

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE,

Plaintiff,

vs.

CA No. 14-1500
Washington, DC
September 14, 2016
2:00 p.m.

FEDERAL ELECTION COMMISSION,

Defendant.

TRANSCRIPT OF ORAL ARGUMENT

BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

BEFORE THE HONORABLE PATRICIA A. MILLETT
UNITED STATES CIRCUIT JUDGE

BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

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COURTROOM DEPUTY: Civil Case 14-1500.

Independence Institute versus Federal Election Commission.
Will counsel please identify themselves to the Court and
reporter.

MR. DICKERSON: Allen Dickerson for plaintiffs,
Independence Institute.

MR. MUELLER: Greg Mueller for the defendants.

HON. PATRICIA MILLETT: Good afternoon, everyone.
We're here on cross motions for summary judgment in this case.
And I think, unless counsel have any other matters to raise,
we are ready to proceed.

Mr. Dickerson.

MR. DICKERSON: Thank you, Your Honors, and may it
please the Court. I would ask the Court's permission to
reserve three minutes for rebuttal.

From the 1976 decision of Buckley versus Valeo
until 2002 and the passage of the McCain-Feingold Act, the
following ad could be run without any regulation at the
federal level whatsoever. Who is Bill Yellowtail? He
preaches family values, but took a swing at his wife. And
Yellowtail's response, he only slapped her, but her nose
wasn't broken. He talks law and order but is himself a
convicted felon. And although he talks about protecting
children, Yellowtail failed to make his own child support

1 payments, and then voted against child support enforcement.
2 Call Bill Yellowtail, tell him support family values.

3 Congress looked at this ad and ads like it, and
4 reasonably concluded that it was intended to defeat the
5 election of Bill Yellowtail for Congress. But because it does
6 not conclude the so-called magic words from the Buckley test,
7 "vote for/vote against" and their equivalence, it cannot be
8 regulated at the Federal level.

9 HON. COLLEEN KOLLAR-KOTELLY: Can I ask you to slow
10 down a little bit, we are actually getting a record here.

11 MR. DICKERSON: Of course, Judge.

12 HON. PATRICIA MILLETT: And before we go more into
13 the merits, I want to talk a little bit about mootness.

14 MR. DICKERSON: Certainly.

15 HON. PATRICIA MILLETT: And I want to make sure I
16 understand your position. To begin with, you didn't file a
17 motion for expedition before the three-judge court or propose
18 a particularly expedited briefing schedule. And in response
19 to mootness, you've invoked -- you haven't said, oh, we want
20 to keep running this ad. You've said, we want to run
21 substantively similar ads going forward. So I'm just trying
22 to understand what the status of the ad is that is before us.

23 MR. DICKERSON: The status of the ad is that we
24 would like to run this ad with such changes as need to be
25 made. For instance, Senator Bennett is no longer a member of

1 the Senate, that would obviously have to change.

2 HON. PATRICIA MILLETT: Uh-huh.

3 MR. DICKERSON: And to run it within the 60-day
4 general election.

5 HON. PATRICIA MILLETT: Which we're into already.

6 MR. DICKERSON: That is correct.

7 HON. PATRICIA MILLETT: Okay. Since you haven't
8 asked for expedition, if there were not to be a decision, just
9 hypothetically, before the election, we wouldn't try, but just
10 hypothetically, are you done then with that ad?

11 MR. DICKERSON: No, I think that my understanding
12 is that we would want to run it in future elections.

13 HON. PATRICIA MILLETT: Because your affidavit --
14 your declaration did not say that, it did not say -- your
15 prior declarations had said we want to run this and
16 substantively similar ads, and this one did not say that you
17 wanted to continue running this ad. So I do want to be very
18 clear that we've got you on record that your intent is to
19 continue running this ad.

20 MR. DICKERSON: Our intent is to continue running
21 this ad with such changes that need to be made and
22 substantively similar ads.

23 HON. COLLEEN KOLLAR-KOTELLY: But you're running it
24 up to the election or are you just going to run it in general?

25 THE COURT: My understanding from my client is that

1 we would want to run it during the electioneering
2 communication period.

3 HON. COLLEEN KOLLAR-KOTELLY: Only?

4 HON. AMIT MEHTA: If we don't make a decision
5 before this election cycle concludes and say the bill is
6 passed or defeated before the next election cycle, what's your
7 intent with respect to other ads?

8 MR. DICKERSON: Our intention would be to run ads
9 that are in all material ways similar but perhaps referencing
10 a different act.

11 HON. PATRICIA MILLETT: Just to be crystal clear.
12 Only during periods covered by this provision or do you --
13 your organization is an educational organization, and you say
14 you're addressing legislative matters. I'm having trouble
15 understanding then why you -- whether your position is that
16 you only want to run ads during the 60-day period or whether
17 you intend to run these ads year round and it's just that you
18 don't want to stop when the 30 or 60-day periods kick in?

19 MR. DICKERSON: I'm not sure that's in the case.
20 To sort of expand on that. As we discussed in the context of
21 the 501(c)(3) argument, you know, as a 501(c)(3) organization
22 your ability to talk about legislation is severely curtailed.
23 The amount of resources you can bring to bear on speech like
24 this is limited by federal tax law. Consequently, my
25 understanding is that because the resources available are

1 limited, my client would like to bring these issues to the
2 attention of the people of the State of Colorado during times
3 when people are paying attention to political matters, which
4 is the 60-day election window.

5 HON. PATRICIA MILLETT: Not during times when this
6 might be in active consideration before Congress?

7 MR. DICKERSON: They may wish to do that as well,
8 but that isn't regulated by electioneering communication.

9 HON. PATRICIA MILLETT: Was this particular ad run
10 at all any time outside the electioneering communication time
11 periods?

12 MR. DICKERSON: No.

13 HON. PATRICIA MILLETT: Not while it was pending in
14 the Senate and the Senate was in session?

15 HON. COLLEEN KOLLAR-KOTELLY: It hasn't been run at
16 all?

17 MR. DICKERSON: No.

18 HON. PATRICIA MILLETT: You chose not to run it
19 outside the electioneering communication times?

20 MR. DICKERSON: That's correct.

21 HON. PATRICIA MILLETT: And at least now you're --
22 I get that you say it's outside the record. Your expectation
23 is that with other ads you may also want to run them during
24 the same electioneering communication time period?

25 MR. DICKERSON: Yes, for the same reason.

1 HON. PATRICIA MILLETT: Okay.

2 MR. DICKERSON: In the inevitable challenge to
3 McCain-Feingold and McConnell v. FEC, the Court dealt with a
4 very substantial record focused on this question. This
5 question of whether or not the magic words test from
6 Buckley --

7 HON. PATRICIA MILLETT: I just want to back up
8 again.

9 MR. DICKERSON: Certainly.

10 HON. PATRICIA MILLETT: Why would it be -- so
11 you've talked about why this issue is capable of repetition,
12 but why would it evade review as to this ad if this thing were
13 to moot out without a decision before November, because you
14 would then have, I take it, three and a half or so years to
15 litigate the issue?

16 MR. DICKERSON: Well, no.

17 HON. PATRICIA MILLETT: Before there would be
18 another electioneering communication?

19 MR. DICKERSON: Well, the window is every two
20 years. And as this --

21 HON. PATRICIA MILLETT: These focus on senators,
22 when do you have your next senatorial election after this?

23 MR. DICKERSON: I'm not sure.

24 HON. COLLEEN KOLLAR-KOTELLY: I thought it was
25 2020.

1 HON. PATRICIA MILLETT: 2020. I mean, if we're
2 back up for primaries, we're talking three years?

3 MR. DICKERSON: Unless, of course, the decision is
4 made to ask someone in the House do this, which would be every
5 two years.

6 HON. PATRICIA MILLETT: But you haven't said
7 anything about that in your declaration. I'm a little
8 confused as to why -- I haven't understood why you invoked
9 this exception, and your declaration doesn't make any
10 reference to wanting to run this ad again, even though prior
11 declarations had said this ad and substantive similar ones,
12 the ones submitted to us, seem to be quite deliberately
13 limited to only substantive similar ads. And you're evoking
14 the capable of repetition yet evading review when it doesn't
15 seem like this ad, which you now say you do want to continue
16 running, would evade review.

17 MR. DICKERSON: Well, I think it would evade review
18 because the process takes so long.

19 HON. PATRICIA MILLETT: More than three years?

20 MR. DICKERSON: Possibly.

21 HON. PATRICIA MILLETT: I don't think that's the
22 test. Have you found a case for mootness where you've had
23 more than three years to litigate something and they've
24 applied the yet evading review test?

25 MR. DICKERSON: I would have to look at the

1 Wisconsin Right to Life case, but my memory is that that was
2 one where -- in fact, the subject matter of the litigation was
3 entirely moot since it involved a sitting senator's particular
4 vote. And that senator, if I remember correctly, was no
5 longer in the Senate. The Supreme Court nonetheless said, you
6 know, the FEC made substantively similar arguments, and the
7 Supreme Court said, look, you never manage to get these things
8 litigated in time for an election.

9 HON. PATRICIA MILLETT: Well, I just -- to lay it
10 out for you. First of all, the issue was no longer a live
11 issue that they were interested in, the filibuster issue,
12 which is not your position. Your legislation, presumably,
13 will be reintroduced in the new Congress.

14 MR. DICKERSON: That's certainly our hope.

15 HON. PATRICIA MILLETT: And the other thing that
16 I'm just struggling with. Normally this capable of repetition
17 standard is not that hard to meet in these types of cases, but
18 your complaint is pointedly devoted to just the single ads
19 status. Your relief is entirely focused on a single ad.
20 Whereas, in Wisconsin Right to Life, their complaint was
21 focused on three ads and a category of related ads called
22 grassroots lobbying ads. But you choose not to take that
23 tactic in this litigation. You chose to say, we want to
24 litigate this one single ad. We want relief addressed to this
25 one single ad. And you're going to have three and a half

1 years to litigate it.

2 MR. DICKERSON: Well, this --

3 HON. PATRICIA MILLETT: I don't think you're in the
4 same boat.

5 MR. DICKERSON: -- substantively similar ads. I
6 mean, I take Your Honor's point, and I think you're correct in
7 the sense that in an as-applied challenge we do care very much
8 about the content of the ad, as I imagine I'm making clear
9 from my references in the McConnell sham issue ad context.
10 But, again, that's because as 501(c)(3), that's the type of ad
11 we can run. We're not entitled to run the sort of ads which
12 call for the --

13 HON. PATRICIA MILLETT: But you haven't asked for
14 relief with respect to a category, that's what I'm struggling
15 with on mootness. You haven't asked for it as to a category
16 of materials. You've asked for it for a single ad which puts
17 you in a very different boat from Wisconsin Right to Life.
18 And I haven't seen that scenario in this capable of
19 repetition, and I'm actually not sure how we're supposed to
20 apply a constitutional test when we don't even have a category
21 or the ad that's the object of the complaint in front of us.

22 MR. DICKERSON: Well, I think the same way the
23 Supreme Court did in Wisconsin Right to Life.

24 HON. PATRICIA MILLETT: They had a category and the
25 category was defined by specific boundaries, a definitional

1 boundary that was offered for that category of ads. You can't
2 do that with yours. You've said it's this ad and here's the
3 context of this ad and the features of this ad that make it
4 appropriate as applied to this ad, not as applied to a
5 category of ads.

6 MR. DICKERSON: I disagree slightly in two ways.

7 HON. PATRICIA MILLETT: Uh-huh.

8 MR. DICKERSON: One being that to the extent we
9 have asked for relief for substantively similar ads, that is a
10 category.

11 HON. PATRICIA MILLETT: Is that in your complaint?

12 MR. DICKERSON: I'm sorry.

13 HON. PATRICIA MILLETT: Is that in your complaint?

14 MR. DICKERSON: I believe so. If it's not, well --

15 HON. PATRICIA MILLETT: Well, you haven't moved to
16 amend with all the mootness and everything that's going on.
17 I'm trying to understand. So your view is --

18 MR. DICKERSON: It's certainly in this case through
19 the affidavit from my client that they intend to do so.

20 HON. PATRICIA MILLETT: Well, again, that was the
21 one -- substantively similar ads?

22 MR. DICKERSON: Right. That's category one. And,
23 two, in the same way that -- it's true that there was a
24 category in Wisconsin Right to Life, but it was a category
25 derived from the content of the ads themselves. When the

1 Chief Justice in the controlling opinion talks about genuine
2 issue speech and genuine issue ads, which is what we think
3 this is, it belongs in that category. He lays out what that
4 looks like, but with reference to the specific ads that
5 Wisconsin Right to Life wanted to run, even though those ads
6 were no longer going to be run due to the passage of time.

7 HON. PATRICIA MILLETT: With respect to that
8 category and they sort of lay out the features of it in
9 Wisconsin Right to Life, is it your position that even if
10 something sort of went down the check list and met that
11 category, but it was pretty easily inferred or implied from
12 the message that you were weighing in on one side or the
13 other, or you at least were trying to communicate with voters
14 about, in a way that it suggests concerns about a person who
15 was running for office, that that would be different from the
16 ad you have here -- that would be in a different category?

17 MR. DICKERSON: I think that's absolutely right.
18 And that's really the crux of the case. The crux of the case
19 is, the fact that the ads in McConnell, the entire record of
20 which was like the Yellowtail ad that I just read, and where
21 the record reflected 100,000 pages of expert testimony and
22 social science research and factual findings about how the
23 only difference between these ads and ads that are express
24 advocacy is that you swapped the call to action. If you
25 have --

1 HON. PATRICIA MILLETT: Well, I'm talking about
2 something that actually meets the sort of criteria in
3 Wisconsin Right to Life.

