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P R O C E E D I N G S

(10:09 a.m.)

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

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

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

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

In the case that you consider today, it is a felony for a small, nonprofit corporation to offer interested viewers a 90-minute political documentary about a candidate for the nation's highest office that General Electric, National Public Radio, or George Soros may freely broadcast. Its film may be shown in theaters, sold on DVDs, transmitted for downloading on the Internet, and its message may be distributed in the form of a book. But its producers face 5 years in 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 -- that the Congress
24 was intended to prohibit. In fact, as the -- as the
25 Reporters Committee for -- for Freedom of Speech points

1 out, the documentary is objectively indistinguishable
2 from other 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 -- 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 contribution
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 is 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's -- 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'd just like to get -- I
8 want to get an answer to the question.

9 MR. OLSON: Yes, I think --

10 JUSTICE BREYER: Yes. Okay.

11 MR. OLSON: -- that to the extent that it --

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

19 (Laughter.)

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

23 MR. OLSON: The difference is: It's exactly
24 what the Court was describing in Wisconsin Right to
25 Life. It is a 90 -- it is -- it informs and educates,

1 which is what the Court said, or the Chief Justice's
2 opinion, the controlling opinion said, was the mark of
3 an issue communication. And as this Court said --

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

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

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

21 MR. OLSON: Yes, it did, Justice Ginsburg,
22 but what my point is: That there isn't just two boxes
23 in the world of communications about public issues, one
24 box for so-called issues and one box for campaign
25 advocacy. That's what I think the Court meant when it

1 said, not just in Wisconsin Right to Life but in earlier
2 cases, that the distinction dissolves upon application.

3 JUSTICE SOUTER: But no matter how many
4 boxes we have, doesn't this one fall into campaign
5 advocacy? I mean, I've got the government's brief open
6 at -- open at pages 18 to 19 with the quotations: She
7 will lie about anything. She's deceitful. She's
8 ruthless, cunning, dishonest, do anything for power,
9 will speak dishonestly, reckless, a congenital liar,
10 sorely lacking in qualifications, not qualified as
11 commander in chief. I mean, this sounds to me like
12 campaign advocacy.

13 MR. OLSON: It -- what -- what the court was
14 talking about and as Justice Kollar-Kotelly talked about
15 is broadcast advertising, these 10-minute -- 10-second,
16 30-second, 60-second bursts of communication that are --
17 that are the influence in elections.

18 JUSTICE BREYER: I want to get the answer to
19 what I was asking.

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

23 MR. OLSON: This is a long discussion of the
24 record, qualifications, history, and conduct of someone
25 who is in the political arena, a person who already

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

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

25 Now, why is that not the same as vote

1 against Smith? Though I grant you, it's more
2 intelligent. It's more informative. It's even better
3 electioneering. So we're after electioneering. Why
4 doesn't that fall within the forbidden category?

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

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

21 JUSTICE BREYER: I -- I guess it's the same
22 as if you were to say, you know, I think Smith is a
23 great guy. That's all. I'm sharing information. And
24 what I don't see is if you agree that we could ban the
25 commercial that says, I see Smith is a great guy, why is

1 it any different to supplement that with the five best
2 things that Smith ever did?

3 MR. OLSON: Because -- because of the First
4 Amendment. Congress shall make no law abridging the
5 freedom of speech. When -- when the government -- when
6 this Court has permitted that to happen, it has only
7 done it in the most narrow circumstances for a
8 compelling governmental interest.

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

20 MR. OLSON: I understand that, Justice
21 Kennedy, and it is difficult. But let me say that the
22 record that you were considering in McConnell -- and I
23 specifically invite, as I did before, page -- the
24 Court's attention to 646 of this -- of the district
25 court's opinion, which specifically said the government

1 and Congress was concerned about these short, punchy ads
2 that you have no choice about seeing, and not concerned
3 about a thorough recitation of facts or things that you
4 would have to make an affirmative decision to opt into.

