the answer to
16 what I was asking.

17 JUSTICE SOUTER: But it -- it seems to me,
18 the answer to Justice Breyer's question: This is a
19 don't vote for Jones.

20 MR. OLSON: This is a long discussion of the
21 record, qualifications, history, and conduct of someone
22 who is in the political arena, a person who already
23 holds public office, who now holds a different public
24 office, who, yes, at that point, Justice Souter, was
25 running for office. But the fact is that what could the

1 individual making a -- as I said, the Reporters
2 Committee for the Right to Life said this is
3 indistinguishable from something that is on the public
4 media every day, a long discussion. It might be -- what
5 you're suggesting is that unless it's somehow
6 evenhanded, unless it somehow says -- which would be
7 viewpoint discrimination or prevention of viewpoints,
8 which is the safe harbor that the government has written
9 into its so-called safe harbor, if you don't have a
10 point of view, you can go ahead and express it.

11 JUSTICE BREYER: No, that isn't -- that
12 isn't the suggestion. The suggestion I was going to, or
13 trying to get to, is we know you can't just say vote
14 against Smith, vote against Smith, vote against Smith.
15 Now, I wanted to know the difference between that and a
16 film that picks out bad things that people did -- no
17 good ones, just bad ones the candidate did. And then we
18 have another film that picks out just good things
19 candidates do. And so candidates run films that show
20 the good things they do, and then someone else shows the
21 bad things they do.

22 Now, why is that not the same as vote
23 against Smith? Though I grant you, it's more
24 intelligent. It's more informative. It's even better
25 electioneering. So we're after electioneering. Why

1 doesn't that fall within the forbidden category?

2 MR. OLSON: The government has the burden to
3 prove -- and there's a compelling governmental interest
4 narrowly tailored, Justice Breyer, because all kinds of
5 things of the type that you're talking about are
6 permissible if your name is General Motors -- I, mean if
7 your name is General Electric rather than General
8 Motors, if your name is Disney, if your name is George
9 Soros, if your name is National Public Radio.

10 What you're suggesting is that a long
11 discussion of facts, record, history, interviews,
12 documentation, and that sort of thing, if it's all
13 negative, it can be prohibited by -- and it's a felony.
14 You can go to jail for 5 years for sharing that
15 information with the American public, or if it's all
16 favorable, you can go to jail. But if you did half and
17 half, you couldn't.

18 JUSTICE BREYER: I -- I guess it's the same
19 as if you were to say, you know, I think Smith is a
20 great guy. That's all. I'm sharing information. And
21 what I don't see is if you agree that we could ban the
22 commercial that says, I see Smith is a great guy, why is
23 it any different to supplement that with the five best
24 things that Smith ever did?

25 MR. OLSON: Because -- because of the First

1 Amendment. Congress shall make no law abridging the
2 freedom of speech. When -- when the government had --
3 when this Court has permitted that to happen, it has
4 only done it in the most narrow circumstances for a
5 compelling governmental interest.

6 JUSTICE KENNEDY: But I -- I guess what --
7 what Justice Breyer is asking is -- I have the same
8 question. If we concede -- and at the end of the day
9 you might not concede this, but if we take this as a
10 beginning point, that a short, 30-second, 1-minute
11 campaign ad can be regulated, you want me to write an
12 opinion and say, well, if it's 90 minutes, then that's
13 different. I -- it seems to me that you can make the
14 argument that 90 -- that 90 minutes is much more
15 powerful in support or in opposition to a candidate.
16 That's I -- that's the thrust of the questioning.

17 MR. OLSON: I understand that, Justice
18 Kennedy, and it is difficult. But let me say that the
19 record that you were considering in McConnell -- and I
20 specifically invite, as I did before, page -- the
21 Court's attention to 646 of this -- of the district
22 court's opinion, which specifically said the government
23 and Congress was concerned about these short, punchy ads
24 that you have no choice about seeing, and not concerned
25 about a thorough recitation of facts or things that you

1 would have to make an affirmative decision to opt into.

2 And the reason why it's difficult is that we
3 are talking about an infinite variety of ability of
4 people to speak about things that matter more to them
5 than anything else, who will be --

6 CHIEF JUSTICE ROBERTS: Counsel, I think you
7 have kind of shifted your focus here from the difference
8 between a 10-second ad and a 90-minute presentation and
9 how that presentation is received, whether it's over the
10 normal airwaves or on this Video On Demand. What --
11 what is the distinction between the 10-second commercial
12 and, say, the 90-minute infomercial?

13 MR. OLSON: The thing that I think it's --
14 it's pointed out specifically in your opinion,
15 controlling opinion for Wisconsin Right To Life. That
16 which informs and educates and may seek to persuade is
17 something that is -- is on the line of being
18 permissible. The government hasn't established -- never
19 did try to establish -- I did shift -- I didn't shift
20 but all of these are factors. It's who's doing the
21 speaking.

22 JUSTICE SCALIA: You can educate in 30
23 seconds. I mean in -- in a 30-second ad you present
24 just one of these criticisms of the candidate instead of
25 lumping all of them together for 90 minutes.

1 MR. OLSON: The point, I think --

2 JUSTICE SCALIA: Isn't that education?

3 MR. OLSON: The point, I think, Justice
4 Scalia, is, yes, you can educate in 10 seconds, you can
5 educate in 30 seconds. But what -- what the Court was
6 trying to do -- what Congress was trying to do is get at
7 the things that were most potentially corruptive.

8 JUSTICE SCALIA: Wait, are you making a
9 statutory argument now or a constitutional argument?
10 What Congress was trying to do has nothing to do, it
11 seems to me, with the constitutional point you're
12 arguing.

13 MR. OLSON: The government makes the point
14 that it established a voluminous record of evidence.
15 Both Congress had before it and this Court had before it
16 a voluminous volume of evidence because it had the
17 burden of proving that something was really bad with
18 these -- these types of advertisements.

