Transcript:

ORAL ARGUMENT OF THEODORE B. OLSON ON BEHALF OF THE PETITIONER

Chief Justice Roberts: We will hear argument today in Case 08-205, Citizens United v. The Federal Election Commission.

Mr. Olson.

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 of Video On Demand.

Because the limitation on speech, political speech, is at the core of the First Amendment, the government has a heavy burden to establish each application of a restriction on that form of speech is a narrowly tailored response to a compelling governmental interest.

The government cannot prove and has not attempted to prove that a 90-minute documentary made available to people who choose affirmatively to receive it, to opt in, by an ideologically oriented small corporation poses any threat of quid pro quo corruption or its appearance.

Indeed, this documentary is the very definition of robust, uninhibited debate about a subject of intense political interest that the First Amendment is there to guarantee.

Justice Souter: Mr. Olson, if the film were distributed by General Motors, would your argument be the same?

Mr. Olson: Well, it wouldn't -- definitely would not be the same because there are several aspects of the argument that we present.

However, in one respect, it would.

A 90-minute documentary was not the sort of thing that the -- the BCRA -- that the Congress was intended to prohibit.

In fact, as the -- as the Reporters Committee for -- for Freedom of Speech points out, the documentary is objectively indistinguishable from other news media commentary--

Justice Souter: But the -- the point, then, of similarity is you would, whether it was offered by General Motors or offered by -- by this Petitioner, in effect call for some qualification of the -- the general rule allowing limitations on corporate political activity of -- of the speech variety?

Mr. Olson: --Yes, we would, although it is a very important factor.

Justice Souter: So how would we draw the line?

Mr. Olson: Well, one of the reasons that -- one of the bases upon which you would draw the line is to look at the documentary -- the voluminous documentary record that the government cites and this Court cited in the McConnell case as a justification for the restrictions themselves.

As--

Justice Souter: Well, would every -- in effect, every limitation on corporate speech or on corporate expenditure and the nature of speech be subject, then, to in effect this all-factor balancing test?

Mr. Olson: --Well, I think what I'm trying to say is that what the -- what the Congress was concerned with -- and Judge Kollar-Kotelly in the district court opinion that you considered in McConnell discusses this on page 646 of her opinion -- that this sort of communication was not something that Congress intended to prohibit.

You would look at, if Congress intended to prohibit 90 minutes--

Justice Souter: So -- so your -- your argument then is there's something distinct about the speech, which could be considered regardless of the corporate form?

Mr. Olson: --Well, that's part of our argument, yes.

It's not--

Justice Souter: If that is the case, what is -- what is the answer to this?

That -- that still is going to involve a -- a fairly complicated set of analyses, probably in a lot of cases.

Why is that necessary or worthwhile to preserve First Amendment values when you could have done this with a PAC?

Mr. Olson: --Well, as this Court said in the Wisconsin Right to Life case just a couple years ago, that the PAC vehicle is burdensome and difficult--

Justice Souter: That's right.

You've got reporting.

You've got limitations on -- on corporate contributions and so on, but in this case, for example, most of your contributions, as I understand from the record, were individual.

They weren't corporate.

There was one perhaps.

There was some corporate contribution--

Mr. Olson: --Yes, on page 252 of the appendix and 251, it points out -- you're absolutely correct -- that 1 percent of the contributions--

Justice Souter: --Okay.

Mr. Olson: --were from corporations.

Justice Ginsburg: Was that -- was that established?

I thought that the record was hardly made of the contributors to this film.

I think there was something like $200,000 accounted for, and the film cost -- to get the Channel '08, whatever it was, to put it on cost over a million dollars?

Mr. Olson: The government sent an interrogatory, Justice Ginsburg, asking for the major contributions with respect to this project, and the ones that they sought -- the government sought what they thought was important; the answer to that interrogatory is at page 251a and 252a -- that the government was seeking information with respect to contributions at a $1,000 or more; 198,000 came from individuals.

And, by the way, the three largest contributors that are listed on page 252 of the Joint Appendix are given credit in the film itself.

So there's no effort to -- to conceal those individuals.

So that it is possible -- it's possible that corporations throughout America were giving small amounts of money to this.

That record doesn't establish one way or the other.

What it does establish is what the government felt was necessary for its case that the major contributors were individuals and not corporations.

Justice Breyer: You have answered Justice Souter.

I took your answer to be the following: That if the corporation had paid -- paid for a program and the program was 90 minutes which said vote for Smith, vote for Smith over and over -- that's the program -- that you concede that the government could ban this under the Act.

Mr. Olson: Well, it's -- it is difficult--

Justice Breyer: I don't think they would.

We agree.

It's an imaginary hypothetical.

But, in fact, if they did have 90 minutes of vote for Smith or vote against Jones, you concede for purposes of this argument that the government can ban it.

Is that bright or not?

Mr. Olson: --If -- not by this organization.

We think that if it's a small, nonprofit organization, which is very much like the Massachusetts--

Justice Breyer: Okay, okay.

So one of your arguments is this is a special corporation.

You can't.

Now suppose it's General Motors.

Can they?

Mr. Olson: --Well, General Motors may be smaller than the client that we are representing.

[Laughter]

Justice Breyer: I'd just like to get -- I want to get an answer to the question.

Mr. Olson: Yes, I think--

Justice Breyer: Yes.

Okay.

Mr. Olson: --that to the extent that it--

Justice Breyer: Okay.

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

What ----

[Laughter]

What -- how does this film vary from my example, and why does the variance make a difference?