4 MR. DICKERSON: Sure.

5 HON. PATRICIA MILLETT: But the implicit message is
6 not going to be lost on many people at all, which is not --
7 Yellowtail was pretty in-the-face and I wouldn't even call it
8 implicit. Then the other question I have is, you haven't
9 identified for us any other ad that Independence Institute has
10 run other than this one that would meet the similar standard
11 to the one you're advancing here. And the other one that I'm
12 aware of, the Tenth Circuit case, you made all the same
13 arguments to them that you're making to us, but then now in
14 your brief here, in your reply brief, you say, oh, no, no,
15 that was one with an implicit message.

16 So how do we apply, given that on one day you can
17 think your message is pure issue advocacy, and a year later
18 you'll say, well, that was actually an implicit message. How
19 are we supposed to apply this constitutional test in this case
20 where -- I assume your position is the one before us is not
21 like the one in the Tenth Circuit, it has no implicit message.
22 But we don't have anything to make this as-applied challenge
23 to, if that one is going to become moot.

24 MR. DICKERSON: Right. So a few responses, Your
25 Honor.

1 HON. PATRICIA MILLETT: Uh-huh.

2 MR. DICKERSON: One, I mean, obviously people make
3 arguments in the alternative.

4 HON. PATRICIA MILLETT: Uh-huh.

5 MR. DICKERSON: And I think that's what is going on
6 here somewhat in the background. And, two --

7 HON. PATRICIA MILLETT: I'm sorry. Are you making
8 an argument in the alternative here?

9 MR. DICKERSON: No. The argument in the
10 alternative before the Tenth Circuit, which of course doesn't
11 bind this court.

12 HON. PATRICIA MILLETT: I thought -- I didn't think
13 there was any argument in the alternative, you all stipulated
14 that it was genuine issue advocacy. And it was only in your
15 reply brief here that we were told it was something else.

16 MR. DICKERSON: For purposes of this case --

17 HON. PATRICIA MILLETT: Uh-huh.

18 MR. DICKERSON: -- we're distinguishing out of
19 circuit precedent, that's all that is.

20 HON. PATRICIA MILLETT: Okay. But that's exactly
21 my trouble.

22 MR. DICKERSON: Right. I want to answer the
23 substantive question. I think the answer is that -- if I
24 could have just one minute to sort of get the architecture.

25 HON. PATRICIA MILLETT: Absolutely.

1 MR. DICKERSON: The problem from our point is view
2 is that you got McConnell, which is based on a record. The
3 FEC did its job and it proved that these are the equivalent of
4 express advocacy. These are sham ads. And the McConnell
5 court draws a distinction between so-called issue ads and
6 genuine issue ads, both in the banned context and in the
7 disclosure context.

8 We had Citizens United. In Citizens United, again,
9 you have a case that doesn't look anything like a genuine
10 issue ad. Our point is that if this is a genuine issue ad,
11 regardless of all of these cases that don't actually bind this
12 court because they involve very different speech, the
13 obligation here is to anew and with fresh eyes, as a District
14 Court, apply exacting scrutiny to determine the fit between
15 the disclosure that's being requested by the Government and
16 the informational interest in showing voters who supports and
17 opposes candidates. That's the test. The test is to decide
18 that fit as a question of fact.

19 HON. PATRICIA MILLETT: But you said if this is a
20 genuine issue ad.

21 MR. DICKERSON: Well, if it's a genuine issue ad
22 then there is no fit, for the simple reason that disclosing --

23 HON. PATRICIA MILLETT: We have to decide that this
24 is a genuine issue ad?

25 MR. DICKERSON: I think that that is one approach.

1 But, again, these are all different ways of formulating the
2 fact that exacting scrutiny applies here. They're just
3 different tests for talking about how close is the fit from
4 the Government's disclosure.

5 HON. PATRICIA MILLETT: I thought you wanted this
6 case to decide whether a genuine issue ad could be subject to
7 these disclosure provisions. So the first thing we have to do
8 is decide that this is a genuine issue ad, correct? It has to
9 be a genuine issue ad. We have to find -- make that
10 determination, otherwise we're doing a hypothetical
11 constitutional ruling.

12 MR. DICKERSON: I'm not sure I agree, Your Honor,
13 for the simple reason that, again, much as in Wisconsin Right
14 to Life, there is a script in front of you, and that script
15 can be measured against the Governmental interest in informing
16 the voters as to the financial constituencies of candidates.
17 If, on the face of this ad, there's no supporter opposition of
18 a candidate, then there's no informational interest. The fit
19 falls apart.

20 Now, you can think of that as a tailoring analysis
21 under exacting scrutiny or you can think of it as the category
22 of genuine issue ads doesn't meet the Government's
23 informational interest. Those are two ways of saying exactly
24 the same thing.

25 HON. AMIT MEHTA: I guess the difficulty that we're

1 facing is that in an as-applied challenge, particularly like
2 the one that you're advocating here which is so tied to the
3 text of the ad, how we can make that very assessment that
4 you've just talked about without having the text in front of
5 us, if all you've told us you want to do is in the future run
6 ads like this, which is all your press release says.

7 I mean, I guess the issue is, how do you reconcile
8 the factually intensive inquiry you want us to make, and part
9 of the inquiry is the Government's interest, which you've
10 argued is tied to the text of the ad, without knowing what the
11 text of any future ad might be. There's one ad before us, but
12 we have no idea what any future ad might say, other than the
13 representation that you wish to run ads like it in the future.

14 MR. DICKERSON: Well, because that's what it
15 generally looks like to decide an as-applied challenge under
16 the capable of repetition yet evading review standard. Again,
17 I'm not sure this is as easily distinguished from the
18 Wisconsin Right to Life situation as is being suggested. And
19 I think, you know, especially if you look at Wisconsin Right
20 to Life I, where the Court reversed a District Court decision
21 unanimously saying that it couldn't consider an as-applied
22 challenge on the facts of that case. I think there is some
23 danger of backing up into that same legal error.

24 HON. PATRICIA MILLETT: But you concede your
25 complaint is quite different than the Wisconsin Right to Life

1 one.

2 MR. DICKERSON: I do not concede that it's
3 completely different or materially different.

4 HON. PATRICIA MILLETT: Your prayer for relief is
5 that you want a declaration as applied to Independence
6 Institute's proposed advertisement, singular, right? And you
7 want another declaration as applied to the Independence
8 Institute's proposed advertisement, singular? That is not
9 Wisconsin Right to Life. They said as to these ads and
10 grassroots lobbying ads. The two complaints are materially
11 different in the prayer for relief and the preceding
12 paragraphs as well.

13 What I'm struggling with -- I get the point that
14 you say you want to do substantively similar going forward,
15 but I'm having trouble, given how you have now told me you
16 characterized your ad for the Tenth Circuit, I would have
17 thought, there's your evidence as being substantively similar.
18 But you now tell me, no, no, no, that's not substantively
19 similar, that in fact is one that had an implicit message
20 attached to it, in trying to distinguish a Tenth Circuit case.

21 So if I say, well -- that's what I'm struggling
22 with. This is not what happened in Wisconsin Right to Life.
23 What I'm struggling with is how do I know what's substantively
24 similar when the other ad that you've run, that I thought
25 would have checked the box for substantively similar, I'm

1 told, is not. And that implicit messaging, as you've already
2 acknowledged, it is exactly what it is okay for the law to
3 guard against.

4 MR. DICKERSON: Because it deals with a different
5 statute under state law, not the federal law. And because the
6 Federal EC definition can never be triggered by that
7 communication.

8 HON. PATRICIA MILLETT: Well, I think you would
9 agree that the operative terms, other than -- they're still a
10 little more stringent -- you're a lower dollar amount in the
11 Colorado law, but the operative terms are otherwise the same
12 as the statute here.

13 MR. DICKERSON: Again, and I see my time is
14 expiring --

15 HON. PATRICIA MILLETT: No. Just so you know,
16 we'll go as long as we need, don't worry, we'll give you time
17 for rebuttal, you won't lose that.

18 MR. DICKERSON: I appreciate that.

19 HON. PATRICIA MILLETT: I've chewed up too much of
20 your time. I will let you go to the merits. I just want to
21 make sure I really -- it's a constitutional question, and you,
22 for obvious reason, have an as-applied challenge, and want us
23 to draw careful lines about what falls within that as-applied
24 challenge. And we are -- at least I am -- I don't want to
25 speak for the others, struggling with exactly what the

1 boundaries of an as-applied challenge are so that we can anew
2 the constitutional analysis that you want us to. So that's
3 why I'm bothering you with all of this.

4 MR. DICKERSON: Sure. I think there's a few steps
5 in this.

6 HON. PATRICIA MILLETT: Uh-huh.

7 MR. DICKERSON: One is the fact that the emphasis
8 on the pleadings is not how the Supreme Court has generally
9 dealt with the capable of repetition review standard. I point
10 Your Honor to the Davis v. FEC opinion, where the use of a
11 press release months after the decision, the District Court
12 are far along into the proceeding, was considered sufficient
13 to invoke that exception by the Supreme Court.

14 So, one, I think the standard to meet for that,
15 especially in election cases, is very low. And despite the
16 FEC's tradition of invoking objections to this, the Supreme
17 Court, to my knowledge, has never said -- has never come down
18 on their side.

19 HON. PATRICIA MILLETT: No, but case law has
20 required what's called a demonstrated probability --

21 MR. DICKERSON: Certainly.

22 HON. PATRICIA MILLETT: -- of recurrence on the
23 same terms as the complaint before the Court.

24 MR. DICKERSON: Which is why --

25 HON. PATRICIA MILLETT: That's the issue that we're

1 talking about.

2 MR. DICKERSON: Right. And I think that's why
3 we're back to the fact that -- again, looking at the Davis
4 case, the facts of Davis, were that a candidate was -- there
5 was a prohibition on self-funding by candidates for federal
6 office. There was a candidate who had run in a particular
7 election, there was no real indication he was going to run
8 again. There were questions raised by mootness. He filed --
9 a press release was reported. I think judicial notice was
10 taken of the fact that he was going to possibly run again,
11 maybe. And that was considered enough to get over precisely
12 the hurdles Your Honor just mentioned.

13 HON. PATRICIA MILLETT: Uh-huh.

14 MR. DICKERSON: So I think the accommodation that
15 has been put in the record here is sufficient to meet that
16 exception.

17 HON. PATRICIA MILLETT: You're telling us you're
18 going to run this ad again, even though you didn't say that in
19 your declaration? That's now the representation on the
20 record?

21 MR. DICKERSON: Yes, that's the representation on
22 the record.

23 HON. PATRICIA MILLETT: Beyond the November
24 election here?

25 MR. DICKERSON: Yes, because my client really does

1 care about this act. And to your mind, Judge Mehta, about,
2 you know, well, what happens if the act is passed or some
3 such -- I mean, again, I think we're in an uncomfortable
4 position where -- what my client really wants to be able to do
5 is run ads, saying, there's a good piece of legislation under
6 the Federal Congress, call your representatives and ask them
7 to support it, which is exactly what Wisconsin Right to Life
8 was talking about. So I'm not sure the category problem is
9 quite as difficult as it appears at first --

10 HON. PATRICIA MILLETT: How do I know when you just
11 say it abstractly like that that in fact it won't be a
12 Hickenlooper-type? Here's important legislation, call your
13 elected representative versus Justice Safety Valve Act.
14 Here's important legislation, call your representative.
15 That's what I'm struggling with.

16 MR. DICKERSON: If we're talking sort of a remedy,
17 which may be --

18 HON. PATRICIA MILLETT: I'm not talking remedy.
19 I'm talking -- how do I know what I'm going to be applying the
20 Constitution to, what is it going to look like?

21 MR. DICKERSON: Right. And I think the
22 answer there -- I think there's two answers there. One is
23 this is the ad we want to run. Maybe we'll swap out who the
24 representatives are, but this is the ad we want to run so long
25 as this act is possible. Two, if we were to run substantively

1 similar ads they would look like this. And they are different
2 from -- in measurable, policable ways from the Governor
3 Hickenlooper ad. The Governor Hickenlooper ad is about a
4 general category of executive power, it's not about a specific
5 bill being advanced in the legislative body.

6 HON. PATRICIA MILLETT: Do you think that's a
7 constitutional difference?

8 MR. DICKERSON: Personally, no. But the Supreme
9 Court --

10 HON. PATRICIA MILLETT: Well, then what am I
11 supposed to do with that?

12 MR. DICKERSON: Because Your Honor may rely upon
13 the fact that the Wisconsin Right to Life opinion didn't talk
14 about executive action but it did talk about precisely this
15 sort of legislative issue.

16 HON. PATRICIA MILLETT: I understand, but -- go
17 ahead.

18 HON. AMIT MEHTA: Am I correct that the Tenth
19 Circuit actually did deal with the mootness issue and did,
20 following Wisconsin Right to Life, actually determine that
21 mootness was not a problem even though the election cycle had
22 run on that particular ad?

23 MR. DICKERSON: I believe that's correct.

24 HON. PATRICIA MILLETT: Okay. Do you want to get
25 to your merits? I think we're starting to slide into it.

1 MR. DICKERSON: The merits issue I can deal with
2 briefly, especially in light of the time.

3 HON. PATRICIA MILLETT: The first thing I want to
4 do is ask you, in light of what we've been talking about with
5 the Tenth Circuit case, can you tell me how you define the
6 genuine issue ads that -- maybe you don't even want to use
7 that label, but use whatever label you want. Define exactly
8 and precisely for me, as if you were writing an opinion, the
9 category of advertisements or communications that you think
10 are protected under your as-applied theory, and please do so
11 in a way that allows me to distinguish the Hickenlooper ad
12 from this ad.