19 And what the -- what the Court did is say,
20 well, okay -- in McConnell -- yes, there is a
21 substantial burden that the government met that these
22 types of communications -- not the Internet, not books,
23 not other types of things -- are really bad enough that
24 the government could pick those out, and it has narrowly
25 tailored its solution to that problem by prohibiting

1 those things. And the government talks about today in
2 its brief the things that Congress felt were the most
3 acute problems. Now --

4 JUSTICE SCALIA: So you're making a
5 statutory argument now?

6 MR. OLSON: I'm making a --

7 JUSTICE SCALIA: You're saying that this --
8 this isn't covered by it.

9 MR. OLSON: Yes, I am making a statutory
10 argument in the sense that you will construe the statute
11 in the ways that doesn't violate the Constitution. The
12 Constitution, as -- as the Court said in Wisconsin Right
13 to Life, gives ties to the speaker, errs on the side of
14 permitting the speech, not prohibiting the speech. And
15 so all those things may be statutory arguments, Justice
16 Scalia, but they are also constitutional arguments.

17 And in response to every one of these
18 questions, the government has the burden of proving this
19 sort of speech, which the Reporters say is
20 indistinguishable, than the kind of information that
21 news media puts out all the time, not --

22 CHIEF JUSTICE ROBERTS: So this argument
23 doesn't depend upon whether this is properly
24 characterized as express -- the functional equivalent of
25 express advocacy? Your contention is that even if it

1 is, that because it wasn't in the factual record in
2 McConnell or before Congress, it is a type of functional
3 -- it is a type of express advocacy that's not covered
4 by the Act?

5 MR. OLSON: I don't think, Chief Justice
6 Roberts, that it is remotely the functional equivalent
7 of express advocacy, because what the Court and Congress
8 was thinking about with respect to express advocacy was
9 short, punchy things that you have no --

10 CHIEF JUSTICE ROBERTS: Well, that's --
11 that's why I'm trying to figure out, the distinction in
12 your argument. I mean, if we think that this is the
13 functional equivalent of express advocacy, are you
14 contending that it is nonetheless not covered in light
15 of the record before the Court in McConnell and before
16 Congress?

17 MR. OLSON: I -- I think I would agree with
18 that, but I would also say that the -- the idea, the
19 functional equivalent of express advocacy is the very
20 magic word problem that this Court has struggled with in
21 McConnell and in -- in each of the cases.

22 I would -- I said at the beginning that this
23 is an incomprehensible prohibition, and I -- and my -- I
24 think that's demonstrated by the fact that since 2003
25 this Court has issued something close to 500 pages of

1 opinions interpreting and trying to apply the First
2 Amendment to Federal election law. And I counted 22
3 separate opinions from the Justices of this Court
4 attempting to -- in just the last 6 years, attempting to
5 figure out what this statute means, how it can be
6 interpreted. In fact --

7 CHIEF JUSTICE ROBERTS: Well, that's because
8 it's mandatory appellate jurisdiction. I mean, you
9 don't have a choice.

10 (Laughter.)

11 MR. OLSON: There would be fewer -- there
12 would be fewer opinions. I guess my point is that --

13 JUSTICE STEVENS: And maybe those cases
14 presented more difficult issues than this one.

15 MR. OLSON: I think this presents a much
16 easier issue, Justice Stevens, because this is the type
17 of -- if there is anything that the First Amendment is
18 intended to protect in the context of elections that are
19 occurring -- which, by the way, occur 4 years running,
20 but the last election, presidential election occurred
21 throughout the entire 2008 -- if the American people
22 need to have that kind of information. And the statute
23 is both overly broad because if it were a hotel ad, if
24 it was a hotel saying Senator Clinton stayed here or
25 Senator McCain stayed here, it would be prohibited

1 because it was a hotel saying so, even though it really
2 had nothing to do with the election. If it is -- but
3 it's -- if it's a corporation that put together an
4 analysis of the earmark positions of each of the
5 senatorial candidates -- most all of the candidates were
6 running from the Senate, they all had this -- these
7 issues where they may have voted or not against
8 earmarks, that would --

9 JUSTICE GINSBURG: But, Mr. Olson, this is
10 -- I think you were right in conceding at the beginning,
11 this is not like the speech involved in Wisconsin Right
12 to Life. This is targeted to a specific candidate for a
13 specific office to be shown on a channel that says
14 Election '08, that tells the viewer over and over again
15 what, just for example, it concludes with these are
16 things worth remembering before you go in potentially to
17 vote for Hillary Clinton.

18 Now, if that isn't an appeal to voters, I
19 can't imagine what is.

20 MR. OLSON: Yes, Justice Ginsburg, I
21 understand your point. There is much in there that if
22 you saw it, you would form an opinion with respect to
23 how you might want to vote. You might -- it might form
24 a different -- you might form all kinds of different
25 opinions.

1 But it was -- it was an analysis of the
2 background record and history and qualifications of
3 someone running for president, of course I concede that.
4 But what is the -- what is the maker of a movie to take
5 out in order to prevent that from happening?

6 I understand from some of the questions that
7 if it was more evenhanded -- if it said, well, this
8 candidate did this, but this candidate did this or this
9 candidate was born in the Panama Canal Zone and this
10 candidate was born in Hawaii, and that affects whether
11 or not they are natural-born citizens or not, and it was
12 more evenhanded, would that then not be a felony?

13 JUSTICE SOUTER: As you -- as you've said
14 yourself, as you pointed out, there -- there is a point
15 at which there is no nonporous border between issue
16 discussion and candidate discussion. But I think the --
17 the problem that -- that Justice Ginsburg is having, I'm
18 having, and others is that it does not seem to me that
19 with the quotations we're dealing with here, as Justice
20 Breyer said, it's not a musical comedy. I think we --
21 we have no choice, really, but to say this is not issue
22 advocacy; this is express advocacy saying don't vote for
23 this person.

24 And if that is a fair characterization, the
25 difference between 90 minutes and 1 minute, either for

1 statutory purposes or constitutional purposes, is a
2 distinction that I just cannot follow.

3 MR. OLSON: Well, it is a distinction that
4 Congress was concerned about, and it's a distinction
5 that's all over the record --

6 JUSTICE SOUTER: You say that. Why --
7 what -- what is your basis for saying that Congress is
8 -- is less concerned with 90 minutes of don't vote for
9 Clinton than it was with 60 seconds of don't vote?

10 MR. OLSON: Because -- because the record in
11 Congress and the record in this Court is that those
12 types of advertisements were more effective because they
13 came into your home --

14 JUSTICE SOUTER: They are the characteristic
15 advertisement. There is no question about that. That
16 is the paradigm case. I agree with you. But I don't
17 see how you -- you then leap-frog from saying -- from
18 saying that is the paradigm case to saying that this
19 never covers anything but the paradigm case when the
20 only distinction is time.