Mr. Olson: --The difference is: It's exactly what the Court was describing in Wisconsin Right to Life.

It is a 90 -- it is -- it informs and educates, which is what the Court said, or the Chief Justice's opinion, the controlling opinion said, was the mark of an issue communication.

And as this Court said--

Justice Ginsburg: Mr. Olson, I thought you conceded in the -- at least as I read your reply brief, that you were no longer saying this is about an issue unrelated to any election.

I thought you said that this was a 90-minute movie

"concerning the qualifications, character, and fitness of a candidate for the Nation's highest office. "

And that's just what Wisconsin Right to Life was not.

It was not about the character, qualifications, and fitness of either of the Senators.

Mr. Olson: --What the -- what the Court said in Wisconsin Right to Life was that the distinction between an issue -- issue advocacy and campaign advocacy dissolves upon practical application.

This is exactly what the Court was talking about there.

And--

Justice Ginsburg: But didn't the Court there say this is not about character, qualifications, and fitness?

Mr. Olson: --Yes, it did, Justice Ginsburg, but what my point is: That there isn't just two boxes in the world of communications about public issues, one box for so-called issues and one box for campaign advocacy.

That's what I think the Court meant when it said, not just in Wisconsin Right to Life but in earlier cases, that the distinction dissolves upon application.

Justice Souter: But no matter how many boxes we have, doesn't this one fall into campaign advocacy?

I mean, I've got the government's brief open at -- open at pages 18 to 19 with the quotations: She will lie about anything.

She's deceitful.

She's ruthless, cunning, dishonest, do anything for power, will speak dishonestly, reckless, a congenital liar, sorely lacking in qualifications, not qualified as commander in chief.

I mean, this sounds to me like campaign advocacy.

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

Justice Breyer: I want to get the answer to what I was asking.

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

Mr. Olson: This is a long discussion of the record, qualifications, history, and conduct of someone who is in the political arena, a person who already holds public office, who now holds a different public office, who, yes, at that point, Justice Souter, was running for office.

But the fact is that what could the individual making a -- as I said, the Reporters Committee for the Right to Life said this is indistinguishable from something that is on the public media every day, a long discussion.

It might be -- what you're suggesting is that unless it's somehow evenhanded, unless it somehow says -- which would be viewpoint discrimination or prevention of viewpoints, which is the safe harbor that the government has written into its so-called safe harbor, if you don't have a point of view, you can go ahead and express it.

Justice Breyer: No, that isn't -- that isn't the suggestion.

The suggestion I was going to, or trying to get to, is we know you can't just say vote against Smith, vote against Smith, vote against Smith.

Now, I wanted to know the difference between that and a film that picks out bad things that people did -- no good ones, just bad ones the candidate did.

And then we have another film that picks out just good things candidates do.

And so candidates run films that show the good things they do, and then someone else shows the bad things they do.

Now, why is that not the same as vote against Smith?

Though I grant you, it's more intelligent.

It's more informative.

It's even better electioneering.

So we're after electioneering.

Why doesn't that fall within the forbidden category?

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

What you're suggesting is that a long discussion of facts, record, history, interviews, documentation, and that sort of thing, if it's all negative, it can be prohibited by -- and it's a felony.

You can go to jail for 5 years for sharing that information with the American public, or if it's all favorable, you can go to jail.

But if you did half and half, you couldn't.

Justice Breyer: I -- I guess it's the same as if you were to say, you know, I think Smith is a great guy.

That's all.

I'm sharing information.

And what I don't see is if you agree that we could ban the commercial that says, I see Smith is a great guy, why is it any different to supplement that with the five best things that Smith ever did?

Mr. Olson: Because -- because of the First Amendment.

Congress shall make no law abridging the freedom of speech.

When -- when the government -- when this Court has permitted that to happen, it has only done it in the most narrow circumstances for a compelling governmental interest.

Justice Kennedy: But I -- I guess what -- what Justice Breyer is asking is -- I have the same question.

If we concede -- and at the end of the day you might not concede this, but if we take this as a beginning point, that a short, 30-second, 1-minute campaign ad can be regulated, you want me to write an opinion and say, well, if it's 90 minutes, then that's different.

I -- it seems to me that you can make the argument with 90 -- the 90 minutes is much more powerful in support or in opposition to a candidate.

That's I -- that's the thrust of the questioning.

Mr. Olson: I understand that, Justice Kennedy, and it is difficult.

But let me say that the record that you were considering in McConnell -- and I specifically invite, as I did before, page -- the Court's attention to 646 of this -- of the district court's opinion, which specifically said the government and Congress was concerned about these short, punchy ads that you have no choice about seeing, and not concerned about a thorough recitation of facts or things that you would have to make an affirmative decision to opt into.

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

Chief Justice Roberts: Counsel, I think you have kind of shifted your focus here from the difference between a 10-second ad and a 90-minute presentation and how that presentation is received, whether it's over the normal airwaves or on this Video On Demand.

What -- what is the distinction between the 10-second commercial and, say, the 90-minute infomercial?

Mr. Olson: --The thing -- I think it's -- it's pointed out specifically in your opinion, controlling opinion, for Wisconsin Right to Life.

That which informs and educates and may seek to persuade is something that is -- is on the line of being permissible.

The government hasn't established -- never did try to establish -- I did shift -- I didn't shift but all of these are factors.

It's who's doing the speaking--

Justice Scalia: You can educate in 30 seconds.

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

Mr. Olson: --The point, I think--

Justice Scalia: Doesn't that educate?