13 MR. DICKERSON: I think the difference is that the
14 entire sweep of federal litigation about electioneering
15 communications all comes down to a single point of position.
16 It comes down to this idea that we're distinguishing between
17 the sort of ads like Bill Yellowtail and the sort of ads like
18 Wisconsin Right to Life. Now, drawing that distinction, you
19 just follow what the controlling --

20 HON. PATRICIA MILLETT: Wisconsin Right to Life was
21 about a prohibition. They agreed that the disclosure
22 provisions could be applied to those ads.

23 MR. DICKERSON: That's true.

24 HON. PATRICIA MILLETT: So --

25 MR. DICKERSON: That says nothing about the speech

1 underlying it.

2 HON. PATRICIA MILLETT: So can you go on -- give me
3 a definition that one would put into an opinion, if one were
4 writing it, as to what you think is carved out, it's not
5 covered by McConnell or Citizens United definition. You'd
6 want to be able to advise your client, here are the elements,
7 you can do this.

8 MR. DICKERSON: The elements -- I mean, my first
9 answer, Your Honor, is that you follow this exact ad as
10 closely as humanly possible. That would be my first piece of
11 advice.

12 HON. PATRICIA MILLETT: Well, that's not an
13 opinion. I can't say, you can run as long as you start with
14 this and have this many lines, and then down here you say
15 that. There really needs to be an objective test.

16 MR. DICKERSON: But Your Honor could say you can
17 run this ad full stop. But to answer your broader question, I
18 don't have a better answer than quoting from the controlling
19 opinion in Wisconsin Right to Life II, where the opinion walks
20 through what a genuine issue ad looks like. I'm searching for
21 the passage, but it basically says, you know, talks about an
22 issue, has a call to action about an issue. And it shows this
23 sort of indicia of a sham issue ad. Again, that's the
24 fundamental distinction going on here.

25 HON. PATRICIA MILLETT: Let's get to the

1 language --

2 HON. AMIT MEHTA: This says: No reasonable
3 interpretation -- that is susceptible to no reasonable
4 interpretation other than as an appeal to vote for or against
5 a specific candidate.

6 MR. DICKERSON: That's the test, but there's also a
7 description of what that would look like.

8 HON. PATRICIA MILLETT: If you've got the case in
9 front of you. I think it's on page, without my glasses, 470.
10 Is that where it says: The ads focus on a legislative issue.

11 MR. DICKERSON: Yes.

12 HON. PATRICIA MILLETT: Take a position on the
13 issue. Exhort the public to adopt that position. And urge
14 the public to contact public officials with respect to the
15 matter. And the way you say, don't worry about the
16 Hickenlooper ad, is because it would be constitutionally
17 different if we scratched out legislative issue and put in
18 executive issue?

19 MR. DICKERSON: Not necessarily, but that's not the
20 scope of this case.

21 HON. PATRICIA MILLETT: How about if we were to
22 say, as to this defined category, you know, your as-applied
23 challenge succeeds -- how would we write that in a way that
24 would protect against the implicit message in the Hickenlooper
25 ad, other than you said swap out executive for legislative?

1 MR. DICKERSON: Again, I guess my most fundamental
2 push back is that our view is the Tenth Circuit got it wrong
3 and that doesn't bind this Court.

4 HON. PATRICIA MILLETT: I get that you think they
5 got the legal ruling wrong. But I assume -- I mean, you
6 volunteered in your reply report brief in your own words to
7 describe that, the Tenth Circuit didn't say that, they said
8 that you all acknowledged -- they talked about your joint
9 stipulation in that case. So it was your words, not the Tenth
10 Circuit, that said that was a bad one because that one had an
11 implicit message -- is that right? The Tenth Circuit didn't
12 say it had an implicit message, did it?

13 MR. DICKERSON: I believe that's correct. Yes.

14 HON. PATRICIA MILLETT: Don't blame that on the
15 Tenth Circuit. So you told me that's different and that's
16 out. So I have to have a legal test.

17 MR. DICKERSON: I'm sorry, Your Honor, what do you
18 mean by "that's different and that's out?"

19 HON. PATRICIA MILLETT: Well, you just said that
20 type of ad is not, for at least today's purposes, within the
21 scope of your definition of the as-applied category that
22 should be constitutionally protected.

23 MR. DICKERSON: That's right because we're only
24 interested in this ad involving federal legislation. That's
25 all we're interested in in this courtroom.

1 HON. PATRICIA MILLETT: So the only thing that you
2 would then -- the only difference you would say for the Tenth
3 Circuit is executive versus legislative, if we otherwise adopt
4 the Wisconsin Right to Life definition in determining -- one
5 has to write an opinion --

6 MR. DICKERSON: Of course.

7 HON. PATRICIA MILLETT: One has to define the
8 category. And I don't think it would be responsible to say,
9 there's a constitutional exception for word-for-word verbatim
10 from the beginning to the last period, the ad that you have in
11 front of us. I haven't ever seen an opinion like that. They
12 tend to talk about -- describe it in terms of legal elements
13 and the legal tests, so that we're not sort of making this up
14 as we go along. I think it would be dangerous if we had a
15 rule where judges could --

16 MR. DICKERSON: And certainly I don't want to tread
17 on Article III limitations, but --

18 HON. PATRICIA MILLETT: -- ad by ad go through
19 this.

20 MR. DICKERSON: I take Your Honor's point. My
21 response is quite simply that this is a narrow case in this
22 courtroom, it has nothing to do with the Hickenlooper ad,
23 which is not before you. And this test from Wisconsin Right
24 to Life adequately covers our speech and any speech we would
25 want to do in the future.

1 HON. PATRICIA MILLETT: How would this protect --
2 put aside Hickenlooper -- how would this protect against
3 ads -- what prong here on this test would protect against
4 implicit messages, subtle messages?

5 MR. DICKERSON: We don't think the standard is
6 subtle messaging.

7 HON. PATRICIA MILLETT: I'm sorry.

8 MR. DICKERSON: We don't think the standard is
9 subtle messaging.

10 HON. PATRICIA MILLETT: What does that mean?

11 MR. DICKERSON: It means that --

12 HON. PATRICIA MILLETT: I'm letting you write the
13 opinion here.

14 MR. DICKERSON: I wish that were true, Your Honor.

15 HON. PATRICIA MILLETT: If you have the language in
16 front of you, just tell me -- would you add a sentence that
17 says, unless there's a settle message or --

18 MR. DICKERSON: If I were writing the opinion, my
19 opinion would be the consistent application of the Supreme
20 Court has been to bar sham issue advocacy. The Tenth Circuit
21 was incorrect to not notice and recognize that this opinion --
22 that in its opinion it was dealing with genuine issue
23 advocacy.

24 Genuine issue advocacy is a category of speech the
25 Supreme Court has not had a chance to review in the context of

1 disclosure and disclaimer rules, although only disclosure, not
2 disclaimer apparent here.

3 HON. PATRICIA MILLETT: Imagine how this definition
4 would include things that would have implicit messages, even
5 if you want to put aside Hickenlooper, that definition
6 wouldn't do much of anything to police against things that go
7 around in --

8 MR. DICKERSON: But it would police against the --

9 HON. PATRICIA MILLETT: -- the sheep's wool of a
10 genuine issue ad, but in fact are sending subtle messages.

11 MR. DICKERSON: But I do think it would police
12 effectively against the Bill Yellowtail ads and the sort of
13 sham issue advocacy --

14 HON. PATRICIA MILLETT: It may do that. What if --
15 because part of your as-applied challenge was to -- look,
16 you've got the names of both senators here, not just the one
17 that's up for election.

18 MR. DICKERSON: Because we're not interested in the
19 election.

20 HON. PATRICIA MILLETT: What if the ad only had the
21 person that was up for election?

22 MR. DICKERSON: That's not our ad.

23 HON. PATRICIA MILLETT: I understand that. What's
24 your position on the Constitution's application -- your
25 proposed constitutional test?

1 MR. DICKERSON: I would think it would be material.
2 And, again, that it would be the duty of the reviewing court
3 to look at the four-corners of the ad and compare it to --

4 HON. PATRICIA MILLETT: That would, of course, meet
5 the Wisconsin Right to Life factors, that ad.

6 MR. DICKERSON: I'm not certain it would.

7 HON. PATRICIA MILLETT: It wouldn't. Do you take a
8 position on the issue, exhort them to adopt -- urge them to
9 contact public officials? It seems to me -- I'm just
10 struggling here with understanding the category that we have
11 here. Would it matter to you if -- because right now in the
12 ad it talks about the whole issue and educates people about
13 the justice. The problem is out there in the legislation
14 that's out there, and then at the end it says, call these
15 senators about this. If it opened with: Call these senators.

16 MR. DICKERSON: I'm not sure that makes a
17 difference. Again, there is necessarily going to be some
18 fact-based element to the application of exacting scrutiny.
19 I mean, I take Your Honor's point about having to write an
20 opinion. My concern --

21 HON. PATRICIA MILLETT: I think you want a legal
22 rule. I think you want it. You're telling me the way that
23 the way you avoid mootness is you have a category of
24 communications you want to have protected.

25 MR. DICKERSON: That's one of the things I'm

1 saying. I'm also saying that I think this Court has
2 jurisdiction over --

3 HON. PATRICIA MILLETT: I've got another
4 category --

5 MR. DICKERSON: -- just over this ad and can rule
6 on the applicability of just this ad. But if that's not an
7 opinion this Court is comfortable writing that, yes, the test
8 from Wisconsin Right to Life and this concept of genuine issue
9 advocacy, a concept which incidentally goes beyond this, you
10 know, it comes out of the Buckley '75 opinion, it comes out of
11 Buckley v. Valeo and --

12 HON. PATRICIA MILLETT: But you haven't made the --
13 chosen to make this litigation about that broad category, is
14 my understanding, from what you've told me.

15 MR. DICKERSON: I think where we're just possibly
16 reaching, I don't think it's a chasm, but at least a
17 weight-able brook --

18 HON. PATRICIA MILLETT: Uh-huh.

19 MR. DICKERSON: -- is that it's our position,
20 looking at Davis, looking at Wisconsin Right to Life, looking
21 at, as Your Honor pointed out, looking at the decision in
22 Colorado in the Tenth Circuit, that it is appropriate for the
23 court to rule on the basis of a script, and that there isn't
24 that need to carve out a particular category of speech, for
25 the reason that this is a fact-intensive inquiry.

1 We're sitting here as a District Court on summary
2 judgment on a question that does have factual predicates.
3 Those factual predicates are the specifics of the speech.
4 This is why when the Supreme Court looked at the Citizens
5 United speech, it looked at the ad, it watched the movie. And
6 it said, no, looking at this movie all together, we're of the
7 opinion, as a finding of fact, that this is a functional
8 equivalent of express advocacy.

9 HON. AMIT MEHTA: It raises another question that I
10 had about the scope of your challenge, and that is, whether --
11 and maybe this is a distinction without a difference, but
12 whether you are asking us to rule that the disclosure
13 obligation is unconstitutional as to all 501(c)(3)s. I mean,
14 you've got two significant distinctions that you're wishing to
15 draw from Citizens United. One is the nature of the
16 organization, and two is the content of the ad.

17 So are you asking us to make a ruling that would
18 opt all -- that would -- that it would be constitutionally
19 impermissible to require disclosure for an ad like this for
20 all 501(c)(3)s?

21 MR. DICKERSON: Yes and no, but if I can unpack it.
22 Yes, absolutely in a sense that an ad like this would be
23 covered by an as-applied ruling. The way you read an
24 as-applied ruling is by comparing future facts to the facts of
25 the as-applied case. So certainly in that sense. But going

1 to the question of 501(c)(3) status, I don't think our
2 argument has ever been that there's something magical about
3 501(c)(3)s. It's not that, you know, Congress's imposition of
4 something created some magical thing. We have been thinking
5 more along the lines of the Massachusetts Citizens for Life
6 case.

7 This is an issue of what does the organization look
8 like as a matter of fact? What does it do as a matter of
9 fact? What are its limitations as a matter of fact? And just
10 as in Wisconsin -- in Massachusetts Citizens for Life, where
11 the Court said, well, we have this organization, it has these
12 restrictions, and can do these things and can't do these
13 things. It's not that the Court said because you're organized
14 under such and such of the Massachusetts corporate law, that's
15 why you get this exemption.

16 No. What the Court said was, looking at your
17 overall activity, you're not the sort of organization which
18 the Government can sustain an exacting scrutiny analysis
19 against.

20 HON. AMIT MEHTA: Do we have that kind of record
21 before us? You've chosen to litigate this in a way that
22 doesn't really present us with much of a factual record when
23 it comes to the burdens, not just on your organization, but on
24 501(c)(3)s in general, and that's a big part of your argument,
25 it seems to me.

1 MR. DICKERSON: Again, with the bifurcation of the
2 content of the speech versus the organization. I think that's
3 fair.

4 HON. AMIT MEHTA: What's fair?

5 MR. DICKERSON: Your statement that the burdens are
6 a relevant part of our argument. Our point is this. Our
7 point is that, again, there isn't much of a record here. The
8 FEC has the burden of persuasion and chose not to build one.
9 We have a verified complaint that lays out all of the material
10 aspects of how our organization is run, the fact that it's
11 organized in a certain way, that is, that voters have an
12 expectation -- voters -- excuse me, that is, donors have an
13 expectation of privacy in their donations, that it wants to
14 run ads during a certain period because of resource
15 constraints. All of that is in the case. And that's enough
16 to say, without reference to 501(c)(3) as a category, although
17 that is shorthand for all of those things, that that sort of
18 organization, imposing these sort of burdens upon it, one,
19 does create very real risks.

20 The FEC itself put into the record the fact that
21 there are organizations and people out there who don't love
22 our client. If you look at the SBA -- the Susan B. Anthony
23 List case from two terms ago in the Supreme Court, you know,
24 one of the concerns is, you know, if you allow enforcement
25 actions in private complaints and things of that nature.