21 MR. OLSON: The -- the -- I think the --
22 what -- what Congress was concerned about is the most
23 severe and the most acute problem, as Justice
24 Kollar-Kotelly said, which everyone acknowledges was the
25 problem Congress sought to address with BCRA. It's not

1 just that, however.

2 The point that you just made about a
3 nonporous border, it is the government's responsibility
4 to the extent that you can't figure out how evenhanded
5 you must be or what you must take out of your
6 communication in order not to go to jail for airing it,
7 it is the functional equivalent -- if everything is the
8 functional equivalent that mentions a candidate during
9 an election, which is what the government says, it's the
10 functional equivalent of a prior restraint, because you
11 don't dare --

12 JUSTICE SCALIA: Mr. Olson, I -- I think
13 we've been led astray by -- by the constant reference to
14 what Congress intended. As I understood your point, it
15 was not -- it was not that, well, one is covered by the
16 statute and the other isn't, but it is that one is
17 covered by the Constitution and the other isn't. And it
18 may well be that -- that the kind of speech that is
19 reflected in a serious 90-minute documentary is entitled
20 to greater constitutional protection. And it may well
21 be that the kind of speech that is not only offered but
22 invited by the listener is entitled to -- is entitled to
23 heightened First Amendment scrutiny, which is -- which
24 is what this is since you have pay for view --

25 MR. OLSON: I agree with that completely,

1 Justice Scalia.

2 Mr. Chief Justice, if I may reserve the
3 remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Stewart.

6 ORAL ARGUMENT OF MALCOLM L. STEWART

7 ON BEHALF OF THE RESPONDENT

8 MR. STEWART: Mr. Chief Justice, and may it
9 please the Court:

10 The lead opinion in Wisconsin Right to Life
11 didn't just use the term "functional equivalent of
12 express advocacy"; it explained what that term meant,
13 and on page 2667 of volume 127 of the Supreme Court
14 Reporter, the plurality or the lead opinion stated: "In
15 light of these considerations, a Court should find that
16 an ad is the functional equivalent of express advocacy
17 only if the ad is susceptible of no reasonable
18 interpretation other than as an appeal to vote for or
19 against a specific candidate."

20 So the functional equivalence test doesn't
21 depend on the length of the advertisement or the medium
22 in which the advertisement --

23 CHIEF JUSTICE ROBERTS: Well, the length of
24 the advertisements wasn't remotely at issue in either
25 Washington Right to Life or McConnell or before Congress

1 when they passed this law.

2 MR. STEWART: Well, certainly Congress
3 considered a variety of evidence bearing on campaign
4 practices that had been undertaken in the past. They
5 were primarily -- most of the examples on which they
6 focused were 30-second and 60-second advertisements. It
7 had certainly been a recurring phenomenon in the past
8 that candidates would air, for instance, 30-minute
9 infomercials.

10 CHIEF JUSTICE ROBERTS: Any discussion
11 either in McConnell -- any citation either in McConnell
12 or the Congressional Record to those types of
13 documentaries?

14 MR. STEWART: I'm not sure about the
15 citation; I'm not aware of any citation in McConnell or
16 the Congressional Record, but it was certainly a known
17 phenomenon. And I think the real --

18 CHIEF JUSTICE ROBERTS: Well, I mean, how do
19 we know it was a known phenomenon in terms of the
20 evolution of the statute and the decision of this Court
21 upholding it? There is no reference to it.

22 MR. STEWART: Well, the real -- I think the
23 real key to ascertaining Congress's intent is to look to
24 the definition of electioneering communication that
25 Congress enacted into the statute, and that definition

1 requires that the communication be a broadcast, cable or
2 satellite communication in order to qualify as an
3 electioneering communication, and that it be aired
4 within a certain proximity to a Federal election, and
5 that in the case of an --

6 CHIEF JUSTICE ROBERTS: So -- so if Wal-Mart
7 airs an advertisement that says we have candidate action
8 figures for sale, come buy them, that counts as an
9 electioneering communication?

10 MR. STEWART: If it's aired in the right
11 place at the right time, that would be covered. Now,
12 under this Court's decision in Wisconsin Right to Life
13 it would be unconstitutional as applied to those
14 advertisements, because those advertisements certainly
15 would be susceptible of a reasonable construction of the
16 Constitution.

17 JUSTICE ALITO: Do you think the
18 Constitution required Congress to draw the line where it
19 did, limiting this to broadcast and cable and so forth?
20 What's your answer to Mr. Olson's point that there isn't
21 any constitutional difference between the distribution
22 of this movie on video demand and providing access on
23 the Internet, providing DVDs, either through a
24 commercial service or maybe in a public library,
25 providing the same thing in a book? Would the

1 Constitution permit the restriction of all of those as
2 well?

3 MR. STEWART: I think the -- the
4 Constitution would have permitted Congress to apply the
5 electioneering communication restrictions to the extent
6 that they were otherwise constitutional under Wisconsin
7 Right to Life. Those could have been applied to
8 additional media as well. And it's worth remembering
9 that the preexisting Federal Election Campaign Act
10 restrictions on corporate electioneering which have been
11 limited by this Court's decisions to express advocacy.

12 JUSTICE ALITO: That's pretty incredible.
13 You think that if -- if a book was published, a campaign
14 biography that was the functional equivalent of express
15 advocacy, that could be banned?

16 MR. STEWART: I'm not saying it could be
17 banned. I'm saying that Congress could prohibit the use
18 of corporate treasury funds and could require a
19 corporation to publish it using its --

20 JUSTICE ALITO: Well, most publishers are
21 corporations. And a publisher that is a corporation
22 could be prohibited from selling a book?

23 MR. STEWART: Well, of course the statute
24 contains its own media exemption or media --

25 JUSTICE ALITO: I'm not asking what the

1 statute says. The government's position is that the
2 First Amendment allows the banning of a book if it's
3 published by a corporation?