Mr. Olson: --The point, I think, Justice Scalia, is, yes, you can educate in 10 seconds, you can educate in 30 seconds.

But what -- what the Court was trying to do -- what Congress was trying to do is get at the things that were most potentially corruptive.

Justice Scalia: Wait, are you making a -- a statutory argument now or a constitutional argument?

What Congress was trying to do has nothing to do, it seems to me, with the constitutional point you're arguing.

Mr. Olson: The government makes the point that it established a voluminous record of evidence.

Both Congress had before it and this Court had before it a voluminous volume of evidence because it had the burden of proving that something was really bad with these -- these types of advertisements.

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

And the government talks about this today in its brief, the things that Congress felt were the most acute problems.

Now--

Justice Scalia: So you're making a statutory argument now?

Mr. Olson: --I'm making a--

Justice Scalia: You're saying that this -- this isn't covered by it.

Mr. Olson: --Yes, I am making a statutory argument in the sense that you will construe the statute in the way that doesn't violate the Constitution.

The Constitution, as -- as the Court said in Wisconsin Right to Life, gives -- ties to the speaker, errs on the side of permitting the speech, not prohibiting the speech.

And so all of those things may be statutory arguments, Justice Scalia, but they are also constitutional arguments.

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

Chief Justice Roberts: So -- so this argument doesn't depend upon whether this is properly characterized as express -- the functional equivalent of express advocacy?

Your contention is that even if it is, that because it wasn't in the factual record in McConnell or before Congress, it is a type of functional -- it is a type of express advocacy that's not covered by the Act?

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

Chief Justice Roberts: Well, that's -- that's why I'm trying to figure out, the distinction in your argument.

I mean, if we think that this is the functional equivalent of express advocacy, are you contending that it is nonetheless not covered in light of the record before the Court in McConnell and before Congress?

Mr. Olson: --I -- I think I would agree with that, but I would also say that the -- the idea of the functional equivalent of express advocacy is a very magic word problem that this Court has struggled with in McConnell and in -- in each of the cases.

I would -- I said at the beginning that this is an incomprehensible prohibition, and I -- and my -- I think that's demonstrated by the fact that since 2003 this Court has issued something close to 500 pages of opinions interpreting and trying to apply the First Amendment to Federal election law.

And I counted 22 separate opinions from the Justices of this Court attempting to -- in just the last 6 years, attempting to figure out what this statute means, how it can be interpreted.

In fact--

Chief Justice Roberts: Well, that's because it's mandatory appellate jurisdiction.

I mean, it's -- you don't have a choice.

[Laughter]

Mr. Olson: --There would be fewer -- there would be fewer opinions.

I guess my point is that--

Justice Stevens: And maybe those cases presented more difficult issues than this one.

Mr. Olson: --I think this presents a much easier issue, Justice Stevens, because this is the type of -- if there is anything that the First Amendment is intended to protect in the context of elections that are occurring -- which, by the way, occur 4 years running, but the last election, presidential election, occurred throughout the entire 2008 -- if the American people need to have that kind of information.

And the statute is both overly broad because if it was a hotel ad, if it was a hotel saying Senator Clinton stayed here or Senator McCain stayed here, it would be prohibited because it was a hotel saying so, even though it really had nothing to do with the election.

If it is -- but it's -- if it's a corporation that put together an analysis of the earmark positions of each of the senatorial candidates -- most all of the candidates were running from the Senate, they all had this -- these issues where they may have voted or not against earmarks, that would be--

Justice Ginsburg: But, Mr. Olson, this is -- I think you were right in conceding at the beginning, this is not like the speech involved in Wisconsin Right to Life.

This is targeted to a specific candidate for a specific office to be shown on a channel that says Election '08, that tells the -- the viewer over and over again what -- just for example, it concludes with these are things worth remembering before you go in potentially to vote for Hillary Clinton.

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

Mr. Olson: --Yes, Justice Ginsburg, I understand your point.

There is much in there that if you saw it, you would form an opinion with respect to how you might want to vote.

You might -- it might form a different -- you might form all kinds of different opinions.

But it was -- it was an analysis of the background record and history and qualifications of someone running for president.

Of course I concede that.

But what is the -- what is the maker of a movie to take out in order to prevent that from happening?

I understand from some of the questions that if it was more evenhanded -- if it said, well, this candidate did this, but this candidate did this or this candidate was born in the Panama Canal

Zone and this candidate was born in Hawaii, and that affects whether or not they are natural-born citizens or not, and it was more evenhanded, would that then not be a felony?

Justice Souter: As you -- as you've said yourself, as you pointed out, there -- there is a point at which there is no nonporous border between issue discussion and candidate discussion.

But I think the -- the problem that -- that Justice Ginsburg is having, that I'm having, and others is that it does not seem to me that with the quotations we're dealing with here -- as Justice Breyer said, it's not a musical comedy.

I think we -- we have no choice, really, but to say this is not issue advocacy; this is express advocacy saying don't vote for this person.

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

Mr. Olson: Well, it is a distinction that Congress was concerned about, and it's a distinction that's all over the record--

Justice Souter: You say that -- why -- what -- what is your basis for saying that Congress is -- is less concerned with 90 minutes of don't vote for Clinton than it was with 60 seconds of don't vote?

Mr. Olson: --Because -- because the record in Congress and the record in this Court is that those types of advertisements were more effective because they came into your home--

Justice Souter: They are the characteristic advertisement.

There is no question about that.

That is the paradigm case.

I agree with you.

But I don't see how you -- you then leap-frog from saying -- from saying that is the paradigm case to saying that this never covers anything but the paradigm case when the only distinction is time.