1 HON. AMIT MEHTA: You stipulated that away, haven't
2 you? This is not a case about potential harassment or
3 intimidation, and you stipulated that away.

4 MR. DICKERSON: Oh, that's a separate point, Your
5 Honor, although I understand the confusion. That was my
6 mistake. I am drawing a distinction between -- so to back up.
7 I think this is best illustrated by how Citizens United
8 handled an as-applied case. You know, Citizens United did
9 reach this question of whether or not disclosure and
10 disclaimer rules -- and, again, disclaimer rules aren't here.
11 We're willing to put our name on the ad, it's just the
12 disclosure filings. Whether disclosure filings were
13 appropriate on the face of those ads under exacting scrutiny,
14 and it did that analysis. Only then did it say that there's
15 this additional exception if you can show that your donors are
16 going to be subject to threats, harassment or reprisal.

17 We're not making that last step, we're simply
18 saying this flunks exacting scrutiny. There's no need to
19 reach that back-up understanding. If Your Honor looks at how
20 Citizens United is written, that's very clearly a back-up
21 argument after the implication of exacting scrutiny. All
22 we're asking --

23 HON. COLLEEN KOLLAR-KOTELLY: Slow down. You're
24 going too quick, not for the record, but for us to absorb it.

25 MR. DICKERSON: That's a back-up argument to the

1 application of exactly scrutiny.

2 HON. AMIT MEHTA: I understand that, but I think
3 the point I want to make sure I'm clear on, because I thought
4 I heard you slipping into some suggestion that organizations
5 like yours are susceptible to greater risk of retaliation,
6 harassment and what have you. You're not making that argument
7 before us, correct?

8 MR. DICKERSON: I'm not making that argument about
9 donors certainly. I do think that the existence of -- I don't
10 think we've stipulated away the fact that the FEC can come
11 after someone who doesn't file an electioneering communication
12 report, someone being an organization.

13 HON. AMIT MEHTA: You don't have to stipulate to
14 that, that's what the law requires.

15 MR. DICKERSON: I agree. And that is one of the
16 burdens imposed by the law.

17 HON. PATRICIA MILLETT: What happens if something
18 is a genuine issue ad but the issue is a hot button electoral
19 issue as well?

20 MR. DICKERSON: Well, I would certainly hesitate to
21 write that opinion since I would imagine it would be very --

22 HON. PATRICIA MILLETT: Again, you haven't given me
23 any definition other than Wisconsin Right to Life, which would
24 capture exactly those. So what if it were a hot button? If
25 it were immigration reform?

1 MR. DICKERSON: I don't think that matters, because
2 the question is, is this ad about a candidacy? Is it about an
3 election? Is it about someone running for office? You know,
4 the McConnell ads very obviously were, that was a factual
5 finding. The Citizens United ads very obviously were. They
6 have no issue content whatsoever. They're just about -- go
7 watch this movie that says, don't vote for Hillary Clinton.

8 HON. PATRICIA MILLETT: But what if you have the ad
9 that begins like yours with background information, and just
10 to take one side of the debate versus the other, for purposes
11 of a hypothetical, it begins with children crying as their
12 parents are getting taken away. Breaking up families is bad.
13 And it goes on and has pictures and images, it doesn't say
14 anything about senatorial election. And then goes on just
15 like yours and talks about the issue, and then cites a pending
16 immigration reform bill.

17 Call X, will stop families from getting split up.
18 Tell your -- call Senator X, and by the way, during the 60-day
19 period is up for election and is closely tied and known to be
20 someone who is opposed to that bill.

21 MR. DICKERSON: I think there's two --

22 HON. PATRICIA MILLETT: Does that one get treated
23 the same as yours?

24 MR. DICKERSON: I think it would, yes. And the
25 reason for that is that -- I mean, again, that's not -- I'm

1 arguing the back-up that we're writing an opinion beyond the
2 specific text of our ad, which is my position should be the
3 scope of this case. But that is an ad which doesn't say
4 anything about that person's position on the case or on the
5 question. It's tied to an actual pending question of
6 legislation. I mean, at some point the danger here is that
7 during the 60-day period you shut down the ability of --

8 HON. PATRICIA MILLETT: I completely get that. I
9 completely get that was a hypothetical. There's plenty of
10 arguments on both sides, but one can also imagine it could
11 also be run by -- call so-and-so and let that person know that
12 you support keeping families together and the candidate would
13 be a proponent of that very bill that you're asking people to
14 call on. It could be run by folks either way, but it seems to
15 me, probably way more than your Hickenlooper case -- or
16 example, that that would -- it would be a little hard blank
17 reality to say that that is not something that weighs in on
18 electioneering in exactly the ways that Congress and the FEC
19 are supposed to pursue.

20 People may want and voters may want to know who is
21 behind that ad so they can evaluate those arguments, those
22 policy arguments. And maybe the FEC would want to know who's
23 behind it and in front of it because, golly gee, given how
24 closely this person is tied to that bill and that policy
25 debate and how it's all they are talking about on the campaign

1 trail, we want to make sure there's nobody end running
2 limitations here that we need to enforce.

3 MR. DICKERSON: I think that's why I think there's
4 two dangers there. One is leaving that to a bureaucratic
5 enforcement process is itself dangerous, which is why I do
6 think it's covered. And the reason is that, again -- the fact
7 that it's an effective ad about a question of public policy
8 doesn't change the fact it's about a question of public
9 policy.

10 HON. PATRICIA MILLETT: Well, I think the problem
11 is -- I guess I have to leave this on the table, is you've
12 asked -- it's not clear to me what you keep asking for. It
13 seems to be a bit of a moving target because part of your
14 arguments here was that your ad doesn't suggest anyone's
15 position on an issue -- that's electoral issue, it just
16 doesn't, and my hypothetical clearly would. So what am I
17 supposed to do with that?

18 MR. DICKERSON: I'm not sure it clearly would. But
19 I think these are reasons to only decide the ad that's in
20 front of you. I think these are reasons to say, look, if
21 someone has another ad that's different in really any way, a
22 sensible lawyer is going to say, go to Court and ask for
23 declaratory judgment if you're so sure. Or the FEC would be
24 able to do a regulation giving that sort of guidance based
25 upon the statute.

1 HON. PATRICIA MILLETT: But you would argue that
2 it's unconstitutional for the exact same reasons your ads are
3 unconstitutionally regulated?

4 MR. DICKERSON: If they're different ads, I might
5 lose that case and win this one.

6 HON. AMIT MEHTA: Can I ask why we're even talking
7 about the content of the ads? Here's what I mean. If the ad
8 meets the definition of electioneering communication, doesn't
9 Citizens United pretty much say it doesn't really matter where
10 along the spectrum it falls. I mean, there it was applied to
11 an ad, a commercial ad, which, yes, has some First Amendment
12 protection, but arguably has far less First Amendment
13 protection than issue ads or any other types of political
14 speech.

15 So why are we -- should we even be worried about
16 the kind of line drawing that you're asking us to do with
17 respect to that content of the ad?

18 MR. DICKERSON: I very much appreciate the question
19 because I think Your Honor is completely correct that the
20 deciding question here from a precedent standpoint is the ads
21 in Citizens United. To answer the question, I think there's
22 been a danger in the law in the way this case has been argued
23 by the Commission of conflating two different problems
24 identified about regulations of political speech in this area.
25 And that's the problem with vagueness and the problem of

1 overbreadth.

2 The problem that you can -- you can have a law that
3 is very clear but is unconstitutional in its application to a
4 particular type of speech. I think that's what's going on
5 here. We're not claiming that there's a vagueness problem in
6 the electioneering communication definition, we're claiming
7 that under exacting scrutiny there's no fit between the
8 public's informational interests in who's supporting a
9 candidate and this ad, because this ad doesn't support a
10 candidate. That's why we're looking at the language of the
11 ad.

12 HON. AMIT MEHTA: Yeah, but the Court didn't
13 grapple with the vagueness issue or the overbreadth issue in
14 Citizens United either, but it came very squarely in favor of
15 the disclosure requirements as to what it considered
16 commercial speech. Your speech here isn't commercial speech,
17 it's something that's arguably -- has greater protection under
18 the First Amendment.

19 So why should the disclosure requirements be
20 subject to greater First Amendment scrutiny here when that
21 wasn't the case in Citizens United?

22 MR. DICKERSON: Well, because they're entitled to
23 more First Amendment protection.

24 HON. AMIT MEHTA: In a disclosure context?

25 MR. DICKERSON: Absolutely, in any context.

1 HON. PATRICIA MILLETT: More? Why are they more?

2 HON. AMIT MEHTA: Why more?

3 MR. DICKERSON: Because they're political speech.

4 HON. PATRICIA MILLETT: So was Citizens United.

5 MR. DICKERSON: Well, that's sort of the debate,
6 right?

7 HON. PATRICIA MILLETT: Your brief told me they
8 were pejorative attacks on a prospective presidential
9 candidate.

10 MR. DICKERSON: I think they were. But again --

11 HON. PATRICIA MILLETT: But they weren't?

12 MR. DICKERSON: No. Let me spell this out.

13 HON. PATRICIA MILLETT: Yes.

14 MR. DICKERSON: The ads in Citizens United, you're
15 exactly right, Your Honor, they don't get a lot of play in the
16 opinion. And the reason for that is that they are so
17 obviously connected to Hillary: The Movie. They're about --
18 go watch this movie. They're merely --

19 HON. COLLEEN KOLLAR-KOTELLY: They did not discuss
20 the -- lump them together in the opinion, they were separate
21 discussions.

22 MR. DICKERSON: I agree.

23 HON. COLLEEN KOLLAR-KOTELLY: They spent more time
24 on the movie, but they were separate discussions.

25 MR. DICKERSON: They were. In those separate

1 discussions, the Court said, the reason we're going to
2 regulate these is even if they're merely a request for a
3 commercial transaction, right, they're still pejorative and
4 they're still about Hillary Clinton. So I guess I have a
5 three-step argument on this. One is that pejorative --

6 HON. COLLEEN KOLLAR-KOTELLY: On the pejorative --
7 I mean, I think they said more about the movie for that. But,
8 you know, in terms of looking through it, that's not what they
9 hung their hat on in terms of making this decision, that it
10 was pejorative.

11 MR. DICKERSON: What they also didn't hang their
12 hat on is whether this was genuine issue speech. The argument
13 I am making is that if you look at the ads in Hillary, or the
14 ads for Hillary: The Movie, they do one of two things. And
15 people can disagree about this because the Court didn't really
16 say. But our view is that they all are intimately tied to
17 this movie. And, Your Honor, they do refer --

18 HON. COLLEEN KOLLAR-KOTELLY: That's not the way
19 the opinion was written in the Supreme Court.

20 MR. DICKERSON: Respectfully, Judge, they referred
21 to the ads themselves as making pejorative references to --

22 HON. COLLEEN KOLLAR-KOTELLY: Very minor. I went
23 through this in my opinion, so I can tell you -- I forgot how
24 many times, but I looked at it, and it was mostly connected --
25 not that often. It certainly wasn't part of the standards

1 that they were looking at. That's what you're focusing on.

2 MR. DICKERSON: It's one thing we're saying, but
3 another thing we're saying is that the ads in -- for Hillary
4 were never pled or argued to be genuine issue speech because
5 they're not. They are at best -- at best -- they are about
6 requesting a commercial transaction. And because commercial
7 speech is subject to less constitutional protection, it's not
8 obvious that they're necessarily entitled to exacting
9 scrutiny.

10 HON. PATRICIA MILLETT: That's what the Supreme
11 Court applied.

12 MR. DICKERSON: It did, which I appreciate.

13 HON. PATRICIA MILLETT: Don't appreciate it. We're
14 bound by the fact that they viewed those ads separate from the
15 movie as entitled to exacting scrutiny, are we not?

16 MR. DICKERSON: Yes.

17 HON. PATRICIA MILLETT: Okay. Well, let's not
18 pretend then that it was lesser commercial speech.

19 HON. AMIT MEHTA: And because it was treated -- say
20 this Supreme Court treated it as commercial speech or
21 certainly made reference to it, wouldn't, arguably, the
22 public's interest in disclosure be less? In other words, why
23 would the public care if this is simply an ad and who is
24 paying for the ad?

25 On the other hand, it seems there is a greater

1 public interest in knowing who is talking about a candidate,
2 even with respect to -- even if the ad doesn't adopt a
3 specific position on an issue.

4 MR. DICKERSON: I think the answer on that --
5 again, there may be disagreement here on what exactly those
6 ads look like in terms of how they should be interpreted.
7 Our view is that, yes, the informational interest is clearly
8 met, but it's met because these are ads solely about Hillary
9 Clinton's candidacy for president. There's not other content.

10 To the extent there is any other content, it's to
11 ask you to buy a movie which is about Hillary Clinton's
12 candidacy for president. There's no background discussion of
13 an issue here. So it's distinguishable on the simple basis
14 that the Buckley '75 opinion, the Buckley v. Valeo, Wisconsin
15 Right to Life, has suggested there is this category of genuine
16 discussion of issues of public importance, including pending
17 legislation specifically, and that that is entitled to special
18 dispensation.

19 The reason we have exacting scrutiny at all in
20 these cases is because the Supreme Court said there's a danger
21 that you're going to vacuum up speech where there's not an
22 informational interest. The fact that there's informational
23 interests for these particular ads, which have no content,
24 aside from Hillary Clinton is someone you shouldn't like, and
25 you should go watch this movie to see more reasons why you

1 shouldn't like Hillary Clinton.

2 Well, there may be an informational interest in
3 that because it's unambiguously connected to her campaign, but
4 our ads look nothing like that. So in an as-applied context,
5 our argument is simply, compare the scripts, look at the
6 scripts. You can make the arguments that these are ads and
7 this is a movie where there's a Government -- there's an
8 interest of the voting public in knowing who's paying for
9 this, because it's pretty clear what they think of Hillary
10 Clinton. It's not clear what the Independent Institute thinks
11 of these senators because it doesn't matter and because it's
12 contingent.