4 MR. STEWART: Because the First Amendment
5 refers both to freedom of speech and of the press, there
6 would be a potential argument that media corporations,
7 the institutional press, would have a greater First
8 Amendment right. That question is obviously not
9 presented here. But the other two things --

10 JUSTICE KENNEDY: Well, suppose it were an
11 advocacy organization that had a book. Your position is
12 that under the Constitution, the advertising for this
13 book or the sale for the book itself could be prohibited
14 within the 60 -- 90-day period -- the 60 -- the 30-day
15 period?

16 MR. STEWART: If the book contained the
17 functional equivalent of express advocacy. That is, if
18 it was subject to no reasonable interpretation --

19 JUSTICE KENNEDY: And I suppose it could
20 even, is it the Kindle where you can read a book? I
21 take it that's from a satellite. So the existing
22 statute would probably prohibit that under your view?

23 MR. STEWART: Well, the statute applies to
24 cable, satellite, and broadcast communications. And the
25 Court in McConnell has addressed the --

1 JUSTICE KENNEDY: Just to make it clear,
2 it's the government's position that under the statute,
3 if this kindle device where you can read a book which is
4 campaign advocacy, within the 60-30 day period, if it
5 comes from a satellite, it's under -- it can be
6 prohibited under the Constitution and perhaps under this
7 statute?

8 MR. STEWART: It -- it can't be prohibited,
9 but a corporation could be barred from using its general
10 treasury funds to publish the book and could be required
11 to use -- to raise funds to publish the book using its
12 PAC.

13 CHIEF JUSTICE ROBERTS: If it has one name,
14 one use of the candidate's name, it would be covered,
15 correct?

16 MR. STEWART: That's correct.

17 CHIEF JUSTICE ROBERTS: It's a 500-page
18 book, and at the end it says, and so vote for X, the
19 government could ban that?

20 MR. STEWART: Well, if it says vote for X,
21 it would be express advocacy and it would be covered by
22 the pre-existing Federal Election Campaign Act
23 provision.

24 CHIEF JUSTICE ROBERTS: No, I'm talking
25 about under the Constitution, what we've been

1 discussing, if it's a book.

2 MR. STEWART: If it's a book and it is
3 produced -- again, to leave -- to leave to one side the
4 question of.

5 CHIEF JUSTICE ROBERTS: Right, right.
6 Forget the --

7 MR. STEWART: -- possible media exemption,
8 if you had Citizens United or General Motors using
9 general treasury funds to publish a book that said at
10 the outset, for instance, Hillary Clinton's election
11 would be a disaster for this --

12 CHIEF JUSTICE ROBERTS: Take my
13 hypothetical. It doesn't say at the outset. It funds
14 -- here is -- whatever it is, this is a discussion of
15 the American political system, and at the end it says
16 vote for X.

17 MR. STEWART: Yes, our position would be
18 that the corporation could be required to use PAC funds
19 rather than general treasury funds.

20 CHIEF JUSTICE ROBERTS: And if they didn't,
21 you could ban it?

22 MR. STEWART: If they didn't, we could
23 prohibit the publication of the book using the corporate
24 treasury funds.

25 JUSTICE BREYER: I wonder if that's -- I

1 mean, I take it the answer to the question, can the
2 government ban labor unions from saying we love this
3 person, the corporations, we love them, the
4 environmentalists saying we love them, is of course the
5 government can't ban that. The only question is, who's
6 paying for it. And they can make a determination of how
7 much money the payors can pay, but you can't ban it.

8 MR. STEWART: That's correct.

9 JUSTICE BREYER: All right. If that's
10 correct, then I take it the interesting question here
11 would be -- I don't know if it arises in this case --
12 suppose there were a kind of campaign literature or --
13 or advocacy that either a corporation had to pay for it,
14 it couldn't pay for it through the PAC, because for some
15 reason -- I don't know, the PAC -- and there's no other
16 way of getting it to the public -- that would raise a
17 Constitutional question, wouldn't it?

18 MR. STEWART: It would raise a
19 Constitutional --

20 JUSTICE BREYER: Is that present in this
21 case?

22 MR. STEWART: It's not present in this case.
23 I don't think it would raise a difficult constitutional
24 question because presumably if the reason the
25 corporation couldn't do it through the PAC -- the only

1 reason I could think of is that it couldn't find
2 PAC-eligible donors who were willing to contribute for
3 this speech. And if that's the case, the corporation
4 would -- could still be forbidden to use its general
5 treasury.

6 JUSTICE BREYER: I don't know about that.
7 But I guess I would be worried if in fact there was some
8 material that couldn't get through to the public. I
9 would be very worried. But I don't think I have to
10 worry about that in this case, do I?

11 MR. STEWART: That's correct, both because
12 the question isn't presented here and because
13 Congress --

14 CHIEF JUSTICE ROBERTS: No, but if we accept
15 your constitutional argument, we're establishing a
16 precedent that you yourself say would extend to banning
17 the book, assuming a particular person pays for it.

18 MR. STEWART: I think the Court has already
19 held in, both in Austin and in McConnell, that Congress
20 can or that Congress or State legislatures can prohibit
21 the use of corporate treasury funds for express
22 advocacy.

23 CHIEF JUSTICE ROBERTS: To write a book, to
24 pay for somebody to write a book?

25 MR. STEWART: Well, in MCFL, for instance,

1 the communication was not a book, but it was a
2 newsletter, it was written material; and the Court held
3 this was express advocacy for which the use of corporate
4 treasury funds would ordinarily be banned. It held that
5 because of the distinctive characteristics of the
6 particular corporation at issue in that case, MCFL was
7 entitled to a constitutional exemption. But I think the
8 clear thrust of MCFL is that the publication and
9 dissemination of a newsletter containing express
10 advocacy could ordinarily be banned with respect to the
11 use of corporate treasury funds.

12 CHIEF JUSTICE ROBERTS: Not just a -- I
13 suppose a sign held up in Lafayette Park saying vote for
14 so and so. Under your theory of the Constitution, the
15 prohibition of that would be constitutional?

16 MR. STEWART: Again, I do want to make clear
17 that if by prohibition you mean ban on the use of
18 corporate treasury funds, then, yes, I think it's
19 absolutely clear under Austin, under McConnell that the
20 use of corporate treasury funds could be banned if
21 General Motors, for instance --

22 JUSTICE SCALIA: And -- and you -- you get
23 around the fact that this would extend to any publishing
24 corporation by saying that there is a media exemption
25 because the Constitution guarantees not only freedom of

1 speech but also of the press?