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

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

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

25 JUSTICE SCALIA: You can educate in 30

1 seconds. I mean in -- in a 30-second ad you present
2 just one of these criticisms of the candidate instead of
3 lumping all of them together for 90 minutes.

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

5 JUSTICE SCALIA: Doesn't that educate?

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

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

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

22 And what the -- what the Court did is say,
23 well, okay -- in McConnell -- yes, there is a
24 substantial burden that the government met that these
25 types of communications -- not the Internet, not books,

1 not other types of things -- are really bad enough that
2 the government could pick those out, and it has narrowly
3 tailored its solution to that problem by prohibiting
4 those things. And the government talks about this today
5 in its brief, the things that Congress felt were the
6 most acute problems. Now --

7 JUSTICE SCALIA: So you're making a
8 statutory argument now?

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

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

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

21 And in response to every one of these
22 questions, the government has the burden of proving this
23 sort of speech, which the Reporters say is
24 indistinguishable -- they're the kind of information
25 that news media puts out all the time, not --

1 CHIEF JUSTICE ROBERTS: So -- so this
2 argument doesn't depend upon whether this is properly
3 characterized as express -- the functional equivalent of
4 express advocacy? Your contention is that even if it
5 is, that because it wasn't in the factual record in
6 McConnell or before Congress, it is a type of functional
7 -- it is a type of express advocacy that's not covered
8 by the Act?

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

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

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

1 I would -- I said at the beginning that this
2 is an incomprehensible prohibition, and I -- and my -- I
3 think that's demonstrated by the fact that since 2003
4 this Court has issued something close to 500 pages of
5 opinions interpreting and trying to apply the First
6 Amendment to Federal election law. And I counted 22
7 separate opinions from the Justices of this Court
8 attempting to -- in just the last 6 years, attempting to
9 figure out what this statute means, how it can be
10 interpreted. In fact --

11 CHIEF JUSTICE ROBERTS: Well, that's because
12 it's mandatory appellate jurisdiction. I mean, it's --
13 you don't have a choice.

14 (Laughter.)

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

17 JUSTICE STEVENS: And maybe those cases
18 presented more difficult issues than this one.

19 MR. OLSON: I think this presents a much
20 easier issue, Justice Stevens, because this is the type
21 of -- if there is anything that the First Amendment is
22 intended to protect in the context of elections that are
23 occurring -- which, by the way, occur 4 years running,
24 but the last election, presidential election, occurred
25 throughout the entire 2008 -- if the American people

1 need to have that kind of information. And the statute
2 is both overly broad because if it was a hotel ad, if it
3 was a hotel saying Senator Clinton stayed here or
4 Senator McCain stayed here, it would be prohibited
5 because it was a hotel saying so, even though it really
6 had nothing to do with the election. If it is -- but
7 it's -- if it's a corporation that put together an
8 analysis of the earmark positions of each of the
9 senatorial candidates -- most all of the candidates were
10 running from the Senate, they all had this -- these
11 issues where they may have voted or not against
12 earmarks, that would be --

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

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

24 MR. OLSON: Yes, Justice Ginsburg, I
25 understand your point. There is much in there that if

1 you saw it, you would form an opinion with respect to
2 how you might want to vote. You might -- it might form
3 a different -- you might form all kinds of different
4 opinions.

5 But it was -- it was an analysis of the
6 background record and history and qualifications of
7 someone running for president. Of course I concede
8 that. But what is the -- what is the maker of a movie
9 to take out in order to prevent that from happening?

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

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

1 is not issue advocacy; this is express advocacy saying
2 don't vote for this person.

3 And if that is a fair characterization, the
4 difference between 90 minutes and 1 minute, either for
5 statutory purposes or constitutional purposes, is a
6 distinction that I just cannot follow.