Mr. Olson: --The -- the -- I think the -- what -- what Congress was concerned about is the most severe and the most acute problem, as Justice Kollar-Kotelly said, which everyone acknowledges was the problem Congress sought to address with BCRA.

It's not just that, however.

The point that you just made about a nonporous border, it is the government's responsibility to the extent that you can't figure out how evenhanded you must be or what you must take out of

your communication in order not to go to jail for airing it, it is the functional equivalent -- if everything is the functional equivalent -- if it mentions a candidate during an election, which is what the government says, it's the functional equivalent of a prior restraint, because you don't dare--

Justice Scalia: Mr. Olson, I -- I think we've been led astray by -- by the constant reference to what Congress intended.

As I understood your point, it was not -- it was not that, well, one is covered by the statute and the other isn't, but it is that one is covered by the Constitution and the other isn't.

And it may well be that -- that the kind of speech that is reflected in a serious 90-minute documentary is entitled to greater constitutional protection.

And it may well be that the kind of speech that is not only offered but invited by the listener is entitled to -- is entitled to heightened First Amendment scrutiny, which is -- which is what this is since you have pay per view and--

Mr. Olson: --I agree with that completely, Justice Scalia.

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

Chief Justice Roberts: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART ON BEHALF OF THE RESPONDENT

Mr. Stewart: Mr. Chief Justice, and may it please the Court: The lead opinion in Wisconsin Right to Life didn't just use the term 2667 of volume 127 of the Supreme Court Reporter, the plurality or the lead opinion stated:

"In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. "

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

Chief Justice Roberts: Well, the length of the advertisements wasn't remotely at issue in either Washington Right to Life or McConnell or before Congress when they passed this law.

Mr. Stewart: --Well, certainly Congress considered a variety of evidence bearing on campaign practices that had been undertaken in the past.

They were primarily -- most of the examples on which they focused were 30-second and 60-second advertisements.

It's certainly been a recurring phenomenon in the past that candidates would air, for instance, 30-minute infomercials.

Chief Justice Roberts: Any discussion in either McConnell -- any citation either in McConnell or the Congressional Record to those types of documentaries?

Mr. Stewart: I'm not sure about the citation; I'm not aware of any citation in McConnell or the Congressional Record, but it was certainly a known phenomenon.

And I think the real key to--

Chief Justice Roberts: Well, I mean, how do we know it was a known phenomenon in terms of the evolution of the statute and the decision of this Court upholding it if there's no reference to it?

Mr. Stewart: --Well, the real -- I think the real key to ascertaining Congress's intent is to look to the definition of electioneering communication that Congress enacted into the statute, and that definition requires that the communication be a broadcast, cable, or satellite communication in order to qualify as an electioneering communication, and that it be aired within a certain proximity to a Federal election, and that in the case of an--

Chief Justice Roberts: So -- so if Wal-Mart airs an advertisement that says we have candidate action figures for sale, come buy them, that counts as an electioneering communication?

Mr. Stewart: --If it's aired in the right place at the right time, that would be covered.

Now, under this Court's decision in Wisconsin Right to Life, it would be unconstitutional as applied to those advertisements, because those advertisements certainly would be susceptible of a reasonable construction--

Justice Alito: Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth?

What's your answer to Mr. Olson's point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book?

Would the Constitution permit the restriction of all of those as well?

Mr. Stewart: --I think the -- the Constitution would have permitted Congress to apply the electioneering communication restrictions to the extent that they were otherwise constitutional under Wisconsin Right to Life.

Those could have been applied to additional media as well.

And it's worth remembering that the pre-existing Federal Election Campaign Act restrictions on corporate electioneering which have been limited by this Court's decisions to express advocacy--

Justice Alito: That's pretty incredible.

You think that if -- if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?

Mr. Stewart: --I'm not saying it could be banned.

I'm saying that Congress could prohibit the use of corporate treasury funds and could require a corporation to publish it using its PAC.

Justice Alito: Well, most publishers are corporations.

And a -- a publisher that is a corporation could be prohibited from selling a book?

Mr. Stewart: Well, of course, the statute contains its own media exemption or media--

Justice Alito: I'm not asking what the statute says.

The government's position is that the First Amendment allows the banning of a book if it's published by a corporation?

Mr. Stewart: --Because the First Amendment refers both to freedom of speech and of the press, there would be a potential argument that media corporations, the institutional press, would have a greater First Amendment right.

That question is obviously not presented here.

The -- the other two things--

Justice Kennedy: Well, suppose it were an advocacy organization that had a book.

Your position is that under the Constitution, the advertising for this book or the sale for the book itself could be prohibited within the 60/90-day period -- the 60/30-day period?

Mr. Stewart: --If the book contained the functional equivalent of express advocacy.

That is, if it was subject to no reasonable interpretation--

Justice Kennedy: And I suppose it could even -- is it the Kindle where you can read a book?

I take it that's from a satellite.

So the existing statute would probably prohibit that under your view?

Mr. Stewart: --Well, the statute applies to cable, satellite, and broadcast communications.

And the Court in McConnell has addressed the--

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

Mr. Stewart: --It -- it can't be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and could be required to use -- to raise funds to publish the book using its PAC.

Chief Justice Roberts: If it has one name, one use of the candidate's name, it would be covered, correct?

Mr. Stewart: That's correct.

Chief Justice Roberts: If it's a 500-page book, and at the end it says, and so vote for X, the government could ban that?

Mr. Stewart: Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provisions.

