

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 *Amicus Curiae* of The Reporters
Committee for Freedom of the Press
in Support of Appellant**

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STATEMENT OF INTEREST¹

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has an interest in ensuring that the Bipartisan Campaign Reform Act of 2002 (“BCRA”), 2 U.S.C. § 431 *et seq.*, is not used to suppress this feature-length political documentary, as it would be an “obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

¹ Pursuant to Sup. Ct. R. 37, counsel for the Reporters Committee declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amicus curiae* (aside from those who have given general consent to all *amici*) has been filed with the Clerk.

SUMMARY OF ARGUMENT

Amicus curiae The Reporters Committee for Freedom of the Press (the “Reporters Committee”) urges the Court to reverse the decision below and clarify that the suppression of a feature-length political documentary is an impermissible abridgment of the First Amendment’s protection of freedom of the press.

Throughout American history, the news media’s coverage of government affairs has included commentary as well as reporting. This commentary “include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) It also has included endorsements that expressly advocate the election of named candidates. Time and again, the Court has protected the freedom of the press to publish such commentary.

The Bipartisan Campaign Reform Act of 2002 (“BCRA”) does not purport to suppress news media commentary – indeed, it includes an express exemption for media commentary. 2 U.S.C. § 434(f)(3)(B)(i). This exemption, however, excludes a growing number of non-traditional journalists distributing their work in new ways, including the video on-demand technology used by Appellant. The incompleteness of the news exemption has had little import until now, given the clear-cut distinction between the archetypical 30-second political advertisement and the sort of commentary that journalists have historically provided. But the decision below, suppressing a documentary that is objectively indistinguishable from

other news media commentary, removes this intuitive bright-line distinction that allowed journalists to do their jobs without fear of the criminal penalties associated with violating Federal Election Commission (“FEC”) regulations. By criminalizing the distribution of a long-form documentary film as if it were nothing more than a very long advertisement, the district court has created uncertainty about where the line between traditional news commentary and felonious advocacy lies. All that is certain is that the line will depend on a subjective determination of the FEC.

ARGUMENT

I. CRITICISM AND ADVOCACY OF CANDIDATES FOR OFFICE HAS ALWAYS BEEN A ROLE OF THE AMERICAN PRESS.

Appellant produced and sought to distribute *Hillary: The Movie* – a critical, feature-length documentary about Senator Hillary Clinton. *Hillary: The Movie* does not differ, in any relevant respect, from the critiques of presidential candidates produced throughout the entirety of American history. In every American election since George Washington’s uncontested bid for the presidency in 1789, the press has reported on the candidates’ qualifications for office, distributing commentary that often attacks one candidate and favors another. See John Allen Hendricks & Shannon K. McCraw, *Coverage of Political Campaigns*, in *American Journalism: History, Principles, Practices* 181 (W. David Sloan & Lisa Mullikin Parcell eds., 2002). Though the method of news delivery

has changed, the news media's long tradition of taking stances for and against candidates has not. *Id.*

The simplest example of this is the editorial endorsement. Since at least the 1800 presidential race, American newspapers have endorsed candidates and provided commentary praising their favored candidate (and often denigrating the opponent). Edward J. Larson, *The Tumultuous Election of 1800, America's First Presidential Campaign: A Magnificent Catastrophe* 206-07 (2008). In every American presidential election, newspapers have played an important role by advocating for endorsed candidates.²

For just as long, the news media has criticized candidates for office, often publishing indictments of their experience and qualifications. In 1824, often considered the first election in which the candidates actively campaigned against one another, newspapers critiqued the backgrounds of candidates John Quincy Adams and Andrew Jackson. See Hendricks & McCraw, *supra*, at 181. Similarly, Edward R. Murrow's *See it Now* (sponsored by Alcoa Inc.) in 1954 essentially accused Senator Joseph McCarthy of treason, asserting that "[t]he actions of the junior Senator from Wisconsin have caused alarm and dismay amongst our allies abroad, and given considerable comfort to our enemies." See Philip Hamburger, *Matters of State: A Political Excursion* 91 (2003).

² See, e.g., *Endorsements through the Ages*, <http://www.nytimes.com/interactive/2008/10/23/opinion/20081024-endorse.html> (reprinting *New York Times* presidential endorsements from 1860 to the present).