7 MR. OLSON: Well, it is a distinction that
8 Congress was concerned about, and it's a distinction
9 that's all over the record --

10 JUSTICE SOUTER: You say that -- why --
11 what -- what is your basis for saying that Congress is
12 -- is less concerned with 90 minutes of don't vote for
13 Clinton than it was with 60 seconds of don't vote?

14 MR. OLSON: Because -- because the record in
15 Congress and the record in this Court is that those
16 types of advertisements were more effective because they
17 came into your home --

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

25 MR. OLSON: The -- the -- I think the --

1 what -- what Congress was concerned about is the most
2 severe and the most acute problem, as Justice
3 Kollar-Kotelly said, which everyone acknowledges was the
4 problem Congress sought to address with BCRA. It's not
5 just that, however.

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

16 JUSTICE SCALIA: Mr. Olson, I -- I think
17 we've been led astray by -- by the constant reference to
18 what Congress intended. As I understood your point, it
19 was not -- it was not that, well, one is covered by the
20 statute and the other isn't, but it is that one is
21 covered by the Constitution and the other isn't. And it
22 may well be that -- that the kind of speech that is
23 reflected in a serious 90-minute documentary is entitled
24 to greater constitutional protection. And it may well
25 be that the kind of speech that is not only offered but

1 invited by the listener is entitled to -- is entitled to
2 heightened First Amendment scrutiny, which is -- which
3 is what this is since you have pay per view and --

4 MR. OLSON: I agree with that completely,
5 Justice Scalia.

6 Mr. Chief Justice, if I may reserve the
7 remainder of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Stewart.

10 ORAL ARGUMENT OF MALCOLM L. STEWART

11 ON BEHALF OF THE RESPONDENT

12 MR. STEWART: Mr. Chief Justice, and may it
13 please the Court:

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

24 So the functional equivalence test doesn't
25 depend on the length of the advertisement or the medium

1 in which the advertisement --

2 CHIEF JUSTICE ROBERTS: Well, the length of
3 the advertisements wasn't remotely at issue in either
4 Washington Right to Life or McConnell or before Congress
5 when they passed this law.

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

14 CHIEF JUSTICE ROBERTS: Any discussion in
15 either McConnell -- any citation either in McConnell or
16 the Congressional Record to those types of
17 documentaries?

18 MR. STEWART: I'm not sure about the
19 citation; I'm not aware of any citation in McConnell or
20 the Congressional Record, but it was certainly a known
21 phenomenon. And I think the real key to --

22 CHIEF JUSTICE ROBERTS: Well, I mean, how do
23 we know it was a known phenomenon in terms of the
24 evolution of the statute and the decision of this Court
25 upholding it if there's no reference to it?

1 MR. STEWART: Well, the real -- I think the
2 real key to ascertaining Congress's intent is to look to
3 the definition of electioneering communication that
4 Congress enacted into the statute, and that definition
5 requires that the communication be a broadcast, cable,
6 or satellite communication in order to qualify as an
7 electioneering communication, and that it be aired
8 within a certain proximity to a Federal election, and
9 that in the case of an --

10 CHIEF JUSTICE ROBERTS: So -- so if Wal-Mart
11 airs an advertisement that says we have candidate action
12 figures for sale, come buy them, that counts as an
13 electioneering communication?

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

20 JUSTICE ALITO: Do you think the
21 Constitution required Congress to draw the line where it
22 did, limiting this to broadcast and cable and so forth?
23 What's your answer to Mr. Olson's point that there isn't
24 any constitutional difference between the distribution
25 of this movie on video demand and providing access on

1 the Internet, providing DVDs, either through a
2 commercial service or maybe in a public library,
3 providing the same thing in a book? Would the
4 Constitution permit the restriction of all of those as
5 well?

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

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

19 MR. STEWART: I'm not saying it could be
20 banned. I'm saying that Congress could prohibit the use
21 of corporate treasury funds and could require a
22 corporation to publish it using its PAC.