13 HON. COLLEEN KOLLAR-KOTELLY: So you're indicating
14 there's less of a Government interest, informational and
15 otherwise, with your ad?

16 MR. DICKERSON: Yes:

17 HON. COLLEEN KOLLAR-KOTELLY: Why?

18 MR. DICKERSON: Because the informational interest
19 was defined in Buckley v. Valeo as determining the financial
20 constituencies of the candidates. It's about who stands
21 behind the candidate.

22 HON. PATRICIA MILLETT: How is the informational
23 interest defined in Citizens United?

24 MR. DICKERSON: Well, that's a good question.

25 HON. PATRICIA MILLETT: It's not much of a question

1 at all. It was a distinct -- recognizing the public interest
2 and knowing who's speaking about a candidate in the days
3 leading up to election. I think that's the interest we need
4 to talk about here.

5 MR. DICKERSON: And, again, I would argue that
6 that's shorthand for the same informational interest that was
7 pointed out in Buckley. There's no indication --

8 HON. PATRICIA MILLETT: It doesn't sound the same.

9 MR. DICKERSON: Well, there's no indication the
10 Supreme Court was adopting a new standard.

11 HON. PATRICIA MILLETT: As that informational
12 interest was articulated in Citizens United, just that
13 articulation, the public interest in knowing who is talking
14 about a candidate in the period immediately leading up to an
15 election, your ads fit that description?

16 MR. DICKERSON: And I disagree, for this reason.
17 Again, this concept coming out of Buckley that if you're going
18 to have an informational interest, it has to be unambiguously
19 connected to a campaign.

20 HON. PATRICIA MILLETT: I want to ask -- I don't
21 want to use that language. I want to use the language that
22 they use in Citizens United, and that is, the public interest
23 in knowing who is speaking about a candidate in the period
24 immediately before an election. And I don't want to
25 psychoanalyze it. I don't want to say that was code for

1 different words. As to those words that the Supreme Court
2 pronounced --

3 MR. DICKERSON: As to those words --

4 HON. PATRICIA MILLETT: That fits this ad.

5 MR. DICKERSON: The language is speaking about a
6 candidate is important because it limits it.

7 HON. PATRICIA MILLETT: Okay. Tell me how.

8 MR. DICKERSON: And the Citizens United ads are
9 about Hillary Clinton as a candidate. And the movie, Hillary,
10 is about Hillary Clinton as a candidate.

11 HON. COLLEEN KOLLAR-KOTELLY: We're not with the
12 movie, let's just move with the ad. They analyze them
13 separately, and that's not what we got in front of us. So
14 let's focus on the ads.

15 MR. DICKERSON: They do analyze them separately,
16 but --

17 HON. COLLEEN KOLLAR-KOTELLY: But it's not a movie
18 that you're asking us to look at, you're asking us to look at
19 an ad. So let's stick to the discussion about the ads.

20 MR. DICKERSON: So let's talk about the actual
21 language of the ads, there are three of them. One of them
22 says, you know, the only good thing we have to say about
23 Hillary Clinton is that she looks good in a pantsuit. That's
24 the content of one of the ads. Another one is: Hillary
25 Clinton is the closest thing we have in America to a European

1 socialist. That's another of the ads. And the third ad says:
2 If you think you know everything about Hillary Clinton, wait
3 until you see the movie, or words to that effect.

4 These are not ads that are about issues, these are
5 ads that contain, as the Supreme Court twice said, pejorative
6 references to Hillary Clinton --

7 HON. PATRICIA MILLETT: We're only talking about
8 the last ad.

9 MR. DICKERSON: Talking about the last ad, there's
10 no issue speech content whatsoever.

11 HON. PATRICIA MILLETT: Why is that an issue? Here
12 is a public figure -- even if she weren't running for
13 office -- here's a public figure.

14 MR. DICKERSON: But it's about her, Judge. That's
15 the difference. The difference is that she's the subject of
16 it.

17 HON. PATRICIA MILLETT: Uh-huh.

18 MR. DICKERSON: Here the legislation is the subject
19 of it. My client doesn't care who the senators are, my client
20 cares that this act gets passed.

21 HON. PATRICIA MILLETT: No, I don't think that's
22 accurate. My assumption is that you run this ad, as you
23 announced, that your job is educating voters and telling them,
24 here is an important piece of legislation, addressing by your
25 ads' terms, an important public policy matter that you should

1 be caring about and that you should be contacting this
2 candidate about at a time when the candidate is most sensitive
3 to your comments and concerns. Correct?

4 MR. DICKERSON: With slight modification.

5 HON. PATRICIA MILLETT: Okay.

6 MR. DICKERSON: It is correct in the sense that we
7 can consider this an important issue.

8 HON. PATRICIA MILLETT: Uh-huh.

9 MR. DICKERSON: And it is correct that we want to
10 run this during a period where it will have the most exposure.
11 I think that the mechanism we have in mind there is more that
12 people tune out politics and especially legislation except
13 during election periods where there is more coverage.

14 HON. PATRICIA MILLETT: I get that. But so the
15 whole point is -- my assumption is -- again, tell me where I'm
16 wrong -- is that the goal of this is people are paying
17 attention and we think it's an important issue; we're agreed
18 on that?

19 MR. DICKERSON: Yes.

20 HON. PATRICIA MILLETT: And that voters should care
21 about this?

22 MR. DICKERSON: Absolutely.

23 HON. PATRICIA MILLETT: And voters should care
24 enough -- that they should care about what their senators are
25 doing about this issue, is that right, or not?

1 MR. DICKERSON: No. And this is the distinction --

2 HON. PATRICIA MILLETT: You tell people to make a
3 phone call. People don't normally do that unless they have
4 decided it's important to them. So it should be important
5 enough to you to bother this person, contact this person. I
6 won't say bother, that's the wrong word, contact this person.

7 MR. DICKERSON: But the distinction I would draw is
8 sort of baked into the way Your Honor asked the question. You
9 asked, this is important to voters, we're not talking about
10 voters. We're talking about citizens who are represented by
11 these people. This is a question of the governed and the
12 government and that connection. It's not a connection of go
13 to the voters and do this.

14 HON. PATRICIA MILLETT: That's fine. Okay.

15 MR. DICKERSON: That's an important distinction.

16 HON. PATRICIA MILLETT: Okay.

17 MR. DICKERSON: I think that's also the distinction
18 with Hillary --

19 HON. PATRICIA MILLETT: Whether you vote or not,
20 you don't have to tell him whether you're going to vote in the
21 election or not, but call him and tell him you care about
22 this.

23 MR. DICKERSON: Absolutely. And it doesn't say
24 this is a really important issue and it's important that we
25 get this right and they have been wrong on this issue. Call

1 them and tell them to stop being wrong on this issue. Which
2 is the format that every ad that I saw in the McConnell record
3 followed.

4 HON. PATRICIA MILLETT: Isn't that implicit?

5 MR. DICKERSON: I don't think so.

6 HON. PATRICIA MILLETT: If they had already staked
7 out a position on this in support of this act, your act
8 wouldn't make much sense, would it? I'm sorry. Your ad
9 wouldn't make much sense. Isn't it implicit that they either
10 haven't yet taken a position -- how dare they be so
11 inattentive to such an important public policy matter, or
12 they're on the wrong side of it and they need to hear from
13 you. If they were the sponsor of this bill, they wouldn't
14 need to hear from people.

15 MR. DICKERSON: I think that's going well outside
16 the four-corners of the ad.

17 HON. PATRICIA MILLETT: Well, it may be implicit in
18 the same way in the Hickenlooper one was implicit about his
19 position.

20 MR. DICKERSON: Again, I disagree, I think that's
21 just too far afield. And it also changes over time. I'm
22 sorry, Your Honor.

23 HON. AMIT MEHTA: What about the other -- we've
24 focused a lot on the informational interests and whether your
25 ad, the FEC's interest in providing information justifies the

1 burden of disclosure. But in McConnell the Court also said
2 that there are other interests at play, including assuring the
3 absence of corruption or the appearance of corruption, as well
4 as gathering data necessary to enforce other election laws.

5 Why isn't a disclosure requirement here justified,
6 based on the desire to learn that this ad isn't paid by a
7 foreign country or someone who is prohibited from running the
8 ads in the United States about the very issue that you've
9 identified in the ad?

10 MR. DICKERSON: And I'm assuming from Your Honor's
11 question that we're putting aside the corruption question,
12 which is the easier answer. But moving to the harder
13 answer --

14 HON. AMIT MEHTA: Maybe it is, maybe it isn't, but
15 let's stick with the harder answer.

16 MR. DICKERSON: In that -- frankly, I think it's a
17 makeweight argument. This isn't a situation where the
18 regulations or the statute is in any way directed towards
19 that. There's no evidence whatsoever in the record that
20 that's the importance of this or the intention of this or that
21 the FEC has ever used it to that end.

22 HON. AMIT MEHTA: It doesn't have to be --

23 HON. COLLEEN KOLLAR-KOTELLY: They put that in
24 their --

25 HON. AMIT MEHTA: The Supreme Court has already

1 held that the interest is justified and the disclosure
2 requirement is constitutional based on that interest. The FEC
3 doesn't have to bring forward that burden with respect to
4 every ad, does it?

5 MR. DICKERSON: I think it does have to show -- I
6 think it does have to show some sort of connection.

7 HON. COLLEEN KOLLAR-KOTELLY: In other words,
8 they'd have to prove that somehow foreign countries would be
9 interested in this particular ad, is that what you're saying?

10 MR. DICKERSON: No.

11 HON. COLLEEN KOLLAR-KOTELLY: Because in their
12 pleadings they indicated, not only did they set out the
13 standard in McConnell, which is quite explicit, but they also
14 indicated besides the informational, some other governmental
15 interest as well, so -- which would apply across the board to
16 any of these ads. So I don't understand why they'd have to
17 prove it in each instance.

18 MR. DICKERSON: I think I'm drawing a legal
19 distinction, Your Honor. In the McConnell case when they talk
20 about gathering information to enforce the act, of course, I
21 mean McCain-Feingold, and at the time, as Your Honor is very
22 well-aware, part of what was going on in the McConnell
23 litigation wasn't just that the ads were completely
24 unregulated, it's that because they were completely
25 unregulated, you could take completely unregulated money and

1 spend them on them, and that was banned in McCain-Feingold,
2 et cetera.

3 So at the time the McCain-Feingold court said that,
4 going back to your point, Your Honor, they had in mind the
5 fact that there are bans on corporate funding of this. They
6 had in mind the fact that there were all of these restrictions
7 on how you could fund an electioneering communication that
8 have been declared unconstitutional. So the legal regime that
9 is being enforced -- I may be incorrect, but my memory is that
10 there's no mention whatsoever in any of these cases about the
11 danger of foreign contributions. It's about the danger of
12 people blowing past contribution limits, or the danger of
13 corporations and unions illegally funding electioneering
14 communications, neither of which are any longer in play.

15 HON. AMIT MEHTA: Our Court of Appeals in speech
16 now, recently, a few years back, identified that very issue.
17 To ensure that a disclosure of such information deters and
18 helps expose violations of other campaign finance restrictions
19 such as those barring contributions from foreign corporations
20 or individuals. Why isn't that same concern relevant here?

21 Yes, it involved a different type of political
22 organization, that I'll concede. But why is the interest any
23 different because you are a 501(c)(3)?

24 MR. DICKERSON: I think the simplest answer is that
25 there's no indication that that's what's going on here. And

1 also that the FEC can't have it both ways. They can't say,
2 look, you know, whenever our regulations aren't in effect, the
3 scope of disclosure is really broad, and whatever they are,
4 it's really narrow. And then say, we're going to have this
5 really narrow -- this really narrow rule about how you go
6 about defining who is disclosed as a donor, and then claim
7 this massive mantle, which was so easily circumvented.

8 That's exactly the problem the Buckley court ran
9 into, where Buckley said: We're going to look at this
10 vagueness problem on political committee definitions and
11 expenditures and that stuff. And then they said: And if we
12 apply what we think we need to as a limited construction on
13 that statute, we're going to be stuck with a situation where
14 it no longer does any work.

15 HON. COLLEEN KOLLAR-KOTELLY: It's also a statute
16 that's not in effect anymore, I mean, that you're talking
17 about. So let's move to the cases where we are talking about,
18 BCRA, and the statute that we're going to be apply here.

19 MR. DICKERSON: Well, I think the Federal Election
20 Campaign Act is still in effect, and that was my reference,
21 was to the way the Court treated that act of which BCRA is
22 merely an amendment. I think you do still have this argument,
23 which the Court considered relevant in a First Amendment
24 challenge in this same act, not this act of Congress, but this
25 same statute that's been amended, you know, where -- really?

1 If you have earmarked contribution disclosure, that's going to
2 somehow allow the FEC -- that's a fancy. There's no reason to
3 believe that whatsoever.

4 HON. PATRICIA MILLETT: Really? I mean, really?
5 Didn't we just uphold the earmarking regulation as a
6 reasonable exercise of balanced judgment that they had to make
7 in a difficult area?

8 MR. DICKERSON: Yes, we did.

9 HON. PATRICIA MILLETT: Because you know as well as
10 anybody that if they go too far one way or the other, you're
11 going to be attacking them on that end as well. You're going
12 to -- heads we win, tails you lose, FEC, in this area. So the
13 fact that they have taken a balanced line here doesn't
14 eliminate the concerns that they have underlying it. You
15 know, more sunlight is better than less, and maybe they would
16 like to have the full glare of spotlights, but you should be
17 thankful haven't gone that far, and maybe the Constitution
18 wouldn't let them anyhow, but be thankful they're not that
19 far.