Half a century later, *Hillary: The Movie* criticized Senator Hillary Clinton’s qualifications and fitness for office – providing precisely the type of commentary the American news media has always provided. Like an increasing number of media organizations, Appellant sought to distribute its documentary using new technology. Editorial tastes and political affiliations aside, the only *objective* distinction between the critiques of Senators Adams, McCarthy, and Clinton is the medium in which each was distributed.

II. THE COURT HAS LONG SAFEGUARDED THE EDITORIAL INDEPENDENCE OF THE NEWS MEDIA

The BCRA excludes from regulation, among other things, speech that “[a]ppears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 434(f)(3)(B)(i). This news exemption recognizes that editorial regulation of the news media would muzzle “one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.” *Mills*, 384 U.S. at 219.

This nation was founded on the idea that “[t]he liberty of the press is ... essential to the nature of a free state,” *McConnell v. FEC*, 540 U.S. 93, 286 n. 17 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting 4 W. Blackstone, Commentaries on the Laws of England 151 (1769)), and a free press is “one of the greatest bulwarks of liberty.” *Id.* at 286

(quoting 1 J. Elliot, *Debates on the Federal Constitution* 335 (2d ed. 1876)).

Recognizing these principles more than forty years ago, the Court invalidated an Alabama law that made it a crime for newspapers to publish editorials on Election Day, finding “practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,” which “of course includes discussions of candidates.” *Mills*, 384 U.S. at 218. The Court concluded that it would be “difficult to conceive of a more obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press” than a criminal statute that “silences the press at a time when it can be most effective.” *Id.* at 219.

The Court reiterated the need for editorial autonomy in *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). *Tornillo* struck down “right of access” laws intended to encourage diverse viewpoints in the media, refusing to “intru[de] into the function of editors” by interfering with “the exercise of editorial control and judgment.” *Id.* at 258. The Court ruled that “[t]he choice of material to go into a newspaper ... and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment,” adding that “[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.” *Id.*; see also *CBS v. Democratic National Committee*, 412 U.S. 94, 117 (1973) (plurality opinion) (“[t]he power of a privately owned newspaper to advance its own political, social,

and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers – and hence advertisers – to assure financial success; and, second, the journalistic integrity of its editors and publishers”); *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 391 (1973) (“we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial”).

Mindful of this constitutional interest in “ensur[ing] that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events,” several federal statutes have drawn a distinction “between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public.” *McConnell*, 540 U.S. at 208 (quotation omitted).

Campaign finance statutes have likewise drawn this distinction. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667 (1990) (statutes may exempt media companies from campaign finance restrictions because of “the unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate”); *id.* at 712 (Kennedy, J., dissenting) (“It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications.”); *McConnell*, 540 U.S. at 156 n.51 (“Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate”); *id.* at 355 (Rehnquist, C.J., dissenting in

part) (doubting “the Court would seriously contend that we must defer to Congress’ judgment if it chose to reduce the influence of political endorsements in federal elections”).

III. BY ALLOWING THE SUPPRESSION OF A DOCUMENTARY FILM, THE DISTRICT COURT OBLITERATED THE BRIGHT-LINE DISTINCTION BETWEEN COMMENTARY AND PROHIBITED EXPRESS ADVOCACY

Congress contemplated the BCRA governing what it saw as a surge of political advertisements flooding the airwaves. *McConnell*, 540 U.S. at 260 (Scalia, J., concurring in part and dissenting in part) (“the most passionate floor statements during the debates on this legislation pertained to so-called attack ads”). Likewise, earlier decisions upholding the BCRA focused on traditional 30-second political advertisements. *See id.* at 207 (discussing a “virtual torrent of televised election-related ads”).

Regulation of traditional political advertising, whatever its other constitutional infirmities, has posed little risk of affecting editorial endorsements or other news media commentary. As long as the distinction between regulated advertising and exempt news commentary was relatively intuitive and objective, it provided the “breathing space” reporters need to perform their constitutionally-protected role. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). Reporters could do their jobs without worrying that an endorsement or exposé might lead to felony charges if the FEC deemed that it was too laudatory or too

critical of a candidate for office. *But c.f. McConnell*, 540 U.S. at 284 (Thomas, J., concurring in part and dissenting in part) (“One would think that *The New York Times* fervently hopes that its endorsement of Presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is ‘too influential,’ and that the ‘appearance of corruption’ is significant when media organizations endorse candidates or run ‘slanted’ or ‘biased’ news stories in favor of candidates or parties?”).