2 MR. STEWART: Well, there is always --

3 JUSTICE SCALIA: But does "the press" mean
4 the media in that Constitutional provision? You think
5 in 1791 there were -- there were people running around
6 with fedoras that had press -- little press tickets in
7 it, "Press"? Is that what "press" means in the
8 Constitution? Doesn't it cover the Xerox machine?
9 Doesn't it cover the right of any individual to -- to
10 write, to publish?

11 MR. STEWART: Well, I think the difficult
12 Constitutional question of whether the general
13 restrictions on use of corporate treasury funds for
14 electioneering can constitutionally be applied to media
15 corporations has never had to be addressed because the
16 statutes that this Court has reviewed have --

17 JUSTICE SCALIA: Well, I don't see any
18 reason why it wouldn't. I'm saying there's no basis in
19 the text of the Constitution for exempting press in the
20 sense of, what, the Fifth Estate?

21 MR. STEWART: In -- in any event, the only
22 question this Court would potentially need to decide in
23 this case is whether the exemption for media companies
24 creates a disuniformity that itself renders the statute
25 unconstitutional, and the Court has already addressed

1 that question in McConnell. The claim was made that
2 because media corporations were exempt, there was
3 inequality of treatment as between those and other
4 corporations. And Congress said no, Congress -- I mean,
5 this Court said no, Congress can protect the interests
6 of the media and of the public in receiving information
7 by drawing that line. With respect to your --

8 JUSTICE SOUTER: To point out how far your
9 argument would go, what if a labor union paid and
10 offered to write a book advocating the election of A or
11 the defeat of B? And after the manuscript was prepared,
12 they then went to a commercial publisher, and they go to
13 Random House. Random House said, yes, we will publish
14 that. Can the distribution of that be in effect subject
15 to the electioneering ban because of the initial labor
16 union investment?

17 MR. STEWART: Well, exactly what the remedy
18 would be, whether there would be a basis for suppressing
19 the distribution of the book, I'm not sure. I think
20 it's clear under --

21 JUSTICE SOUTER: Well, does it come within
22 electioneering because of the initial subvention to the
23 author?

24 MR. STEWART: It wouldn't be an
25 electioneering communication under BCRA because BCRA

1 wouldn't apply to the print media. Now, it would
2 potentially be covered by the --

3 JUSTICE SOUTER: We're -- we're talking
4 about how far the constitutional ban could go, and we're
5 talking about books.

6 MR. STEWART: Well, I -- we would certainly
7 take the position that if the labor union used its
8 treasury funds to pay an author to produce a book that
9 would constitute express advocacy, that that --

10 JUSTICE SOUTER: And the book was then taken
11 over as a commercial venture by Random House?

12 MR. STEWART: The labor union's conduct
13 would be prohibited. The question of whether the book
14 that had already been --

15 JUSTICE SOUTER: No, but prohibition only
16 comes when we get to the electioneering stage.

17 MR. STEWART: That's correct.

18 JUSTICE SOUTER: Okay.

19 MR. STEWART: The question whether the --

20 JUSTICE SOUTER: So for the -- for the labor
21 union simply to -- to hire -- is there -- is there an
22 outright violation when the labor union -- I guess this
23 is a statutory question: Is there an outright violation
24 when the labor union comes up with the original
25 subvention?

1 MR. STEWART: I guess I would have to study
2 the Federal Election Campaign Act provisions more
3 closely to see whether they --

4 JUSTICE SOUTER: Let's assume for the sake
5 of argument that they would not be. The subvention is
6 made, the manuscript is prepared, Random House then
7 publishes it, and there is a distribution within the --
8 what is it -- the 60-day period. Is the -- is the
9 original subvention (a) enough to bring it within the
10 prohibition on the electioneering communication, and (b)
11 is that constitutional?

12 MR. STEWART: Well, again, it wouldn't
13 qualify as an electioneering communication under BCRA
14 because that statutory definition only applies --

15 JUSTICE SOUTER: You're -- you're right. I
16 stand corrected. If the statute covered that as well,
17 if the statute covered the book as well.

18 MR. STEWART: I think the use of labor union
19 funds, as part of the overall enterprise of writing and
20 then publishing the book, would be covered.

21 JUSTICE SOUTER: That would be enough to
22 bring it in, and --

23 MR. STEWART: And I -- I don't --

24 JUSTICE SOUTER: -- the Constitution?

25 MR. STEWART: And I think it would be

1 constitutional to forbid the labor union to do that.
2 Whether it would --

3 CHIEF JUSTICE ROBERTS: Again, just to
4 follow up, even if there's one clause in one sentence in
5 the 600-page book that says, in light of the history of
6 the labor movement, you should be careful about
7 candidates like John Doe who aren't committed to it?

8 MR. STEWART: Well, whether in the context
9 of a 600-page book that would be sufficient to make the
10 book either an electioneering communication or express
11 advocacy --

12 CHIEF JUSTICE ROBERTS: Well, it does by its
13 terms, doesn't it? Published within 60 days. It
14 mentions a candidate for office. What other
15 qualification is there?

16 MR. STEWART: Well, I think the Court has
17 already crossed that bridge in Wisconsin Right to Life
18 by saying the statute could constitutionally be applied
19 only if it were the functional equivalent of express
20 advocacy, and -- so that would be the -- and we accept
21 that constitutional holding. That would be the relevant
22 constitutional question.

23 I wanted to return for a second, Justice
24 Alito, to a question you asked about the purported
25 interchangeability of the Internet and television. And

1 it's certainly true that -- that a growing number of
2 people are coming to experience those media as
3 essentially interchangeable, but there are still a lot
4 of people either who don't have computers at all or who
5 use their televisions and their computers for
6 fundamentally different purposes. And I think it's
7 evident that Citizens United perceived the two media to
8 be distinct because it was willing to pay \$1.2 million
9 to a cable service in order to have the film made
10 available on -- by Video On Demand, when Citizens United
11 could have posted the film on its own Web site, posted
12 the film on YouTube and could have avoided both the need
13 to make the payment and the potential applicability of
14 the electioneering communications provisions.

15 JUSTICE ALITO: If they had done either of
16 the things you just mentioned, putting it on its Web
17 site or putting it on YouTube, your position would be
18 that the Constitution would permit the prohibition of
19 that during the period prior to the primary or the
20 election?