23 JUSTICE ALITO: Well, most publishers are
24 corporations. And a -- a publisher that is a
25 corporation could be prohibited from selling a book?

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

3 JUSTICE ALITO: I'm not asking what the
4 statute says. The government's position is that the
5 First Amendment allows the banning of a book if it's
6 published by a corporation?

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

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

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

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

25 MR. STEWART: Well, the statute applies to

1 cable, satellite, and broadcast communications. And the
2 Court in McConnell has addressed the --

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

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

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

18 MR. STEWART: That's correct.

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

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

1 CHIEF JUSTICE ROBERTS: No, I'm talking
2 about under the Constitution, what we've been
3 discussing, if it's a book.

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

7 CHIEF JUSTICE ROBERTS: Right, right.
8 Forget the --

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

14 CHIEF JUSTICE ROBERTS: No, take my
15 hypothetical. It doesn't say at the outset. If funds
16 -- here is -- whatever it is, this is a discussion of
17 the American political system, and at the end it says
18 vote for X.

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

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

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

1 treasury funds.

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

10 MR. STEWART: That's correct, and they --

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

20 MR. STEWART: It would raise a
21 constitutional --

22 JUSTICE BREYER: Is that present in this
23 case?

24 MR. STEWART: It's not present in the case.
25 I don't think it would raise a difficult constitutional

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: To write a book, to

1 pay for somebody to write a book?

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

14 CHIEF JUSTICE ROBERTS: Not just a
15 newsletter. Suppose a sign held up in Lafayette Park
16 saying vote for so and so. Under your theory of the
17 Constitution, the prohibition of that would be
18 constitutional?

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

25 JUSTICE SCALIA: And -- and you -- you get

1 around the fact that this would extend to any publishing
2 corporation by saying that there is a media exemption
3 because the Constitution guarantees not only freedom of
4 speech but also of the press?

5 MR. STEWART: Well, there has always been --

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

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

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

24 MR. STEWART: In -- in any event, the only
25 question this Court would potentially need to decide in

1 this case is whether the exemption for media companies
2 creates a disuniformity that itself renders the statute
3 unconstitutional, and the Court has already addressed
4 that question in McConnell. The claim was made that
5 because media corporations were exempt, there was
6 inequality of treatment as between those and other
7 corporations. And Congress said no, Congress -- I mean,
8 this Court said no, Congress can protect the interests
9 of the media and of the public in receiving information
10 by drawing that line. With respect to your --

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

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

24 JUSTICE SOUTER: Well, does it -- does it
25 come within electioneering because of the initial

1 subvention to the author?

2 MR. STEWART: It wouldn't be an
3 electioneering communication under BCRA because BCRA
4 wouldn't apply to the print media. Now, it would
5 potentially be covered by the --

6 JUSTICE SOUTER: We're -- we're talking
7 about how far the constitutional ban could go, and we're
8 talking about books.

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

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

15 MR. STEWART: The labor union's conduct
16 would be prohibited. The question of whether the book
17 that had already been --

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

20 MR. STEWART: That's correct.

21 JUSTICE SOUTER: Okay.

22 MR. STEWART: The question whether the --

23 JUSTICE SOUTER: So for the -- for the labor
24 union simply to -- to hire -- is there -- is there an
25 outright violation when the labor union -- I guess this

1 is a statutory question: Is there an outright violation
2 when the labor union comes up with the original
3 subvention?

4 MR. STEWART: I guess I would have to study
5 the Federal Election Campaign Act provisions more
6 closely to see whether they --

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

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

18 JUSTICE SOUTER: You're -- you're right. I
19 stand corrected. If the statute covered that as well,
20 if the statute covered the book as well.