20 But that doesn't mean you get to say you have no
21 serious interest in this. It's not a real interest. That
22 seems quite wrong to me. How can that be?

23 MR. DICKERSON: Even if it is an interest, again,
24 you have to apply exacting scrutiny. You have to say on the
25 facts of this case: Is there a fit between that interest and

1 what's going on here? And I don't see the mechanism by which
2 that fit is accomplished. That's the fundamental problem.
3 You can concede that an interest exists. And we have pushed
4 back vigorously on broad understandings of these interests
5 because we think that's a misreading of the case law.

6 But even if you believe a particular formulation of
7 the interest, that doesn't absolve the Court of its
8 responsibility to conduct a tailoring analysis. On a
9 tailoring analysis, even if that is a valid interest in this
10 case, what's the mechanism? That's what I mean by a
11 makeweight argument. There's no attempt to show that this is
12 tailored in any way.

13 HON. PATRICIA MILLETT: Okay. One more thing I
14 wanted to clear up, and we've had you up for a long time.
15 Sometimes you talk about unambiguously campaign related and
16 sometimes you talk about genuine issue ads. And it strikes me
17 that there's a big delta between those two categories. I'm
18 not talking about legal verbiage here, I'm talking the real
19 word. There's a big difference between unambiguously campaign
20 related and genuine pure issue ads. Do you agree?

21 MR. DICKERSON: Not entirely. And the reason,
22 again, is that these are different ways of formulating the
23 exacting scrutiny analysis. The question isn't -- these are
24 shorthands for saying: How close is the fit between the
25 Government's informational interest or any other interest and

1 what is actually going on here, what they're asking for.

2 And our position has been, the Supreme Court has
3 consistently applied exacting scrutiny. And in every case,
4 maybe there's some difference of opinion on what form of words
5 are used to explain this concept of the fit between the
6 Governmental interest and what's going on. But, at a minimum,
7 what Buckley said is that the Government's informational
8 interest is limited to speech that is unambiguously about a
9 campaign.

10 And as we saw in the McConnell litigation upon
11 which the FEC relied very heavily, what went on there was
12 exactly that question. It was saying, look, we don't see any
13 genuine issue speech out there in the world. What we see are
14 people abusing Buckley, breaking nice things, and we want to
15 do something about it. That doesn't vitiate the fact that the
16 Government's interest is not to anything that happens at
17 whatever point Congress decides. The interest is still
18 limited to campaign-related speech, to electioneering, to
19 some connection --

20 HON. PATRICIA MILLETT: Wait a minute, back up.
21 You're either using the adjective or you aren't.

22 MR. DICKERSON: Which adjective? Sorry.

23 HON. PATRICIA MILLETT: Unambiguously.

24 MR. DICKERSON: No --

25 HON. PATRICIA MILLETT: This time you used

1 "related." I want to say, if the test is the test -- is your
2 view that when you say, we want to run substantively similar
3 ads in the future that that encompasses the entire category of
4 everything that is not unambiguously related to a campaign,
5 including things are quite debatably related to a campaign or
6 at least ambiguously related to a campaign, sure could be
7 inferred as related to a campaign. What do I do with that
8 category? And I think you picked this particular ad because
9 your assumption is people wouldn't put that label on the text
10 of this particular ad, but then you've used these legal texts.

11 So tell me what happens with that category -- that
12 middle category?

13 MR. DICKERSON: The middle category being?

14 HON. PATRICIA MILLETT: Being ambiguously
15 campaign-related, sure looks like -- sure debatably
16 campaign-related, sure looks like it is, but it's not
17 unambiguous, which is a pretty high standard.

18 MR. DICKERSON: And, thankfully, and we may
19 disagree on this, Your Honor, and I'm not quite clear until I
20 answer the question. But for us you've got ambiguously
21 campaign-related up here, you've got express advocacy up here,
22 and then you've got us. We're well below either standard.
23 Whether you apply, you know, a genuine issue speech sort of
24 standard under exacting scrutiny, or you apply an
25 unambiguously campaign-related standard under exacting

1 scrutiny, they're both well below the question of ambiguity.
2 And this ad and our speech is nowhere near the ambiguity line.

3 So in the sense that we're sitting here on an
4 as-applied challenge, there is no reason to reach that
5 question.

6 HON. PATRICIA MILLETT: But someone thought your ad
7 was ambiguously campaign-related.

8 MR. DICKERSON: Well, we're hoping this Court will
9 say that it's not.

10 HON. PATRICIA MILLETT: Well, if we did -- you're
11 doing lots of back-up plans here. So what's your back-up plan
12 if someone did?

13 MR. DICKERSON: If someone did, we'd have a
14 declaratory judgment from the U.S. District Court for the
15 District of Columbia saying otherwise.

16 HON. PATRICIA MILLETT: I'm sorry.

17 MR. DICKERSON: If it's a finding of this Court
18 that it's unambiguous --

19 HON. PATRICIA MILLETT: No, no, no, someone here.
20 One of the three of us -- or two of the three of us. That it
21 was ambiguously campaign-related, although it's certainly not
22 in the wink and nod, like my immigration example, I'll give
23 you that.

24 MR. DICKERSON: I think, again, ambiguous
25 relationship to a campaign is not what exacting scrutiny

1 demands.

2 HON. PATRICIA MILLETT: So that would fail?
3 Banning ambiguously related to a campaign would also fail
4 exacting scrutiny?

5 MR. DICKERSON: No, not necessarily. Again, I
6 understand that desire for a bright-line test, but in this
7 area, as I think is quite clear from reading all these cases,
8 things are messy.

9 HON. PATRICIA MILLETT: Well, it's not just a
10 bright-line test, it's an administrable test, which was the
11 lesson of your Buckley case that you keep referring -- not
12 your Buckley, their Buckley case, that you keep referring --

13 MR. DICKERSON: I had no role in that.

14 HON. PATRICIA MILLETT: -- you keep referring us
15 to. And at least the Supreme Court has said, as to the
16 existing test for electioneering communications, it's easily a
17 bright-line rule, easily administrable --

18 MR. DICKERSON: Yeah.

19 HON. PATRICIA MILLETT: -- which ensures you don't
20 have, I think you called, the bureaucratic policing problem
21 that you referenced.

22 MR. DICKERSON: Which is I think where we're back
23 to -- our view is that if you're applying exacting scrutiny
24 properly, regardless of which of those tests you decide is the
25 correct one coming out of the case law, we fall under it.

1 HON. PATRICIA MILLETT: So your view is that the
2 only thing that survives exacting scrutiny is unambiguously
3 campaign-related --

4 MR. DICKERSON: That's correct.

5 HON. PATRICIA MILLETT: -- for issue ads?

6 MR. DICKERSON: Yes. And, again, real issue ads.
7 We're not talking the so-called --

8 HON. PATRICIA MILLETT: Well, you can't really have
9 real or genuine at the same time that you've got, golly gee,
10 sure looks like, wink, wink, but it's not unambiguous. That's
11 my problem with the delta between the two things I'm trying to
12 figure -- and it sounds to me like your position is anything
13 up to unambiguously campaign-related in your position, your
14 view, would not survive -- would be unlikely to survive
15 exacting scrutiny but, halleluiah, I don't have to deal with
16 that in this case because I'm as far away from that as I could
17 possibly be.

18 MR. DICKERSON: That's correct.

19 HON. PATRICIA MILLETT: Do you guys have more
20 questions for now?

21 MR. DICKERSON: Thank you.

22 HON. PATRICIA MILLETT: Thank you very much. I'm
23 sorry to have kept you up here so long.

24 I'm sorry. We're going to just take a five minute
25 break to let the courtroom reporter take a -- rest her fingers

1 for a minute. Five minutes.

2 BRIEF RECESS

3 AFTER RECESS

4 HON. PATRICIA MILLETT: I'm sorry for the
5 interruption, Mr. Mueller.

6 MR. MUELLER: Good afternoon. May it please the
7 Court, Greg Mueller, for the Federal Election Commission. I'd
8 first like to briefly address the mootness point that we heard
9 from Mr. Dickerson about. I would note that initially we
10 addressed the mootness point in the Court of Appeals, they
11 supplemented the record, the plaintiffs here supplemented the
12 record before this court, and then we didn't dispute it from
13 that point forward. They produced a declaration that we, in
14 our reading at least, looked to square with WRTL, Wisconsin
15 Right to Life, and we didn't dispute it from that point.

16 HON. PATRICIA MILLETT: Is that still your position
17 given the questioning?

18 MR. MUELLER: Well, yeah, we're not disputing the
19 mootness question. We understand that the Court has to
20 satisfy itself of its jurisdiction. Our reading was that it
21 is squared, at least on the capable of repetition point in
22 particular, with WRTL, with Wisconsin Right to Life.

23 HON. PATRICIA MILLETT: But this statute doesn't
24 evade -- I'm sorry. This ad doesn't evade review because
25 there's plenty of time.

1 MR. MUELLER: Yeah. Our focus wasn't on -- their
2 focus was on running materially similar ads. So it is true
3 that within the four-corners of the complaint, the ad that
4 they're discussing could be reviewed in some significant
5 period of time.

6 HON. AMIT MEHTA: I'll ask you the same question I
7 asked your colleague, which is that -- in an as-applied
8 challenge context, how do we -- in which the plaintiff is
9 suggesting that they will run materially similar or like ads,
10 which is what they've said. How do we evaluate that
11 factually? Do we rely simply on the ad that's before us? Is
12 that enough of a record to do an as-applied challenge to
13 something as significant as a disclosure requirement?

14 MR. MUELLER: I agree, Your Honor, that it would be
15 difficult to look at some undescribed ad. And to the extent
16 that it's not described beyond the text of the ad that's in
17 the complaint, I think that that would be a difficult
18 undertaking. But at the same time, also, in WRTL, the Court
19 did look to materially similar ads. I don't know if the
20 characteristics that are presented here are as sharp as they
21 were in WRTL, but materially similar ads, and it mentions
22 legislation and mentions a candidate, at least those features
23 are described, and that comports with WRTL.

24 I'd like to emphasize, in my discussion, McConnell
25 and Citizens United, because they are the instance where an

1 eight justice majority of the Supreme Court on two occasions
2 has upheld the electioneering communication disclosure
3 provision.

4 And from the outset there was a significant
5 discussion about this concept of unambiguously
6 campaign-related from Mr. Dickerson earlier today. And I
7 think it's useful to start from the premise that the
8 unambiguously campaign-related concept that has been discussed
9 was language from both Buckley and McConnell that was used to
10 describe express advocacy or its functional equivalent. So to
11 the extent it's a concept at all, it was used by the Court in
12 those cases to describe express advocacy or later express
13 advocacy and its functional equivalent.

14 HON. PATRICIA MILLETT: What if the exception that
15 they wanted were unambiguously not campaign-related? I don't
16 want to put words in their mouth, but I think that's their
17 view at least of this ad that we have in front of us. If
18 there was no way on Earth that anyone was going to think it
19 wasn't -- had nothing to do with campaign issues, it didn't --
20 it wasn't a hot button issue, it really was educating people
21 about an obscure piece of law that, by the way, Congress is
22 sitting in September and maybe it's going to come up for a
23 committee vote.

24 Is it your view that that is covered by the
25 Citizens United decision, that exacting scrutiny that was

1 applied there would apply just the same or that we would --
2 that there might actually be an exception for something that
3 narrow that could still be adopted consistent with Citizens
4 United?

5 MR. MUELLER: It's covered -- I mean, to the extent
6 that -- I think it's important for us to focus on McConnell
7 and Citizens United and what the Court was doing there. It
8 looked at what was a very objective, easily understood,
9 regulation. And it determined that it served this important
10 governmental interest in informing the electorate about who
11 was speaking about a candidate before the election.

12 The analysis wasn't focused on what the
13 organization intended or if it was trying to affect the
14 election or the substance of the advertisement.

15 HON. PATRICIA MILLETT: How is this ad -- I'm
16 sorry. Go ahead. How is this ad about Senator Udall or plug
17 in whoever is running at the given year? It was Senator Udall
18 the first time, right?

19 MR. MUELLER: Yeah.

20 HON. PATRICIA MILLETT: Pretend he's still running
21 this year. How is this about him?

22 MR. MUELLER: Well, I do think that it's -- the
23 Supreme Court's analysis was focused on the value of knowing
24 who was discussing a candidate the pre-election period.

25 HON. PATRICIA MILLETT: I think the phrase was

1 talking about a candidate.

2 MR. MUELLER: Right.

3 HON. PATRICIA MILLETT: How is this about a
4 candidate?

5 MR. MUELLER: Well, it's valuable to know --
6 well -- and I think the Tenth Circuit case that you discussed
7 earlier did an analysis of that. And so, at a minimum if, you
8 are raising an issue and raise -- mentioning a candidate's
9 name, that -- implicit in that is that either the candidate
10 hasn't addressed it or should address it. So the fact that
11 you're discussing this candidate or the candidate in the time
12 period immediately before an election, it is valuable to the
13 electorate to know the funding behind that advertisement.

14 HON. PATRICIA MILLETT: What if it's just a local
15 neighborhood on their local page on the Internet that wants to
16 say: Thank you, Senator Udall, for handing out the trophy at
17 the little league championship. Now, that's mentioning a
18 candidate and they want to run it September 15th. That's
19 mentioning the candidate in the 60-day lead up period. Is
20 that --

21 MR. MUELLER: No, because the EC provision --
22 presumably it doesn't reach the \$10,000 threshold, then it's
23 not --

24 HON. PATRICIA MILLETT: This is a really good
25 little league, the one that just won the World Series, it's

1 got enough money and sponsorship.