Chief Justice Roberts: No, I'm talking about under the Constitution, what we've been discussing, if it's a book.

Mr. Stewart: If it's a book and it is produced -- again, to leave -- to leave to one side the question of--

Chief Justice Roberts: Right, right.

Forget the--

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

Chief Justice Roberts: --No, take my hypothetical.

It doesn't say at the outset.

If funds -- here is -- whatever it is, this is a discussion of the American political system, and at the end it says vote for X.

Mr. Stewart: --Yes, our position would be that the corporation could be required to use PAC funds rather than general treasury funds.

Chief Justice Roberts: And if they didn't, you could ban it?

Mr. Stewart: If they didn't, we could prohibit the publication of the book using the corporate treasury funds.

Justice Breyer: I wonder if that's -- I mean, I take it the answer to the question, can the government ban labor unions from saying we love this person, the corporations, we love them, the environmentalists saying we love them, is of course the government can't ban that.

The only question is, who's paying for it.

And they can make a determination of how much money the payors can pay, but you can't ban it.

Mr. Stewart: That's correct, and they--

Justice Breyer: All right.

If that's correct, then I take it the interesting question here would be -- I don't know if it arises in this case.

Suppose there were a kind of campaign literature or -- or advocacy that either a corporation had to pay for it, it couldn't pay for it through the PAC because for some reason -- I don't know -- the PAC -- and there's no other way of getting it to the public.

That would raise a constitutional question, wouldn't it?

Mr. Stewart: --It would raise a constitutional--

Justice Breyer: Is that present in this case?

Mr. Stewart: --It's not present in the case.

I don't think it would raise a difficult constitutional question because presumably if the reason the corporation couldn't do it through the PAC -- the only reason I could think of is that it couldn't find PAC-eligible donors who were willing to contribute for this speech.

And if that's the case, the corporation would -- could still be forbidden to use its general treasury.

Justice Breyer: I don't know about that.

But I guess I would be worried if in fact there was some material that couldn't get through to the public.

I would be very worried.

But I don't think I have to worry about that in this case, do I?

Mr. Stewart: That's correct, both because the question isn't presented here and because Congress--

Chief Justice Roberts: No, but if we accept your constitutional argument, we're establishing a precedent that you yourself say would extend to banning the book, assuming a particular person pays for it.

Mr. Stewart: --I think the Court has already held in -- both in Austin and in McConnell, that Congress can or that Congress or State legislatures can prohibit the use of corporate treasury funds for express advocacy.

Chief Justice Roberts: To write a book, to pay for somebody to write a book?

Mr. Stewart: Well, in MCFL, for instance, the communication was not a book, but it was a newsletter, it was written material; and the Court held this was express advocacy for which the use of corporate treasury funds would ordinarily be banned.

It held that because of the distinctive characteristics of the particular corporation at issue in that case, MCFL was entitled to a constitutional exemption.

But I think the clear thrust of MCFL is that the publication and dissemination of a newsletter containing express advocacy could ordinarily be banned with respect to the use of corporate treasury funds.

Chief Justice Roberts: Not just a newsletter.

Suppose a sign held up in Lafayette Park saying vote for so and so.

Under your theory of the Constitution, the prohibition of that would be constitutional?

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

Justice Scalia: And -- and you -- you get around the fact that this would extend to any publishing corporation by saying that there is a media exemption because the Constitution guarantees not only freedom of speech but also of the press?

Mr. Stewart: --Well, there has always been--

Justice Scalia: But does "the press" mean the media in that constitutional provision?

You think in 1791 there were -- there were people running around with fedoras that had press -- little press tickets in it, "Press"?

Is that what "press" means in the Constitution?

Doesn't it cover the Xerox machine?

Doesn't it cover the -- the right of any individual to -- to write, to publish?

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

Justice Scalia: Well, I don't see any reason why it wouldn't.

I'm saying there's no basis in the text of the Constitution for exempting press in the sense of, what, the Fifth Estate?

Mr. Stewart: --In -- in any event, the only question this Court would potentially need to decide in this case is whether the exemption for media companies creates a disuniformity that itself renders the statute unconstitutional, and the Court has already addressed that question in McConnell.

The claim was made that because media corporations were exempt, there was inequality of treatment as between those and other corporations.

And Congress said no, Congress -- I mean, this Court said no, Congress can protect the interests of the media and of the public in receiving information by drawing that line.

With respect to your--

Justice Souter: To point out how far your argument would go, what if a labor union paid an author to write a book advocating the election of A or the defeat of B?

And after the manuscript was prepared, they then went to a commercial publisher, and they go to Random House.

Random House says, yes, we will publish that.

Can the -- can the distribution of that be in effect subject to the electioneering ban because of the initial labor union investment?

Mr. Stewart: --Well, exactly what the remedy would be, whether there would be a basis for suppressing the distribution of the book, I'm not sure.

I think it's clear under--

Justice Souter: Well, does it -- does it come within electioneering because of the initial subvention to the author?

Mr. Stewart: --It wouldn't be an electioneering communication under BCRA because BCRA wouldn't apply to the print media.

Now, it would potentially be covered by the--

Justice Souter: We're -- we're talking about how far the constitutional ban could go, and we're talking about books.

Mr. Stewart: --Well, I -- we would certainly take the position that if the labor union used its treasury funds to pay an author to produce a book that would constitute express advocacy, that that--

Justice Souter: And the book was then taken over as a commercial venture by Random House?

Mr. Stewart: --The labor union's conduct would be prohibited.

The question of whether the book that had already been--

Justice Souter: No, but prohibition only comes when we get to the electioneering stage.