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

24 JUSTICE SOUTER: That would be enough to
25 bring it in, and --

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

2 JUSTICE SOUTER: -- the Constitution?

3 MR. STEWART: And I think it would be
4 constitutional to forbid the labor union to do that.
5 Whether it would --

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

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

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

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

1 I wanted to return for a second, Justice
2 Alito, to a question you asked about the purported
3 interchangeability of the Internet and television. And
4 it's certainly true that -- that a growing number of
5 people are coming to experience those media as
6 essentially interchangeable, but there are still a lot
7 of people either who don't have computers at all or who
8 use their televisions and their computers for
9 fundamentally different purposes.

10 And I think it's evident that Citizens
11 United perceived the two media to be distinct because it
12 was willing to pay \$1.2 million to a cable service in
13 order to have the film made available on -- by Video On
14 Demand, when Citizens United could have posted the film
15 on its own Web site, posted the film on YouTube, and
16 could have avoided both the need to make the payment and
17 the potential applicability of the electioneering
18 communications provisions.

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

25 MR. STEWART: Our position is not that the

1 Constitution would permit it. Our position is that BCRA
2 wouldn't prohibit it because those are not covered
3 media. Now --

4 JUSTICE ALITO: Would the Constitution -- if
5 -- if BCRA -- if Congress in the next act covered that
6 in light of advances in the Internet, would the
7 Constitution permit that?

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

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

19 MR. STEWART: That's correct.

20 JUSTICE SCALIA: Okay.

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

1 JUSTICE KENNEDY: In -- in this case, Mr.
2 Stewart, I take it -- correct me if I'm wrong -- that
3 you think the distinction the Petitioner draws between
4 the 90-minute film and the -- and the short 30-second or
5 1-minute ad is a baseless distinction?

6 MR. STEWART: It is of no constitutional
7 significance. Congress certainly could have drafted the
8 electioneering communication definition --

9 JUSTICE KENNEDY: So if -- if we think that
10 the application of this to a 90-minute film is
11 unconstitutional, then the whole statute should fall
12 under your view --

13 MR. STEWART: Well, I think --

14 JUSTICE KENNEDY: -- because there's no
15 distinction between the two?

16 MR. STEWART: Well, I think the Court has
17 twice upheld the statute as applied to communications
18 that are the functional equivalent of express advocacy.
19 So --

20 JUSTICE KENNEDY: But I'm -- I'm saying that
21 if we -- if we think that this is -- that this film is
22 protected, and you say there's no difference between the
23 film and the ad, then the whole statute must be declared
24 void.

25 MR. STEWART: It would depend on the ground

1 under which you reached the conclusion that the film was
2 protected. If you disagreed with our submission and
3 said there is a constitutional difference between
4 90-minute films and 60-second advertisements, then
5 obviously you could draw that constitutional line. If
6 you concluded that they're all the same but they're all
7 protected, then obviously we would lose both cases.
8 But, again, you would have to --

9 JUSTICE KENNEDY: But you want us to say
10 they're both the same? You want -- you argue that
11 they're both the same.

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

21 And we would stress with respect to the film
22 that what makes this, in our view, an easy case is not
23 simply that the film repeatedly criticizes Hillary
24 Clinton's character and integrity. The clincher is that
25 the film repeatedly links Senator Clinton's purported

1 character flaws to her qualifications for president.

2 JUSTICE KENNEDY: But just from the
3 standpoint of art and literature, that's very odd.
4 Suppose you have a film which is quite moving with
5 scenery and music and magnificent acting, and a subtle
6 message. That may be far more effective in advocating,
7 and everyone knows that.

8 MR. STEWART: And that --

9 JUSTICE KENNEDY: Everyone knows that.

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

19 And the -- the lead opinion in Wisconsin
20 Right to Life said -- I think recognized that it will
21 foreseeably be the case that corporations will craft
22 advertisements that are, in fact, intended to influence
23 Federal elections but that are sufficiently subtle and
24 opaque that they won't constitute the functional
25 equivalent of express advocacy. And -- and the lead

1 opinion simply said that's the price that we have to pay
2 in order to ensure that an unduly broad range of
3 corporate speech is not restricted.