The decision below creates uncertainty, replacing a bright-line distinction with the subjective determinations of the FEC. Such an uncertain line between the constitutionally-protected and the felonious “offers no security for free discussion,” and thus “compels the speaker to hedge and trim.” *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Nor is the worry of FEC action speculative, since the traditional news media regularly engages in “express advocacy” by explicitly urging readers or viewers to vote for an endorsed candidate.

IV. THE NEWS EXEMPTION ALONE PROVIDES INADEQUATE PROTECTION, BECAUSE NEWS MEDIA COMMENTARY IS INCREASINGLY DISTRIBUTED IN WAYS THE EXEMPTION DOES NOT CONTEMPLATE.

With the FEC purporting to regulate even traditional news media commentary, journalists who wish to advocate or criticize a candidate are left to rely

only on the news media exemption. *See* 2 U.S.C. § 434(f)(3)(B)(i). But the exemption applies only to speech that “[a]ppears in a news story, commentary, or editorial distributed through the facilities of [a] broadcast, cable, or satellite television or radio station.” *Id.* A growing number of journalists distribute their work in ways that do not appear to fall within this exemption.

The technology journalists use to disseminate their content is rapidly changing, and there is an accompanying resurgence in independent content – blogs, documentaries, non-profit journalism, and niche publications of many sorts. For example, many newspapers have been forced by the economy and new technology to publish only in electronic formats. *See, e.g.,* David T. Cook, *Our first century*, Christian Science Monitor, Nov. 25, 2008. Even news networks such as ABC and CBS are supplementing their broadcasts of Barack Obama’s inauguration with additional Internet coverage. *See* David Bauder, *TV News Goes All Out Online, Too*, The Wash. Post, January 12, 2009, at C5.

Likewise, news reporting in one of its classic forms – the 30 minute local television newscast – is now often distributed in the same fashion as Appellant planned to distribute *Hillary: The Movie*. Local television stations throughout the country have contracted with local cable providers to distribute their newscasts via video on-demand – the same technology that Citizens United sought to use in this case. *See, e.g.,* *WTMJ-TV launches ‘News on Demand’ with Time Warner Cable*, Business Journal (Milwaukee, Wis.), April 7, 2006; *Replays of local news available*

on cable, San Antonio Express-News, Nov. 11, 2005, at E1.

Other documentary films are likewise distributed via video on-demand, including Michael Moore's *Fahrenheit 9/11*. See FEC Advisory Op. 2004-30 (Smith, concurring) ("under the expansive definition of 'express advocacy' favored by some of my colleagues, the production and promotion of Michael Moore's movie *Fahrenheit 9/11* may have been banned completely, if these activities were financed by corporations"). But the decision below would exclude these from the media exemption as well.

Nor is the example of video on-demand distribution unique. As technology evolves, more distribution platforms will fall *beyond* the scope of the media exemption as interpreted by the FEC. For example, subscribers to TiVo, a service that allows households to digitally record television shows, can access video content from *The New York Times* on their television sets. See David Lieberman, *TiVo diversifies its lineup with Web video*, USA Today, June 7, 2006 at B1. If *The Times* posts endorsements and commentary – what many would call the quintessential example of the American press – it may run the risk of criminal liability because it is not clear that such content would be "distributed through the facilities of any broadcast, cable, or satellite television or radio station." See 2 U.S.C. § 434(f)(3)(B)(i).

CONCLUSION

Many editors would choose not to run the type of commentary seen in *Hillary: The Movie* for a variety of reasons – its political viewpoint, its length, or its tone, for example. These editorial decisions, though, cannot create legally meaningful distinctions without forcing the courts to “sit as superior editors of the press.” See *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 229 (1998).

Justice Thomas in *McConnell* warned of the risk that overbroad campaign finance regulations pose to the news media, saying that would-be censors of the press “need only argue that the press ‘capacity to manipulate popular opinion’ gives rise to an ‘appearance of corruption,’” and that “laws regulating media outlets in their issuance of editorials would be upheld under the” Court’s opinion in *McConnell*. 540 U.S. at 285 (Thomas, J., concurring in part and dissenting in part). The court below has made this a reality, directly suppressing the type of political commentary that has long been the right and responsibility of the news media. For this reason, that application of the BCRA to *Hillary: The Movie* is an unconstitutional abridgment of the First Amendment’s protection for freedom of speech and of the press.

Respectfully submitted,

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