Mr. Stewart: --That's correct.

Justice Souter: Okay.

Mr. Stewart: The question whether the--

Justice Souter: So for the -- for the labor union simply to -- to hire -- is there -- is there an outright violation when the labor union -- I guess this is a statutory question: Is there an outright violation when the labor union comes up with the original subvention?

Mr. Stewart: --I guess I would have to study the Federal Election Campaign Act provisions more closely to see whether they--

Justice Souter: Let's assume for the sake of argument that they would not be.

The subvention is made, the manuscript is prepared, Random House then publishes it, and there is a distribution within the -- what is it -- the 60-day period.

Is the -- is the original subvention (a) enough to bring it within the prohibition on the electioneering communication, and (b) is that constitutional?

Mr. Stewart: --Well, again, it wouldn't qualify as an electioneering communication under BCRA because that statutory definition only applies--

Justice Souter: You're -- you're right.

I stand corrected.

If the statute covered that as well, if the statute covered the book as well.

Mr. Stewart: --I think the use of labor union funds, as part of the overall enterprise of writing and then publishing the book, would be covered.

Justice Souter: That would be enough to bring it in, and--

Mr. Stewart: And I -- I don't--

Justice Souter: --the Constitution?

Mr. Stewart: --And I think it would be constitutional to forbid the labor union to do that.

Whether it would--

Chief Justice Roberts: Again, just to follow up, even if there's one clause in one sentence in the 600-page book that says, in light of the history of the labor movement, you should be careful about candidates like John Doe who aren't committed to it?

Mr. Stewart: --Well, whether in the context of a 600-page book that would be sufficient to make the book either an electioneering communication or express advocacy--

Chief Justice Roberts: Well, it does by its terms, doesn't it?

Published within 60 days.

It mentions a candidate for office.

What other qualification is there?

Mr. Stewart: --Well, I think the Court has already crossed that bridge in Wisconsin Right to Life by saying the statute could constitutionally be applied only if it were the functional equivalent of express advocacy, and -- so that would be the -- and we accept that constitutional holding.

That would be the relevant constitutional question.

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

And it's certainly true that -- that a growing number of people are coming to experience those media as essentially interchangeable, but there are still a lot of people either who don't have

computers at all or who use their televisions and their computers for fundamentally different purposes.

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

Justice Alito: If they had done either of the things you just mentioned, putting it on its Web site or putting it on YouTube, your position would be that the Constitution would permit the prohibition of that during the period prior to the primary or the election?

Mr. Stewart: Our position is not that the Constitution would permit it.

Our position is that BCRA wouldn't prohibit it because those are not covered media.

Now--

Justice Alito: Would the Constitution -- if -- if BCRA -- if Congress in the next act covered that in light of advances in the Internet, would the Constitution permit that?

Mr. Stewart: --Yes, I mean, the Court in McConnell upheld on the electioneering communications on their face, and this Court -- a majority of this Court in Wisconsin Right to Life said those provisions are constitutional as applied--

Justice Scalia: I -- I'm a little disoriented here, Mr. Stewart.

We are dealing with a constitutional provision, are we not, the one that I remember which says Congress shall make no law abridging the freedom of the press?

That's what we're interpreting here?

Mr. Stewart: --That's correct.

Justice Scalia: Okay.

Mr. Stewart: But, again, this -- the Court obviously has grappled in the past with the question of how to apply that provision to use of corporate treasury funds either for express electoral advocacy or its functional equivalent--

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

Mr. Stewart: --It is of no constitutional significance.

Congress certainly could have drafted the electioneering communication definition--

Justice Kennedy: So if -- if we think that the application of this to a 90-minute film is unconstitutional, then the whole statute should fall under your view--

Mr. Stewart: --Well, I think--

Justice Kennedy: --because there's no distinction between the two?

Mr. Stewart: --Well, I think the Court has twice upheld the statute as applied to communications that are the functional equivalent of express advocacy.

So--

Justice Kennedy: But I'm -- I'm saying that if we -- if we think that this is -- that this film is protected, and you say there's no difference between the film and the ad, then the whole statute must be declared void.

Mr. Stewart: --It would depend on the ground under which you reached the conclusion that the film was protected.

If you disagreed with our submission and said there is a constitutional difference between 90-minute films and 60-second advertisements, then obviously you could draw that constitutional line.

If you concluded that they're all the same but they're all protected, then obviously we would lose both cases.

But, again, you would have to--

Justice Kennedy: But you want us to say they're both the same?

You want -- you argue that they're both the same.

Mr. Stewart: --That -- that's correct.

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

And we would stress with respect to the film that what makes this, in our view, an easy case is not simply that the film repeatedly criticizes Hillary Clinton's character and integrity.

The clincher is that the film repeatedly links Senator Clinton's purported character flaws to her qualifications for president.

Justice Kennedy: But just from the standpoint of art and literature, that's very odd.

Suppose you have a film which is quite moving with scenery and music and magnificent acting, and a subtle message.

That may be far more effective in advocating, and everyone knows that.

Mr. Stewart: And that--

Justice Kennedy: Everyone knows that.

Mr. Stewart: --That's essentially the argument that a majority of this Court rejected in Wisconsin Right to Life; that is, that that was part of the basis on which Congress enacted BCRA, part of the reason that it wanted to establish a purely objective test based on naming an identified candidate and airing in proximity to the election.

Congress recognized that in many situations the most effective advocacy is the subtler advocacy.

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

And -- and the lead opinion simply said that's the price that we have to pay in order to ensure that an unduly broad range of corporate speech is not restricted.