4 And we accept that holding, but in this case
5 what we have, people may feel -- is not subtle. People
6 may feel that because it's not subtle, it's less likely
7 to be effective. But the Court's decisions have never
8 drawn a constitutional line between advocacy that is
9 likely to be effective and advocacy that is not.

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

23 CHIEF JUSTICE ROBERTS: Even though that
24 type of case was never presented to the Court in
25 McConnell and was never presented to Congress when it

1 considered BCRA?

2 MR. STEWART: Well, it's not clear whether
3 it was presented to Congress or not. It is certainly
4 true that it was not the focus of congressional
5 attention. But we know from the definition of
6 "electioneering communication" what attributes Congress
7 wanted to make relevant to the coverage determination.
8 That is, it chose to restrict this to broadcast, cable,
9 and satellite communications and to leave out the print
10 media. It chose to restrict it to advertisements or
11 other communications that were aired within a specific
12 proximity to the election. If it had been unconcerned
13 with communications over a certain length, it could
14 certainly have made that part of the statutory
15 definition, but it chose not to do that.

16 JUSTICE GINSBURG: This film has been
17 compared to "Fahrenheit 911," which had the pervasive
18 message that President Bush was unsuited to be
19 President. And so if that film had been financed out of
20 the corporate -- a corporation's general treasury funds
21 and put on an election channel, that would similarly be
22 banned by the statute.

23 MR. STEWART: I am afraid I am not familiar
24 enough with that film to know whether it would have
25 constituted -- to -- to make an informed judgment about

1 whether that would have constituted the functional
2 equivalent of express advocacy under Wisconsin Right to
3 Life. And, of course, the "electioneering
4 communication" definition would apply only if the film
5 had been broadcast within a specified proximity to a
6 primary or general election in -- in 2004. But I think
7 --

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

14 I mean, what's somewhat different about this
15 case is that, unlike over-the-air television, you have a
16 situation where you only get this -- this message would
17 only air -- if somebody elects to hear it. So you
18 really have two interested people, the speaker and the
19 listener who wants to -- who wants to get this.

20 Isn't that a somewhat heightened First
21 Amendment interest than just over-the-air broadcasting
22 of advertising which probably most listeners don't want
23 to hear?

24 (Laughter.)

25 MR. STEWART: Well, I think -- I think the

1 -- first of all, I think if we had tried to make the
2 argument in McConnell that the BCRA provisions, or -- or
3 in any other case, that the BCRA provisions are
4 constitutional as applied to 30- or 60-second
5 advertisements because they are defensible means of
6 protecting listeners who, by hypothesis, don't want to
7 hear the message in the form of a captive audience, I
8 don't think we would have gotten very far.

9 I think it's certainly true that people have
10 a wide variation of attitudes towards campaign
11 advertisements. Some of them find them irritating, and,
12 of course, they can hit the mute button or -- or leave
13 the room, or in the case of people who use TiVo or VCRs
14 can simply fast-forward through them.

15 But the whole premise of the congressional
16 regulation and the whole premise of the corporation's
17 willingness to spend these massive amounts of money was
18 that enough people will be interested in the
19 advertisements that they will ultimately have an
20 electoral effect.

21 And -- and so if you compare the -- the film
22 to the advertisement, the advertisements, in one sense,
23 you could say are a less effective mechanism because a
24 lot of the people who reach them are unwilling listeners
25 or uninterested. But, on the other hand, they're more

1 effective because they reach more people.

2 The -- the flip side is that with the film
3 you reach a smaller audience. It's certainly a more
4 limited group of people who will sign up to receive the
5 movie, but they are more interested in the message. I
6 don't think you can operate on the hypothesis that there
7 is no --

8 JUSTICE SCALIA: You're talking about
9 effectiveness. That wasn't my point. My point was the
10 -- the seriousness of the First Amendment interest
11 that's being impinged where -- where you have both
12 somebody who wants to speak and someone who
13 affirmatively wants to hear what he has to say, and the
14 government says, no, the two of you can't do this.