2 HON. AMIT MEHTA: It's on TV, not on the Internet.

3 HON. PATRICIA MILLETT: I'm sorry. It's on TV.

4 Because they just won the international -- the Little League
5 World Series --

6 HON. AMIT MEHTA: Little League World Series.

7 HON. PATRICIA MILLETT: The Little League World
8 Series and it's going to get 10,000 viewers -- or 50,000
9 viewers, whatever. All the relatives are going to look at it.

10 MR. MUELLER: Geographically targeted --

11 HON. PATRICIA MILLETT: It meets all the criteria.
12 But that's the content.

13 MR. MUELLER: It still would meet it and it
14 actually still serves the important governmental interest,
15 it's providing information to the public about who is
16 supporting this. And --

17 HON. AMIT MEHTA: Your answer to that seems to
18 suggest that it's the FEC's position that once the
19 communication meets the definition, the statement or the
20 content of it really doesn't matter, for purposes of First
21 Amendment scrutiny. Is that your position?

22 MR. MUELLER: Yes, Your Honor. And I think that
23 that's consistent with what the Court -- the Supreme Court
24 talked about in McConnell and in Citizens United, that it
25 was -- the virtue was that it provided information to the

1 public that was useful or was useful in voting or would inform
2 them and --

3 HON. AMIT MEHTA: Let's take an extreme example.
4 We've also seen these ads that some small business runs that
5 uses a parody of a voice or an image of a politician. Say
6 such an ad were to run 30 days, 60 days before an election,
7 and mention the candidate's name. Is that an electioneering
8 communication that would have to meet the disclosure
9 requirements?

10 MR. MUELLER: Well, first I would note that it's
11 pretty far-afield from the advertisement that we have here.

12 HON. AMIT MEHTA: Understood. But you've just said
13 that the content of the communication doesn't matter, so I'm
14 testing how far you're willing to go with that.

15 MR. MUELLER: Understood. If it meets the
16 electioneering communication statute, the prongs of the
17 statute, which we discussed, it would be an electioneering
18 communication. But there is an exception --

19 HON. AMIT MEHTA: How would that meet exacting
20 scrutiny? In other words, what is the Government interest in
21 knowing who was sponsoring an ad that uses a parodied image of
22 a candidate?

23 MR. MUELLER: Your Honor, there are a number of
24 exceptions and I wasn't as quick as --

25 HON. AMIT MEHTA: I checked. I don't think that

1 hypothetical meets one of them.

2 MR. MUELLER: Well, I think to the extent that
3 it's -- I would agree to the extent that it meets the
4 criteria. I think there is a regulatory exception for -- that
5 purely proposes a bona fide commercial transaction. I
6 hesitate to speculate on that particular hypothetical, but to
7 the extent it meets it --

8 HON. PATRICIA MILLETT: Would that have applied to
9 the ads in Citizens United?

10 HON. AMIT MEHTA: I'm looking at 100.29(c), which
11 has the exceptions.

12 MR. MUELLER: Yeah.

13 HON. AMIT MEHTA: And I don't see an exception for
14 bona fide commercial speech or communication. Here's another
15 example. Say there's an ad that says, look, folks, there's an
16 election coming up, you've got two candidates who are running,
17 please go out and vote.

18 What's the Government interest in knowing who is
19 sponsoring such an ad, and why would that not offend the First
20 Amendment?

21 MR. MUELLER: I think that there's a range of
22 interests that are at play here, and there is the interest in
23 knowing who is speaking about the candidate, and that's what
24 we've discussed in the papers. There are other prohibitions
25 that prevent, for example, foreign nationals from running

1 electioneering communications. So there's a range -- a couple
2 of interests at play here that could justify it more broadly.

3 HON. AMIT MEHTA: Do you have to support that
4 factually? Your counterpart has said that there's no evidence
5 that foreign nationals have been running such ads. Do you
6 have to demonstrate that or is it enough to assert the
7 interest?

8 MR. MUELLER: The way it's been described in the
9 cases is that it's there to detect that. But I think the
10 possibility of it is certainly adequate. There's a specific
11 prohibition in the electioneering communications provision
12 itself that prohibits that type of electioneering
13 communication by foreign nationals.

14 HON. COLLEEN KOLLAR-KOTELLY: So is it your view
15 that as long as the ad meets the electioneering communication,
16 strictly in terms of the way we discussed it, that the
17 Governmental interest is always there informationally, or does
18 it depend on the ad in terms of how strong the Government
19 interest is or is it just a flat across the board Government
20 interest and being informed at who is paying for these ads?

21 MR. MUELLER: Yeah, it doesn't vary, Your Honor, it
22 hinges on those factors and it's -- the analysis has never
23 been rooted on how close it is to, for example, express
24 advocacy, and that was the point I was getting to earlier.
25 What plaintiffs have urged here, importing that standard, the

1 spectrum that they've talked about, is an argument that was
2 explicitly rejected by the Court in Citizens United. There
3 they were urged to import that standard here and they
4 expressly rejected that in explicit language. So --

5 HON. AMIT MEHTA: Is it your view that Citizens
6 United really forecloses any as-applied challenges except for
7 in cases of threats, harassments or reprisal?

8 MR. MUELLER: I wouldn't go that far. I think that
9 it's true that the case law has laid out that an as-applied
10 challenge can be brought when there is -- to seek an
11 exception where there is threats or reasonable probability --
12 reasonable possibility of threats, harassment and reprisals.
13 So that is one path that has been established.

14 I can't envision a complaint then that would fall
15 outside the scope of that, but it is possible. But this case
16 is not that, in that it falls within what Citizens United and
17 McConnell discussed, which was meeting the standard and it
18 serves governmental interest.

19 HON. PATRICIA MILLETT: I'm sorry. Can you tell me
20 how -- just specifically go through the governmental interest.
21 Tell me what the public interest is in knowing who is behind
22 this ad.

23 MR. MUELLER: Right.

24 HON. PATRICIA MILLETT: How it polices -- second,
25 address how it polices limitation -- funding limitations and

1 other rules apart from foreign governments, unless that's your
2 only one. And if it also gives you other information that you
3 need to enforce the law. Tell me specifically, because you
4 have the burden here to tell me specifically, how this ad
5 advances the interest you're asserting.

6 MR. MUELLER: Right. On the informational interest
7 with respect to providing information that's useful to voters,
8 I think that there's two important points to make with respect
9 to that, and McConnell emphasizes this point. That often in
10 the realm of these advertisements, generic sounding
11 organizations bring these -- make these advertisements, and
12 it's very difficult for voters to understand who is behind
13 them and who has paid for them. So it serves that interest in
14 providing information to voters that are useful in voting.
15 And the Court talked about how difficult it is to evaluate an
16 ad with a generic sounding name behind it, without having the
17 ability to know who is funding that ad.

18 HON. PATRICIA MILLETT: That would be true for an
19 ad that seems to be talking about a candidate, but if it's
20 just a passing reference to someone who happens to be a
21 candidate, how is there a public interest in that?

22 MR. MUELLER: I think it does go back to what the
23 Tenth Circuit was discussing in Independence Institute v.
24 Williams, that at the very least it is a discussion of the
25 candidate in the pre-election window, and it suggests

1 either --

2 HON. PATRICIA MILLETT: It's a mention -- I don't
3 know if it's a discussion of the candidate. It's a mention of
4 the candidate in the pre-election window. Does that trigger
5 the same public interest as something that is actually about
6 the candidate?

7 MR. MUELLER: I think it does because --

8 HON. PATRICIA MILLETT: Why?

9 MR. MUELLER: Because knowing who is behind it
10 allows you to evaluate it in a way that you couldn't if you
11 were unaware of who was behind it. And to be sure, some
12 disclosures would merit more public attention, would merit
13 greater discussion, would merit greater press coverage. Some
14 disclosures would be more informative than others, but I think
15 across the range of these ads --

16 HON. PATRICIA MILLETT: Happy Birthday -- I'm
17 sorry, I don't know his first name -- Mr. Udall, on the Nat's
18 jumbotron. Is that the kind of communication that's covered
19 as a broadcast?

20 MR. MUELLER: No, I don't believe it would be.

21 HON. PATRICIA MILLETT: Even though it's going to
22 be on TV, it's a game that is being broadcast. Happy Birthday
23 goes up on the jumbotron and the game is being broadcast on
24 TV.

25 MR. MUELLER: It's not an advertisement, it's --

1 that would not be covered by the statute itself.

2 HON. PATRICIA MILLETT: That's not considered an
3 advertisement?

4 MR. MUELLER: (Shook head in a negative response).

5 HON. PATRICIA MILLETT: Okay. What is the
6 definition of advertisement, did I miss that?

7 MR. MUELLER: No. The EC sets up a criteria where
8 it has to be distributed to a certain amount of people and it
9 has to cost a certain amount of money.

10 HON. PATRICIA MILLETT: I don't know how much it
11 cost for the Happy Birthday, probably not enough.

12 MR. MUELLER: That would have been going to the
13 stadium, not the broadcaster. So I doubt that that would be
14 covered by the provision itself.

15 HON. PATRICIA MILLETT: What if some really wealthy
16 person just wanted to put -- really wealthy spouse wanted to
17 put Happy Birthday, I don't know what Senator Udall's first
18 name is, just a quick ad on TV for fun on the local broadcast
19 channel and it cost \$10,000 and one cent.

20 MR. MUELLER: I appreciate the hypothetical, and it
21 is several steps from where we are, but it also -- I mean,
22 certainly in the world of broadcast ads, name, recognition,
23 that sort of thing, it might be relevant to the electorate in
24 evaluating the message, who it came from.

25 HON. PATRICIA MILLETT: The ad here just said:

1 Call your senators. But one of those senators is up for
2 election. Would it then be within the definition or not? It
3 didn't use the last name, it just said: Call your senators
4 and gave the phone number for each office.

5 MR. MUELLER: The provision requires that the
6 candidate -- mentions the candidate's name.

7 HON. PATRICIA MILLETT: Well, it says other things
8 like the incumbent --

9 HON. AMIT MEHTA: Yeah, your regulation says:
10 Unambiguous reference, such as the president, your congressman
11 or the incumbent.

12 MR. MUELLER: That's right.

13 HON. PATRICIA MILLETT: So your senators, plural --

14 HON. AMIT MEHTA: So those ads proposing would be
15 covered?

16 MR. MUELLER: Well, and I think that that's the ad
17 that the plaintiffs are proposing -- proposing here
18 essentially is that it's referencing the senators, and one of
19 them happens to be running for election.

20 HON. PATRICIA MILLETT: Well, that's why I was
21 confused because your regulation talks about your congressman,
22 singular, who happens to be -- and there can only be one
23 congressman running at a time. But if it said: Contact your
24 congressional representatives, plural, and says one of them is
25 coming up -- it's one of those fill-in-the-gap House

1 elections. So it's not your regular two-year election, but
2 it's an emergency fill-in election because somebody resigned.
3 And the ad says: Call your congressional representatives, and
4 it so happens that one representative in the state is up for
5 an interim election.

6 Would that qualify or not?

7 MR. MUELLER: I'm not sure I --

8 HON. PATRICIA MILLETT: If it says: Call your
9 congressional representatives.

10 MR. MUELLER: Right.

11 HON. PATRICIA MILLETT: And the reason it's in the
12 60-day period -- normally all of them would be up for election
13 at the same -- I'm talking about the House now, put aside the
14 Senate, your congressional representatives in the House, call
15 them. And every two years they would all be up for election,
16 it would clearly fall within the meaning, I think -- I assume
17 you think of the statutory definition. But it's not -- it's
18 actually an odd-numbered year. And the only reason there's an
19 election is because for one congressional district somebody
20 resigned suddenly and we have to have a -- I forget if it's a
21 interim or a fill-in -- a special election.

22 But the bill is going through Congress and they say
23 they want to run the ad, they've been running it all along and
24 they want to keep running it during that 60-day period, and it
25 says broadly: Call your congressional representatives. Now

1 this person who was serving as an interim representative and
2 is now in this special election is a candidate, but none of
3 the other congressional representatives are.

4 MR. MUELLER: Your Honor, it sounds like it would
5 be covered by the provision. It reads as if it would be
6 mentioning the candidate --

7 HON. PATRICIA MILLETT: Call your elected
8 representatives. Is that going to be covered, too?

9 MR. MUELLER: No, Your Honor, because it doesn't
10 reference a congressional candidate.

11 HON. PATRICIA MILLETT: But if you do a big
12 collective term for, you know, I don't know, it's Texas,
13 there's a lot of congressional representatives and only one of
14 which happens to actually, by this fluke, electoral fluke, be
15 up for election at the time the bill is going through that
16 clearly identifies -- that clearly identified the candidate.

17 MR. MUELLER: I do hesitate to say because I think
18 that we've stepped beyond the express language of the
19 provision, and I think that there are some unresolved
20 questions that have -- that have not been resolved by the
21 Commission and have not been resolved -- and so I think --

22 HON. PATRICIA MILLETT: I thought your answers to
23 Judge Mehta was, look, you should have this categorical
24 position that exacting scrutiny means -- mentions -- means
25 meet this -- as long as you meet this statutory and regulatory

1 definition, we're good to go on exacting scrutiny no matter
2 what the content of the ad, as long as it mentions somebody or
3 it mentions a group, one of whom would be running for
4 election, then we're good to go.

5 That's what I'm trying to understand is your sense
6 of how this exacting scrutiny -- I mean, I was testing their
7 theory, I needed to understand yours as to what the nature of
8 your position is in defense of the statute.

9 MR. MUELLER: I understand, Your Honor, and I think
10 that the provision is explicit within terms of referencing
11 members of Congress and senators and presidential candidates.
12 And we've stepped a few steps into beyond into what some
13 ambiguity surrounding some of those terms that perhaps hasn't
14 been resolved. So I don't know if I can give a satisfying
15 answer to that particular hypothetical.