And we accept that holding, but in this case what we have, people may feel -- is not subtle.

People may feel that because it's not subtle, it's less likely to be effective.

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

Clearly, if this were express advocacy -- I think clearly, if the -- the narrator had said in the first 30 seconds of the film: A Hillary Clinton presidency would pose a danger to the country, it's important for all citizens to vote against Hillary Clinton, what follows are extended analyses of episodes in her past that reflect Hillary Clinton's unsuitability for that office.

And if then in the last 89 minutes of the film the filmmaker had made no overt reference to the upcoming election but had simply given a negative portrayal of Hillary Clinton, the person, that would be express advocacy that would be proscribable even without regard to BCRA.

So that if--

Chief Justice Roberts: Even though that type of case was never presented to the Court in McConnell and was never presented to Congress when it considered BCRA?

Mr. Stewart: --Well, it's not clear whether it was presented to Congress or not.

It is certainly true that it was not the focus of congressional attention.

But we know from the definition of "electioneering communication" what attributes Congress wanted to make relevant to the coverage determination.

That is, it chose to restrict this to broadcast, cable, and satellite communications and to leave out the print media.

It chose to restrict it to advertisements or other communications that were aired within a specific proximity to the election.

If it had been unconcerned with communications over a certain length, it could certainly have made that part of the statutory definition, but it chose not to do that.

Justice Ginsburg: This film has been compared to 911> ["], which had the pervasive message that President Bush was unsuited to be President.

And so if that film had been financed out of the corporate -- a corporation's general treasury funds and put on an election channel, that would similarly be banned by the statute.

Mr. Stewart: I am afraid I am not familiar enough with that film to know whether it would have constituted -- to -- to make an informed judgment about whether that would have constituted the functional equivalent of express advocacy under Wisconsin Right to Life.

And, of course, the 2004.

But I think--

Justice Scalia: Mr. Stewart, do you think that there's a possibility that the First Amendment interest is greater when what the government is trying to stifle is not just a speaker who wants to say something but also a hearer who wants to hear what the speaker has to say?

I mean, what's somewhat different about this case is that, unlike over-the-air television, you have a situation where you only get this -- this message would only air -- if somebody elects to hear it.

So you really have two interested people, the speaker and the listener who wants to -- who wants to get this.

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

[Laughter]

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

I think it's certainly true that people have a wide variation of attitudes towards campaign advertisements.

Some of them find them irritating, and, of course, they can hit the mute button or -- or leave the room, or in the case of people who use TiVo or VCRs can simply fast-forward through them.

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

And -- and so if you compare the -- the film to the advertisement, the advertisements, in one sense, you could say are a less effective mechanism because a lot of the people who reach them are unwilling listeners or uninterested.

But, on the other hand, they're more effective because they reach more people.

The -- the flip side is that with the film you reach a smaller audience.

It's certainly a more limited group of people who will sign up to receive the movie, but they are more interested in the message.

I don't think you can operate on the hypothesis that there is no--

Justice Scalia: You're talking about effectiveness.

That wasn't my point.

My point was the -- the seriousness of the First Amendment interest that's being impinged where -- where you have both somebody who wants to speak and someone who affirmatively wants to hear what he has to say, and the government says, no, the two of you can't do this.

Mr. Stewart: --Well, I think it was--

Justice Scalia: Don't you think that's somewhat worse than the government just saying to somebody who wants to speak, no, you can't speak?

Mr. Stewart: --I think it would be impossible to divide media up in that way based on the relative likelihood that the recipient of the message will want to hear it.

With respect to the -- the newsletters in MCFL, for instance, on the one -- in many instances, they were made available in public places.

They were also mailed to a variety of people.

You could say--

Justice Scalia: I am not saying will -- will want.

I mean you have a situation here where you don't get it unless you take the initiative to subscribe.

I'm not -- I'm not trying to figure out person by person who wants to hear it and who doesn't.

Here you have a medium in which somebody listens only if that person wants to listen.

So the -- the person speaking wants to speak, and the person hearing wants to hear.

It seems to me that's a stronger -- a stronger First Amendment interest.

Mr. Stewart: --Well, the potential viewers in this case had other alternatives if they wanted to see the film.

The film was available--

Justice Ginsburg: Was -- was this issue aired before the three-judge court, the distinction between, say, putting something on network TV and putting something on View On Demand that the listener has to opt into?

Mr. Stewart: --No.

Indeed, the -- the appellant in its complaint simply alleged affirmatively that his communication, if aired on DVD -- I mean if aired on VOD would fall within the statutory definition of "electioneering communication".

Chief Justice Roberts: Counsel, before you run out here, can I -- we haven't talked about the disclosure requirements yet.

You understand the test to be that disclosure is not required if the names of those disclosed -- if those people would be reasonably subject to reprisals?

Mr. Stewart: That's correct.

This Court has recognized a constitutional exemption for two disclosure requirements in cases where disclosure would have a reasonable likelihood of leading to reprisal.

Chief Justice Roberts: How -- how do we apply that test?

Is it inconceivable to you here that people contributing to such a clearly anti-Clinton advertisement are not going to be subject to reprisals?

Mr. Stewart: It seems unlikely that reprisals would occur because Citizens United -- this is obviously a new film, but it is of a piece with communications that Citizens United has engaged in.

Chief Justice Roberts: That doesn't work, because maybe they are going to change the nature of the documentaries that they fund, or somebody who gave a contribution 5 years ago may decide, boy, I don't like what they're doing.

I'm not going to give anymore.