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

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

19 MR. STEWART: I think it would be impossible
20 to divide media up in that way based on the relative
21 likelihood that the recipient of the message will want
22 to hear it. With respect to the -- the newsletters in
23 MCFL, for instance, on the one -- in many instances,
24 they were made available in public places. They were
25 also mailed to a variety of people. You could say --

1 JUSTICE SCALIA: I am not saying will --
2 will want. I mean you have a situation here where you
3 don't get it unless you take the initiative to
4 subscribe. I'm not -- I'm not trying to figure out
5 person by person who wants to hear it and who doesn't.
6 Here you have a medium in which somebody listens only if
7 that person wants to listen. So the -- the person
8 speaking wants to speak, and the person hearing wants to
9 hear. It seems to me that's a stronger -- a stronger
10 First Amendment interest.

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

14 JUSTICE GINSBURG: Was -- was this issue
15 aired before the three-judge court, the distinction
16 between, say, putting something on network TV and
17 putting something on View On Demand that the listener
18 has to opt into?

19 MR. STEWART: No. Indeed, the -- the
20 appellant in its complaint simply alleged affirmatively
21 that his communication, if aired on DVD -- I mean if
22 aired on VOD would fall within the statutory definition
23 of "electioneering communication."

24 CHIEF JUSTICE ROBERTS: Counsel, before you
25 run out here, can I -- we haven't talked about the

1 disclosure requirements yet. You understand the test to
2 be that disclosure is not required if the names of those
3 disclosed -- if those people would be reasonably subject
4 to reprisals?

5 MR. STEWART: That's correct. This Court
6 has recognized a constitutional exemption for two
7 disclosure requirements in cases where disclosure would
8 have a reasonable likelihood of leading to reprisal.

9 CHIEF JUSTICE ROBERTS: How -- how do we
10 apply that test? Is it inconceivable to you here that
11 people contributing to such a clearly anti-Clinton
12 advertisement are not going to be subject to reprisals?

13 MR. STEWART: It seems unlikely that
14 reprisals would occur because Citizens United -- this is
15 obviously a new film, but it is of a piece with
16 communications that Citizens United has engaged in.

17 CHIEF JUSTICE ROBERTS: That doesn't work,
18 because maybe they are going to change the nature of the
19 documentaries that they fund, or somebody who gave a
20 contribution 5 years ago may decide, boy, I don't like
21 what they're doing. I'm not going to give anymore. It
22 --

23 MR. STEWART: I guess the point I was going
24 to --

25 CHIEF JUSTICE ROBERTS: The fact that

1 they've disclosed in the past by compulsion of law
2 doesn't seem to answer the question of whether they are
3 going to be subject to reprisals.

4 MR. STEWART: Well, the point was that they
5 have disclosed in the past and have provided no evidence
6 of reprisals. But I think the Court's decisions are
7 clear that the burden is on the organization to show a
8 reasonable likelihood, at least to -- to set the -- the
9 ball in motion. And the three-judge district court here
10 said essentially what this Court said in McConnell with
11 regard to a variety of plaintiffs who included Citizens
12 United. That is, the Court said in McConnell and the
13 three-judge district court here that the plaintiffs had
14 made vague allegations of the general possibility of
15 reprisals but had offered no concrete evidence that
16 their own members --

17 CHIEF JUSTICE ROBERTS: But that seems to me
18 you're saying they've got to wait until the -- the horse
19 is out of the barn. You can only prove that you are
20 reasonably subject to reprisals once you've been the
21 victim of reprisals.