16 HON. PATRICIA MILLETT: What I'm trying to get at
17 is to the extent that there are areas of ambiguity that
18 haven't been resolved, should we be concerned that the
19 constitutional provision that you're advancing would allow you
20 to say no to everything, or does one need to leave
21 constitutional breathing room for examples that really don't
22 implicate the interest that you've flagged -- that's how we
23 started on this -- in any way that we can understand.

24 MR. MUELLER: Right. I would go back to Citizens
25 United and McConnell who noted that the provision did set up

1 some relatively bright-line rules that are easy to understand
2 and relatively easy to follow. So from a constitutional
3 standpoint there may be unresolved questions, but with respect
4 to the ad that Mr. Dickerson proposes, or with respect to the
5 breadth of what is often presented, it's relatively easy to
6 understand and easy to reasonably follow. And then also --

7 HON. PATRICIA MILLETT: Why is the public
8 interested -- I'm sorry. How could the ad that they've got in
9 their complaint, how could that ad be used to circumvent your
10 second interest for having these -- this disclosure
11 requirement? How could that be used to circumvent other
12 provisions of the statute, whether funding or otherwise?

13 MR. MUELLER: I think most notable is within the EC
14 provision itself, which prohibits funding from foreign
15 nationals --

16 HON. PATRICIA MILLETT: That's it?

17 MR. MUELLER: -- and detection. I think that those
18 are the two predominant interests. The Court has also noted
19 preventing quid pro quo corruption, but I think we're a step
20 away from that because it isn't directly dealing with a
21 candidate.

22 HON. AMIT MEHTA: Can I ask. With respect to the
23 interest, do you agree that it's the FEC's or the Government's
24 burden to establish the interest, correct?

25 MR. MUELLER: Yes. And I think that's established

1 in CU and McConnell.

2 HON. AMIT MEHTA: And if it's your burden, do we
3 have, in your view, a factual record before us that would
4 justify a conclusion that the Government has met its
5 obligation to establish its interest, and if so, what is that
6 factual record?

7 MR. MUELLER: I do agree that the case is before
8 you on a clean legal question, that's how it was brought to
9 you. I don't think that -- the Government has amply met that
10 in McConnell and amply met that in Citizens United, and in
11 each instance, subsequently, there isn't an obligation to
12 build a new record with respect to every proposed
13 advertisement.

14 So I do think that there is a substantial record,
15 and certainly in McConnell and in Citizens United that
16 addresses that. And I think here, to the extent we have an ad
17 that is before us, we can look at that ad and see how it
18 functions.

19 HON. AMIT MEHTA: In some ways you're sort of
20 flipping the burden, I mean, you're asking them to come
21 forward and say this is how this burdens us rather than the
22 other way around, which is they are not burdened by it, which
23 ought to be your affirmative obligation.

24 MR. MUELLER: Yeah. And I think it is a pure legal
25 argument that we have presented on that point. I would

1 address their 501(c)(3) argument very briefly because it's
2 problematic for a number of reasons. Notably, Citizens United
3 on its own terms broadly applied to nonprofits and didn't look
4 to the status of the speaker, it looked to the message.

5 HON. PATRICIA MILLETT: But didn't the Commission
6 itself at one point think 501(c)(3) was a good distinction?
7 I know it got struck down in Shays, but that was for
8 sufficiency of agency reasoning. But to the extent -- the
9 explanation there, some of it was, look, there's already this
10 line drawing that's done there.

11 MR. MUELLER: Correct. The Commission proposed
12 that regulation and it -- on review, the sufficiency of
13 explanation was the rationale for invalidating it. But that
14 rationale was that it didn't make sense to delegate the
15 Commission's enforcement responsibilities to the IRS because
16 of differing organizational -- different agency interests.

17 HON. PATRICIA MILLETT: So don't delegate anything.
18 But doesn't that suggest, at least, that when it comes to
19 whether you've got a good fit here, when you've got 501(c)(3)s
20 doing ads, doesn't it suggest that you could do a little more
21 tailoring here? Don't delegate to them, you all do it. Just
22 say: Look, they're going to be in so much hot water if they
23 cross these lines anyhow. You know, we're the least of their
24 concerns. So we think that, at least if it's a genuine issue
25 ad, not categorically for 501(c)(3)s, as to those, then if we

1 determine they have not crossed the lines that 26 U.S.C.
2 imposes on them and we determine it's a genuine issue ad,
3 they're good to go, no disclosure?

4 MR. MUELLER: Well, I think that that would be
5 inconsistent with Citizens United, which was focused on who
6 was speaking, not categories of speakers. So in Citizens
7 United they found the interest that was the important
8 governmental interest, and they were focused on the
9 advertisements, not on the identity of the speaker. And I
10 think it would be somewhat problematic to look back and point
11 to the identity of the speaker as a reason for not. It's
12 certainly possible to --

13 HON. PATRICIA MILLETT: That was sort of the
14 upfront role of the speaker, and I'm down at the closely drawn
15 part of exacting scrutiny analysis. So how is your rule
16 closely drawn when it is both a genuine issue ad and it's run
17 by an entity that meets the 501(c)(3) criteria -- complies
18 with the 501(c)(3) criteria?

19 MR. MUELLER: I would just quibble with the
20 standard. There just needs to be a substantial relationship
21 there. And I think that the identity of the speaker --
22 differentiating based on the identity of the speaker would be
23 problematic, I think that that would make it -- it's entirely
24 possible for an entity to violate --

25 HON. PATRICIA MILLETT: Don't your existing

1 regulatory exceptions distinguish between people based on the
2 identity --

3 MR. MUELLER: Not in the --

4 HON. PATRICIA MILLETT: -- of the journalist?

5 MR. MUELLER: Not in this context. I think the
6 advertisements are --

7 HON. PATRICIA MILLETT: What do you mean in this
8 context? If a journalist -- if the editorial board of the New
9 York Times ran this same message on its editorial page, what
10 would happen? Would that be --

11 MR. MUELLER: Yeah, that's accepted.

12 HON. PATRICIA MILLETT: It's accepted because it's
13 the New York Times?

14 MR. MUELLER: Well, Your Honor, I don't think that
15 there's a meaningful distinction between a lot of these
16 different types of organizations. Citizens United was a
17 501(c)(4) organization. Independence Institute is a 501(c)(3)
18 organization. So I don't think that neither of them
19 disclose -- I don't think there's a distinction to be drawn in
20 that regard.

21 HON. PATRICIA MILLETT: Are 501(c)(4)s allowed to
22 intervene in politics -- intervene in political campaigns?

23 MR. MUELLER: There are rules that govern them, but
24 in both of these instances those entities could run the ad,
25 neither of them would be disclosing to the IRS. So I think it

1 would be serving the interest here to have the EC provision
2 apply similarly to those organizations or in the same way to
3 those organizations.

4 HON. PATRICIA MILLETT: Any more questions? All
5 right. We'll give you one more minute to wrap up.

6 MR. MUELLER: Thank you, Your Honor.

7 HON. AMIT MEHTA: I guess I do have one question.
8 You just said that the identity of the speaker ought not to
9 matter, but why shouldn't it? I mean, in terms of the fit and
10 particularly the burden, shouldn't the identity of the speaker
11 go into the factual equation that we need to consider?
12 Certainly, the Commission has one by carving out media
13 organizations and media entities. There are certain
14 organizations that are more devoted to political speech than
15 others. There are individuals who arguably would be covered
16 by these regulations.

17 So why doesn't the identity of the speaker matter
18 to some extent in terms of assessing the burden?

19 MR. MUELLER: Your Honor, I don't doubt that there
20 could be context where it would matter. But within the
21 context of the electioneering communication disclosure
22 provision, and especially within the context of the as-applied
23 challenge that we're doing here where the Supreme Court has
24 evaluated certain types of organizations and the Court -- the
25 organization that is before the Court today, isn't materially

1 distinguishable.

2 I think that it would be a mistake to look to that
3 distinction in this particular context. And I also think
4 we're in a position where the Supreme Court has already held
5 that the EC provision isn't overbroad within the context of
6 the McConnell case. So there is this precedent both in
7 McConnell and Citizens United where they've looked at that and
8 determined that the fit was appropriate, that it was tailored
9 appropriately.

10 So the breath of the precedent that's before the
11 Court, taking in particular those two provisions together,
12 sets the stage where the provision should be upheld and
13 summary judgment should be granted in favor of the Commission.

14 HON. PATRICIA MILLETT: All right. Thank you.
15 Mr. Dickerson, I think you had wanted to reserve three minutes
16 for rebuttal, we'll give you at least that. We'll start with
17 three.

18 MR. DICKERSON: Thank you, Your Honor. I just have
19 two very quick points. The first is on the question of the
20 scope of the as-applied challenge, I found the pages from
21 Wisconsin Right to Life I would like to direct you to, and
22 that's Page 463, where the FEC had argued that in order to
23 prove likely recurrence, they'd have to show that ads would
24 be -- would share all the characteristics showed by the
25 District Court deemed legally relevant. That standard was

1 rejected in favor of the --

2 HON. PATRICIA MILLETT: Sorry. I want to make sure
3 I get to the right page here. 463.

4 HON. COLLEEN KOLLAR-KOTELLY: I missed the case.
5 Which one is it?

6 MR. DICKERSON: Wisconsin Right to Life II, Your
7 Honor.

8 HON. PATRICIA MILLETT: I'm sorry.

9 MR. DICKERSON: Page 463.

10 HON. PATRICIA MILLETT: And you're talking about
11 mootness or are you talking about --

12 MR. DICKERSON: Capable of repetition.

13 HON. PATRICIA MILLETT: Capable of repetition.
14 Got it.

15 MR. DICKERSON: And here, again, I think we have a
16 case where the line that history repeats itself, but not at
17 the level of specificity demanded by the FEC is appropriate
18 here as well, especially where the FEC has apparently learned
19 its lesson and decided not to move forward.

20 Also on the question of evading review, I think it
21 is important to remember that this case has been going on for
22 some time. It involves -- there was an agreement among the
23 parties to expedite it and move very quickly in advance of the
24 last election, which was followed by a trip to the Court of
25 Appeals, which was followed by briefing on whether or not --

1 it's true that we supplemented the record, but of course the
2 FEC opposed that. There was briefing in front of the Court of
3 Appeals on whether or not that supplement would be accepted.
4 Once the Court ruled that it could be, the FEC suddenly
5 dropped its opposition.

6 HON. PATRICIA MILLETT: How far in advance of the
7 blackout period did you start the litigation? The initial
8 blackout period.

9 MR. DICKERSON: Shortly.

10 HON. PATRICIA MILLETT: Shortly. I mean, that's my
11 point, is that it's self-created evasion --

12 HON. COLLEEN KOLLAR-KOTELLY: September 2nd
13 of 2014. Right. There's no reason you couldn't file it, you
14 know, January 2 of 2017. We know these deadlines are coming,
15 this is what -- this is what we do, this is what we want to
16 talk about, we're going to want to keep talking about this.
17 You have plenty of time. It can't be that it evades review
18 because you don't -- normally it's because the conflict
19 doesn't arise until there's no time to resolve it. It's not
20 that we just choose to not initiate the litigation until it's
21 last minute.

22 MR. DICKERSON: I understand that point in the
23 abstract, Your Honor. In concrete terms, speakers often
24 decide, much like viewers do, to pay attention to issues close
25 to moments of national concerns about politics. And I think

1 that's what happened here.

2 The only other thing I wanted to say, very quickly,
3 is that I think that the colloquy with my colleague got to the
4 heart of what's going on here, which is that the FEC does not
5 believe in the light of Citizens United and McConnell that
6 there's any need to look at the content of speech any further.
7 And I think the obvious objection to that is that in both
8 Citizens United and in McConnell there was a record. There
9 was specific speech in front of the Court. The Court applied
10 exacting scrutiny, nonetheless.

11 And if these questions are in fact foreclosed to
12 the point where there's no need to look at the four-corners of
13 an ad any further, that position is impossible to square with
14 the way the Citizens United court actually treated the speech
15 in that case. Thank you.

16 HON. PATRICIA MILLETT: One thing I just wanted to
17 raise with you is given the questions that we've had when
18 mootness wasn't contested between the parties, we would at
19 least invite, if you're interested, a supplemental declaration
20 perhaps elaborating a bit more the capable of repetition --
21 what the status was as to this ad, and understanding of what
22 substantively similar ads might be coming -- going forward.

23 MR. DICKERSON: I would welcome that opportunity,
24 with of course the dropped footnote that it's our view that,
25 as in Wisconsin Right to Life, Your Honors can reach a

1 decision based on the text of this ad.

2 HON. COLLEEN KOLLAR-KOTELLY: So you're telling us
3 you don't want to do it?

4 HON. PATRICIA MILLETT: Some of us might feel
5 better under Article III.

6 MR. DICKERSON: I'm telling you, Judge, I'd like to
7 speak with my client before deciding.

8 HON. COLLEEN KOLLAR-KOTELLY: Set a timeline.

9 HON. PATRICIA MILLETT: We'll give you one week.

10 MR. DICKERSON: That's perfect.

11 HON. PATRICIA MILLETT: Close of business next --
12 what day is today -- Wednesday.

13 HON. COLLEEN KOLLAR-KOTELLY: Yes.

14 MR. DICKERSON: Thank you very much.

15 HON. PATRICIA MILLETT: Anything else? Thank you
16 very much. The case is submitted.

17 END OF PROCEEDINGS AT 4:00 P.M.

18 C E R T I F I C A T E

19 I, Lisa M. Foradori, RPR, FCRR, certify that
20 the foregoing is a correct transcript from the record of
21 proceedings in the above-titled matter.

22

23

24 Date: _____

25 _____
Lisa M. Foradori, RPR, FCRR

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