21 MR. STEWART: Our position is not that the
22 Constitution would permit it. Our position is that BCRA
23 wouldn't prohibit it because those are not covered
24 media. Now --

25 JUSTICE ALITO: Would the Constitution -- if

1 -- if BCRA -- if Congress in the next act covered that
2 in light of advances in the Internet, would the
3 Constitution permit that?

4 MR. STEWART: Yes, I mean, the Court in
5 McConnell upheld on the electioneering communications on
6 their face, and this Court -- a majority of this Court
7 in Wisconsin Right to Life said those provisions are
8 constitutional as applied --

9 JUSTICE SCALIA: I -- I'm a little
10 disoriented here, Mr. Stewart. We are dealing with a
11 constitutional provision, are we not, the one that I
12 remember which says Congress shall make no law abridging
13 the freedom of the press? That's what we're
14 interpreting here?

15 MR. STEWART: That's correct.

16 JUSTICE SCALIA: Okay.

17 MR. STEWART: But, again, this -- the Court
18 obviously has grappled in the past with the question of
19 how to apply that provision to use of corporate treasury
20 funds either for express electoral advocacy or its
21 functional equivalent --

22 JUSTICE KENNEDY: In -- in this case, Mr.
23 Stewart, I take it -- correct me if I'm wrong -- that
24 you think the distinction the Petitioner draws between
25 the 90-minute film and the -- and the short 30-second or

1 1-minute ad is a baseless distinction?

2 MR. STEWART: It is of no constitutional
3 significance. Congress certainly could have drafted the
4 electioneering communication definition.

5 JUSTICE KENNEDY: So if -- if we think that
6 the application of this to a 90-minute film is
7 unconstitutional, then the whole statute should fall
8 under your view --

9 MR. STEWART: Well, I think --

10 JUSTICE KENNEDY: -- because there's no
11 distinction between the two?

12 MR. STEWART: Well, I think the Court has
13 twice upheld the statute as applied to communications
14 that are the functional equivalent of express advocacy.
15 So --

16 JUSTICE KENNEDY: But I'm -- I'm saying if
17 we -- if we think that this is -- that this film is
18 protected, and you say there's no difference between the
19 film and the ad, then the whole statute must be declared
20 --

21 MR. STEWART: It would depend on the ground
22 under which you reached the conclusion that the film was
23 protected. If you disagreed with our submission and
24 said there is a constitutional difference between
25 90-minute films and 60-second advertisements, then

1 obviously you could draw that constitutional line. If
2 you concluded that they're all the same but they're all
3 protected, then obviously we would lose both cases.

4 But, again, you would have to --

5 JUSTICE KENNEDY: But you want us to say
6 they're both the same? You want -- you argue that
7 they're both the same.

8 MR. STEWART: That's correct. Now, it may
9 be the case -- it may be rarer to find a 90-minute film
10 that is so unrelenting in its praise or criticism of a
11 particular candidate that it will be subject to no
12 reasonable interpretation other than to vote for or
13 against that person, but when you have that, as I think
14 we do here, there's no constitutional distinction
15 between the 90-minute film and the 60-second
16 advertisement.

17 And we would stress with respect to the film
18 that what makes this, in our view, an easy case is not
19 simply that the film repeatedly criticizes Hillary
20 Clinton's character and integrity. The clincher is that
21 the film repeatedly links Senator Clinton's purported
22 character flaws to her qualifications for president.

23 JUSTICE KENNEDY: But just from the
24 standpoint of literature, that's very odd. Suppose you
25 have a film which is quite moving with scenery and music

1 and magnificent acting, and the subtle message that may
2 be far more effective in advocating, and everyone knows
3 that. Everyone knows that.

4 MR. STEWART: That's essentially the
5 argument that a majority of this Court rejected in
6 Wisconsin Right to Life. That is, that was part of the
7 basis on which Congress enacted BCRA, part of the reason
8 that it wanted to establish a purely objective test
9 based on naming an identified candidate and airing in
10 proximity to the election. Congress recognized that in
11 many situations the most effective advocacy is the
12 subtler advocacy.

13 And the lead opinion in Wisconsin Right to
14 Life said -- I think recognized -- that it will
15 foreseeably be the case that corporations will craft
16 advertisements that are, in fact, intended to influence
17 federal elections, but that are sufficiently subtle and
18 opaque that they won't constitute the functional
19 equivalent of express advocacy. And -- and the lead
20 opinion simply said that's the price that we have to pay
21 in order to ensure that an unduly broad range of
22 corporate speech is not restricted.

23 And we accept that holding, but in this case
24 what we have, people may feel -- it is not subtle.
25 People may feel that because it's not subtle, it's less

1 likely to be effective. But the Court's decisions have
2 never drawn a Constitutional line between advocacy that
3 is likely to be effective and advocacy that is not.

4 Clearly, if this were express advocacy -- I
5 think clearly, if the -- the narrator had said in the
6 first 30 seconds of the film: A Hillary Clinton
7 presidency would pose a danger to the country, it's
8 important for all citizens to vote against Hillary
9 Clinton, what follows are extended analyses of episodes
10 in her past that reflect Hillary Clinton's unsuitability
11 for that office. And if then in the last 89 minutes of
12 the film the film-maker had made no overt reference to
13 the upcoming election but had simply given a negative
14 portrayal of Hillary Clinton, the person, that would be
15 express advocacy that would be proscribable even without
16 regard to BCRA. So that if --

17 CHIEF JUSTICE ROBERTS: Even though that
18 type of case was never presented to the Court in
19 McConnell and was never presented to Congress when it
20 considered BCRA?

21 MR. STEWART: Well, it's not clear whether
22 it was presented to Congress or not. It is certainly
23 true that it was not the focus of congressional
24 attention. But we know from the definition of
25 "electioneering communication" what attributes Congress

1 wanted to make relevant to the coverage determination.
2 That is, it chose to restrict this to broadcast, cable,
3 and satellite communications and to leave out the print
4 media.

5 It chose to restrict it to advertisements or
6 other communications that were aired within a specific
7 proximity to the election. If it had been unconcerned
8 with communications over a certain length, it could
9 certainly have made that part of the statutory
10 definition, but it chose not to do that.