It--

Mr. Stewart: I guess the point I was going to--

Chief Justice Roberts: --The fact that they've disclosed in the past by compulsion of law doesn't seem to answer the question of whether they are going to be subject to reprisals.

Mr. Stewart: --Well, the point was that they have disclosed in the past and have provided no evidence of reprisals.

But I think the Court's decisions are clear that the burden is on the organization to show a reasonable likelihood, at least to -- to set the -- the ball in motion.

And the three-judge district court here said essentially what this Court said in McConnell with regard to a variety of plaintiffs who included Citizens United.

That is, the Court said in McConnell and the three-judge district court here that the plaintiffs had made vague allegations of the general possibility of reprisals but had offered no concrete evidence that their own members--

Chief Justice Roberts: But that seems to me you're saying they've got to wait until the -- the horse is out of the barn.

You can only prove that you are reasonably subject to reprisals once you've been the victim of reprisals.

Mr. Stewart: --Well, I think the alternatives would be to say that disclosure requirements are categorically unconstitutional, which would be an extreme departure from this Court's prior precedents or--

Chief Justice Roberts: That's saying -- that's saying that the test in McConnell is unworkable, if you say the alternative is to say they are categorically--

Mr. Stewart: --No.

I mean I think the -- if the -- we think the test in McConnell is workable; that is, leave it up to the organization to establish particularized proof of a reasonable likelihood of reprisal.

If you were going to--

Chief Justice Roberts: --If the Boy Scouts run an ad and they have -- they're subject to disclosure, are the donors who support that ad reasonably subject to reprisals?

Mr. Stewart: --I mean, it would depend to some extent on the characteristics of the ad.

Probably not, but I think if the alternative -- the two alternatives to the approach that the Court has taken previously would be first to say these requirements are unconstitutional across the board, or the Court could say as applied to organizations that engage in especially intemperate or extreme speech of the sort that might seem more likely to subject its proponents to reprisal, the disclosure requirements are categorically unconstitutional there.

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

Chief Justice Roberts: Before you sit down, any other?

Thank you, counsel.

Mr. Olson, you have four minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON ON BEHALF OF THE PETITIONER

Mr. Olson: Thank you, Mr. Chief Justice.

It is unquestionably the case that the government takes the position that any form of -- of expressive advocacy can be prohibited if it's done by a corporation.

They say that on page 25 and 26 of their brief, whether it be books, yard signs, newspapers or -- or something printed -- in printed form, and it's only because Congress decided to address the most acute problem that they haven't -- Congress didn't go ahead and decide to do that, which we submit would raise very, very serious constitutional questions, the same type of constitutional questions that we are talking about here.

And that's--

Justice Breyer: Well, I agree with you about that, but I thought what saves this -- many people thought it doesn't save it, it's -- the whole thing's unconstitutional, the whole Act.

That isn't what I thought.

So what saves this is of course you can't prohibit all those things.

What you do is put limitations on the payment for them, see that there are other ways of paying for it, say, through PACs, and then limit very carefully the media that are affected and the times for which they are affected.

Now, that's the statute before us, and it's I think you have to address.

Mr. Olson: --Precisely, and five Justices in Wisconsin Right to Life made the point that the PAC mechanism is burdensome and expensive.

There are briefs in this case that demonstrate how much it is.

And the -- and it's easier if you have lots of money, if you are a big corporation, and you can afford a PAC or you already have one.

So it's a burden on the least capable of communicating.

The--

Justice Stevens: Mr. Olson, can I ask this -- this question?

Wisconsin Right to Life -- Judge Randolph thought the Chief Justice's opinion in that case was controlling in this case.

Do you think the Chief Justice's opinion in that case correctly stated the law?

Mr. Olson: --Of course.

[Laughter]

By definition.

Justice Scalia: Good answer.

[Laughter]

Justice Stevens: I want to be sure because you're -- sometimes I don't think you're quite saying that.

But you do agree that that opinion is correct?

Mr. Olson: What I am saying is I -- we accept the Court's decision in Wisconsin Right to Life.

To the extent that the Court did not get to this type of documentary where the issue distinction, the false dichotomy between issues and candidates--

Justice Stevens: But you accept the test that was stated in his opinion?

Mr. Olson: --The -- the -- that no reasonable -- not reasonably susceptible to any other interpretation?

Of course we do, Justice Stevens, but we submit, a 90-minute discussion of various different issues are subject to all kinds of interpretation, and when you get a long exposition of issues that are important to the public and someone says -- the government says, well, it's going to be -- we can prohibit it, and by the way, the government says, well, when we mean "prohibit" we mean just you can't use your union -- or corporate treasury funds -- what they mean by "prohibit" is that they will put you in jail if you do it.

They will put you in jail for 5 years.

That means prohibited.

Now, what -- what we're getting at here, when -- when you're trying to make a 90-minute movie that discusses things that are important to the public during an election of the highest officer of the United States, many people will interpret that as critical; many people will interpret it as supportive; there are things all over the lot.

So it's subject to lots of different interpretations.

The other thing is I heard Justice -- I mean Mr. Stewart say that if there's one minute at the beginning, it doesn't happen -- it doesn't matter what the other 89 minutes are; we can prohibit it.

Well, where is the person making a movie who wants to address the American public about something that's important to the American public -- there isn't any question about that -- where does he edit his movie?

What cuts?

What does he leave on the drawing -- on the cutting-room floor so that he won't have to go to jail?

He won't dare take the chance.

Chief Justice Roberts: Thank you, counsel.

The case is submitted.