22 MR. STEWART: Well, I think the alternatives
23 would be to say that disclosure requirements are
24 categorically unconstitutional, which would be an
25 extreme departure from this Court's prior precedents or

1 --

2 CHIEF JUSTICE ROBERTS: That's saying --
3 that's saying that the test in McConnell is unworkable,
4 if you say the alternative is to say they are
5 categorically --

6 MR. STEWART: No. I mean I think the -- if
7 the -- we think the test in McConnell is workable; that
8 is, leave it up to the organization to establish
9 particularized proof of a reasonable likelihood of
10 reprisal. If you were going to --

11 CHIEF JUSTICE ROBERTS: If the Boy Scouts
12 run an ad and they have -- they're subject to
13 disclosure, are the donors who support that ad
14 reasonably subject to reprisals?

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

1 I think that would be itself an anomalous
2 and counterproductive content-based distinction if the
3 mere fact of the extremity of your speech insulated you
4 from a constitutional -- from a requirement that would
5 otherwise be constitutional.

6 CHIEF JUSTICE ROBERTS: Before you sit down,
7 any other?

8 Thank you, counsel.

9 Mr. Olson, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF THEODORE B. OLSON

11 ON BEHALF OF THE PETITIONER

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

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

25 JUSTICE BREYER: Well, I agree with you

1 about that, but I thought what saves this -- many people
2 thought it doesn't save it, it's -- the whole thing's
3 unconstitutional, the whole Act. That isn't what I
4 thought. So what saves this is of course you can't
5 prohibit all those things. What you do is put
6 limitations on the payment for them, see that there are
7 other ways of paying for it, say, through PACs, and then
8 limit very carefully the media that are affected and the
9 times for which they are affected. Now, that's the
10 statute before us, and it's I think you have to address.

11 MR. OLSON: Precisely, and five Justices in
12 Wisconsin Right to Life made the point that the PAC
13 mechanism is burdensome and expensive. There are briefs
14 in this case that demonstrate how much it is. And the
15 -- and it's easier if you have lots of money, if you are
16 a big corporation, and you can afford a PAC or you
17 already have one. So it's a burden on the least capable
18 of communicating. The --

19 JUSTICE STEVENS: Mr. Olson, can I ask this
20 -- this question? Wisconsin Right to Life -- Judge
21 Randolph thought the Chief Justice's opinion in that
22 case was controlling in this case. Do you think the
23 Chief Justice's opinion in that case correctly stated
24 the law?

25 MR. OLSON: Of course.

1 (Laughter.)

2 MR. OLSON: By definition.

3 JUSTICE SCALIA: Good answer.

4 (Laughter.)

5 JUSTICE STEVENS: I want to be sure because
6 you're -- sometimes I don't think you're quite saying
7 that. But you do agree that that opinion is correct?

8 MR. OLSON: What I am saying is I -- we
9 accept the Court's decision in Wisconsin Right to Life.
10 To the extent that the Court did not get to this type of
11 documentary where the issue distinction, the false
12 dichotomy between issues and candidates --

13 JUSTICE STEVENS: But you accept the test
14 that was stated in his opinion?

15 MR. OLSON: The -- the -- that no reasonable
16 -- not reasonably susceptible to any other
17 interpretation? Of course we do, Justice Stevens, but
18 we submit, a 90-minute discussion of various different
19 issues are subject to all kinds of interpretation, and
20 when you get a long exposition of issues that are
21 important to the public and someone says -- the
22 government says, well, it's going to be -- we can
23 prohibit it, and by the way, the government says, well,
24 when we mean "prohibit" we mean just you can't use your
25 union -- or corporate treasury funds -- what they mean

1 by "prohibit" is that they will put you in jail if you
2 do it. They will put you in jail for 5 years. That
3 means prohibited.

4 Now, what -- what we're getting at here,
5 when -- when you're trying to make a 90-minute movie
6 that discusses things that are important to the public
7 during an election of the highest officer of the United
8 States, many people will interpret that as critical;
9 many people will interpret it as supportive; there are
10 things all over the lot. So it's subject to lots of
11 different interpretations.

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:11 a.m., the case in the

1 above-entitled matter was submitted.)

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