11 JUSTICE GINSBURG: This film has been
12 compared to "Fahrenheit 911," which had the pervasive
13 message that President Bush was unsuited to be
14 President. And so if that film had been financed out of
15 corporate -- corporations' general treasury funds and
16 put on an election channel, that would similarly be
17 banned by the statute.

18 MR. STEWART: I am afraid I am not familiar
19 enough with that film to know whether it would have
20 constituted -- to -- to make an informed judgment about
21 whether that would have constituted the functional
22 equivalent of express advocacy under Wisconsin Right to
23 Life. And, of course, the "electioneering
24 communication" definition would apply only if the film
25 had been broadcast within a specified proximity to a

1 primary or general election in -- in 2004. But I think
2 --

3 JUSTICE SCALIA: Mr. Stewart, do you think
4 that there's a possibility that the First Amendment
5 interest is greater when what the government is trying
6 to stifle is not just a speaker who wants to say
7 something but also a hearer who wants to hear what the
8 speaker has to say?

9 I mean what is somewhat different about this
10 case is that unlike over-the-air television you have a
11 situation where you only get this -- this message would
12 only air -- if somebody elects to hear it. So you
13 really have two interested people, the speaker and the
14 listener who wants to -- who wants to get this.

15 Isn't that a somewhat heightened First
16 Amendment interest than just over-the-air broadcasting
17 of advertising which probably most listeners don't want
18 to hear?

19 MR. STEWART: Well, I think -- I think the
20 -- first of all, I think if we had tried to make the
21 argument in McConnell that the BCRA provisions -- or --
22 or in any other case that the BCRA provisions are
23 constitutional as applied to 30- or 60-second
24 advertisements because they are defensible means of
25 protecting listeners who, by hypothesis, don't want to

1 hear the message in the form of a captive audience, I
2 don't think we would have gotten very far.

3 I think it's certainly true that people have
4 a wide variation of attitudes towards campaign
5 advertisements. Some of them find them irritating, and,
6 of course, they can hit the mute button or -- or leave
7 the room, or in the case of people who use TiVo or VCRs
8 can simply fast-forward through them.

9 But the whole premise of the congressional
10 regulation and the whole premise of the corporations'
11 willingness to spend these massive amounts of money was
12 that enough people will be interested in the
13 advertisements that they will ultimately have an
14 electoral effect. And -- and so if you compare the--
15 the film to the advertisement, the advertisements in one
16 sense you could say are a less effective mechanism
17 because a lot of the people who reach them are unwilling
18 listeners or uninterested. But, on the other hand,
19 they're more effective because they reach more people.

20 The -- the flip side is that with a film you
21 reach a smaller audience. It is certainly a more
22 limited group of people who will sign up to receive the
23 movie, but they are more interested in the message. I
24 don't think you can operate on the hypothesis that there
25 is no --

1 JUSTICE SCALIA: You are talking about
2 effectiveness. That wasn't my point. My point was the
3 -- the seriousness of the First Amendment interest
4 that's being impinged where -- where you have both
5 somebody who wants to speak and someone who
6 affirmatively wants to hear what he has to say, and the
7 government says, no, the two of you can't do this.

8 MR. STEWART: Well, I think it was --

9 JUSTICE SCALIA: Don't you think that's
10 somewhat worse than the government just saying to
11 somebody who wants to speak, no, you can't speak?

12 MR. STEWART: I think it would be impossible
13 to divide media up in that way based on the relative
14 likelihood that the recipient of the message will want
15 to hear it. With respect to the -- the newsletters in
16 MCFL, for instance, on the one -- in many instances they
17 were made available in public places. They were also
18 mailed to a variety of people. You could say --

19 JUSTICE SCALIA: I am not saying will --
20 will want. I mean you have a situation here where you
21 don't get it unless you take the initiative to
22 subscribe. I'm not -- I'm not trying to figure out
23 person by person who wants to hear it and who doesn't.
24 Here you have a medium in which somebody listens only if
25 that person wants to listen. So the -- the person

1 speaking wants to speak, and the person hearing wants to
2 hear. It seems to me that's a stronger -- a stronger
3 First Amendment interest.

4 MR. STEWART: Well, the potential viewers in
5 this case had other alternatives if they wanted to see
6 the film. The film was available --

7 JUSTICE GINSBURG: Was -- was this issue
8 aired before the three-judge court, the distinction
9 between, say, putting something on network TV and
10 putting something on View On Demand that the listener
11 has to opt into?

12 MR. STEWART: No. Indeed, the appellant in
13 its complaint simply alleged affirmatively that his
14 communication, if aired on DVD -- I mean if aired on VOD
15 would fall within the statutory definition of
16 "electioneering communication."

17 CHIEF JUSTICE ROBERTS: Counsel, before you
18 run out here, can I -- we haven't talked about the
19 disclosure requirements yet. You understand the test to
20 be that disclosure is not required if the names of those
21 disclosed -- if those people would be reasonably subject
22 to reprisals?

23 MR. STEWART: That's correct. This Court
24 has recognized a constitutional exemption for two
25 disclosure requirements in cases where disclosure would

1 have a reasonable likelihood of leading to reprisal.

2 CHIEF JUSTICE ROBERTS: How do we apply that
3 test? Is it inconceivable to you here that people
4 contributing to such a clearly anti-Clinton
5 advertisement are not going to be subject to reprisals?

6 MR. STEWART: It seems unlikely that
7 reprisals would occur because Citizens United -- this is
8 obviously a new film, but it is of a piece with
9 communications that Citizens United has engaged in.

10 CHIEF JUSTICE ROBERTS: That doesn't work,
11 because maybe they are going to change the nature of the
12 documentaries that they fund, or somebody who gave a
13 contribution 5 years ago may decide, boy, I don't like
14 what they're doing. I'm not going to give anymore. It
15 --

16 MR. STEWART: I guess the point I was going
17 to --

18 CHIEF JUSTICE ROBERTS: The fact that
19 they've disclosed in the past by compulsion of law
20 doesn't seem to answer the question of whether they are
21 going to be subject to reprisals.

22 MR. STEWART: Well, the point was that they
23 have disclosed in the past and have provided no evidence
24 of reprisals. But I think the Court's decisions are
25 clear that the burden is on the organization to show a

1 reasonable likelihood, at least to -- to set the -- the
2 ball in motion. And the three-judge district court here
3 said essentially what this Court said in McConnell with
4 regard to a variety of plaintiffs who included Citizens
5 United. That is, the Court said in McConnell and the
6 three-judge district court here that the plaintiffs had
7 made vague allegations of the general possibility of
8 reprisals but had offered no concrete evidence that
9 their own members --

10 CHIEF JUSTICE ROBERTS: But that seems to me
11 you are saying they've got to wait until the -- the
12 horse is out of the barn. You can only prove that you
13 are reasonably subject to reprisals once you've been the
14 victim of reprisals.

15 MR. STEWART: Well, I think the alternatives
16 would be to say that disclosure requirements are
17 categorically unconstitutional, which would be an
18 extreme departure from this Court's prior precedents or
19 --

20 CHIEF JUSTICE ROBERTS: That is saying --
21 that is saying that the test in McConnell is unworkable,
22 if you say the alternative is to say they are
23 categorically --

24 MR. STEWART: No. I mean I think the -- if
25 the -- we think the test in McConnell is workable; that

1 is, leave it up to the organization to establish
2 particularized proof of a reasonable likelihood of
3 reprisal.

4 CHIEF JUSTICE ROBERTS: If the Boy Scouts
5 run an ad and they're subject to disclosure, are the
6 donors who support that ad reasonably subject to
7 reprisals.

8 MR. STEWART: I mean, it would depend to
9 some extent on the characteristics of the ad. Probably
10 not, but I think if the alternative -- the two
11 alternatives to the approach that the Court has taken
12 previously would be first to say these requirements are
13 unconstitutional across the board; or the Court could
14 say as applied to organizations that engage in
15 especially intemperate or extreme speech of the sort
16 that might seem more likely to subject its proponents to
17 reprisal, the disclosure requirements are categorically
18 unconstitutional there.

19 I think that would be itself an anomalous
20 and counterproductive content-based distinction if the
21 mere fact of the extremity of your speech insulated you
22 from a constitutional -- from a requirement that would
23 otherwise be constitutional.

24 CHIEF JUSTICE ROBERTS: Before you sit down,
25 any other? Thank you, counsel.

1 Mr. Olson, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF THEODORE B. OLSON

3 ON BEHALF OF THE PETITIONER

4 MR. OLSON: Thank you, Mr. Chief Justice.

5 It is unquestionably the case that the
6 government takes the position that any form of
7 expression, of expressive advocacy can be prohibited if
8 it's done by a corporation. They say that on page 25
9 and 26 of their brief, whether it be books, yard signs,
10 newspapers or -- or something printed -- in printed
11 form, and it's only because Congress decided to address
12 the most acute problem that they haven't -- Congress
13 didn't go ahead and decide to do that, which we submit
14 would raise very, very serious constitutional questions,
15 the same type of constitutional questions that we are
16 talking about here, and that --

17 JUSTICE BREYER: I agree with you about
18 that, but I thought what saves this -- many people
19 thought it doesn't save it, it's -- whole thing's
20 unconstitutional, whole Act. That isn't what I thought.
21 So what saves this is of course you can't prohibit all
22 those things. What you do is put limitations on the
23 payment for them. See that there are other ways of
24 paying through it, say as PACs, and then limit very
25 carefully the media that are affected and the times for

1 which they are affected. Now, that's the statute
2 reforms, and it's I think you need to address.

3 MR. OLSON: Precisely, and the five justices
4 in Wisconsin Right to Life made the fact that the PAC
5 mechanism is burdensome and expensive. There are briefs
6 in this case that demonstrate how much it is. And the
7 -- and it's easier if you have lots of money, if you are
8 a big corporation, and you can afford a PAC or you
9 already have one. So it's a burden on the least capable
10 of communicating.

11 JUSTICE STEVENS: Mr. Olson, can I ask this
12 question? Coming up with Wisconsin Right to Life, Judge
13 Randolph thought the Chief Justice's opinion in that
14 case was controlling in that case. Do you think the
15 Chief Justice's opinion in that case correctly stated
16 the law?

17 MR. OLSON: Of course.

18 (Laughter.)

19 MR. OLSON: By definition.

20 JUSTICE SCALIA: Good answer.

21 (Laughter.)

22 JUSTICE STEVENS: I want to be sure because
23 you're -- sometimes I don't think you're quite saying
24 that. But you agree that that opinion is correct?

25 MR. OLSON: What I am saying is I -- we

1 accept the Court's decision in Wisconsin Right to Life.
2 To the extent that the Court did not get to this type of
3 documentary where the issue distinction, the false
4 dichotomy between issues and candidates --

5 JUSTICE STEVENS: But you accept the test
6 that was stated in his opinion?

7 MR. OLSON: The -- the -- that no
8 reasonable, not reasonably susceptible to any other
9 interpretation? Of course we do, Justice Stevens, but
10 we submit, a 90-minute discussion of various different
11 issues are subject to all kinds of interpretation, and
12 when you get a long exposition of issues that are
13 important to the public and someone says -- the
14 government says, it's going to be -- well, we can
15 prohibit it, and by the way, the government says, well,
16 when we mean prohibit we mean, you just can't use your
17 union, or corporate treasury funds -- what they mean by
18 prohibit is that they will put you in jail if you do it.
19 They will put you in jail for five years. That means
20 prohibited.

21 Now, what -- what we're getting at here,
22 when -- when you're trying to make a 90-minute movie
23 that discusses things that are important to the public
24 during an election of the highest officer of the United
25 States, many people will interpret that as critical;

1 many people will interpret it as supportive; there are
2 things all over the lot. So it's subject to lots of
3 different interpretations.

4 The other thing is I heard Justice -- I mean
5 Mr. Stewart say that there's one minute at the
6 beginning, it doesn't happen -- it doesn't matter what
7 the other 89 minutes are; we can prohibit it. Well,
8 where is the person making a movie who wants to address
9 the American public about something that's important to
10 the American public -- there isn't any question about
11 that -- where does he edit his movie? What cuts? What
12 does he leave on the drawing -- on the cutting room
13 floor so that he won't have to go to bail -- jail? He
14 won't dare take a chance.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 The case is submitted.

17 (Whereupon, at 11:11 a.m., the case in the
18 above-entitled matter was submitted.)

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25

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