No. 07-953

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether this Court has jurisdiction to hear the appeal in light of the language in 28 U.S.C. 1253 permitting a direct appeal "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

TABLE OF CONTENTS

Page

A. The statutory scheme 1
B. In suits challenging the constitutionality of BCRA that were filed on or before December 31, 2006, this Court had appellate jurisdiction to review district court orders granting or denying requests for preliminary injunctions 2
C. Because the instant suit was filed after December 31, 2006, this Court lacks appellate jurisdiction over appellant's interlocutory appeal 3

TABLE OF AUTHORITIES

Cases:

Bailey v. *Patterson*, 369 U.S. 31 (1962) 6
Goldstein v. *Cox*, 396 U.S. 471 (1970) 5, 6
Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974) 4, 6, 7, 9
Moody v. *Flowers*, 387 U.S. 97 (1967) 4, 6
MTM, Inc. v. *Baxley*, 420 U.S. 799 (1975) 5, 6, 7, 10
Riegel v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008) 4
Wisconsin Right to Life, Inc. v. *FEC*, No. 04-5292, 2004 WL 1946452 (D.C. Cir. 2004) 3

Statutes and rules:

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 403(a), 116 Stat. 113 . . . . . 8, 10
§ 403(a)(1), 116 Stat. 114 . . . . . 1, 2, 10

Statutes and rules—Continued: Page

§ 403(a)(3), 116 Stat. 114 ..... 1, 2, 10
§ 403(d), 116 Stat. 114 8
§ 403(d)(1), 116 Stat. 114 ..... 2, 11
§ 403(d)(2), 116 Stat. 114 ..... 2, 8, 9, 10
28 U.S.C. 1253 ..... *passim*
28 U.S.C. 1254(1) 9
28 U.S.C. 1292 3
28 U.S.C. 1292(a)(1) 2, 9
Fed. R. App. P.:
Rule 4(a)(1)(B) 10
Rule 26(a)(3) 10

Miscellaneous:

H. Con. Res. 361, 107th Cong., 2d Sess. (2002) 8
147 Cong. Rec. 5145 (2001) 8
148 Cong. Rec. (2002):
p. 3947 8
p. 3948 8
p. 3951 8

In the Supreme Court of the United States

No. 07-953

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE

This brief is submitted in response to the Court's order of February 29, 2008, directing supplemental briefing on the question whether the Court has jurisdiction to hear this appeal. In the view of the United States, the Court lacks appellate jurisdiction at this stage of the case.

A. The Statutory Scheme

1. Under Section 403(a)(1) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 114, suits challenging the constitutionality of any BCRA provision may be heard by a three-judge district court within the District of Columbia. BCRA § 403(a)(3) provides that the three-judge court's "final decision" is reviewable by direct appeal to this Court. 116 Stat. 114. For suits filed on or before December 31, 2006, that three-judge court procedure was the exclusive mechanism for pursuing a constitutional challenge to

BCRA. See BCRA § 403(d)(1), 116 Stat. 114. BCRA § 403(d)(2) states, however, that "[w]ith respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action." 116 Stat. 114. Appellant filed this suit in December 2007 and elected to have the action heard by a three-judge district court. See J.S. App. 7a & n.8.

2. BCRA's judicial-review provisions do not establish a BCRA-specific mechanism for appealing an interlocutory order, such as the grant or denial of a preliminary injunction, that is not a "final decision" within the meaning of BCRA § 403(a)(3). Appeals from such orders are therefore governed by the generally applicable provisions of Title 28. This Court has jurisdiction to review the grant or denial of a preliminary injunction "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253. Under 28 U.S.C. 1292(a)(1), the courts of appeals have jurisdiction to review "[i]nterlocutory orders of the district courts" granting or denying preliminary injunctive relief, "except where a direct review may be had in the Supreme Court."

B. In Suits Challenging The Constitutionality Of BCRA That Were Filed On Or Before December 31, 2006, This Court Had Appellate Jurisdiction To Review District Court Orders Granting Or Denying Requests For Preliminary Injunctions

Because the three-judge court procedure established by BCRA § 403(a)(1) was the exclusive mechanism for pursuing pre-2007 challenges to the constitutionality of

any BCRA provisions, such suits were "required by [BCRA] to be heard and determined by a district court of three judges" within the meaning of 28 U.S.C. 1253. An order denying preliminary injunctive relief in such a case was therefore appealable to this Court rather than to the court of appeals. See *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-5292, 2004 WL 1946452 (D.C. Cir. Sept. 1, 2004) (*WRTL*). In *WRTL*, the district court denied a motion for a preliminary injunction, and the plaintiff appealed to the District of Columbia Circuit. The Federal Election Commission (FEC or Commission) moved to dismiss the appeal, and the court of appeals granted the motion to dismiss. The court explained that, because the plaintiff had a right of direct appeal to this Court under 28 U.S.C. 1253, the court of appeals lacked jurisdiction under the terms of 28 U.S.C. 1292. See 2004 WL 1946452, at *1.

C. Because The Instant Suit Was Filed After December 31, 2006, This Court Lacks Appellate Jurisdiction Over Appellant's Interlocutory Appeal

Under 28 U.S.C. 1253, appellant's right of appeal to this Court depends on whether the suit was "*required* by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253 (emphasis added). The correct application of Section 1253 to post-2006 suits challenging BCRA's constitutionality is not free from doubt. On the one hand, Congress has not "required" that all post-2006 constitutional challenges to BCRA must be adjudicated by three-judge courts, but instead has given the plaintiffs in such actions the choice whether the three-judge procedure will be utilized. On the other hand, once appellant exercised its right to el-

ect the judicial review procedures established by BCRA, the Act "required" a three-judge court to be convened.

We are not aware of any prior statute in which Congress has authorized plaintiffs to choose whether a particular claim will be heard by a three-judge court, or of any evidence that Congress anticipated such a statute when it enacted Section 1253. As a practical matter, before the enactment of BCRA's elective judicial-review provision, the word "required" in Section 1253 served primarily to make clear that, even when a three-judge court is *in fact* convened, its orders are not appealable to this Court if the three-judge court has been convened improperly, see, *e.g.*, *Moody* v. *Flowers*, 387 U.S. 97, 104 (1967), or if the three-judge court dismisses the suit on a ground that would have justified the court's dissolution, see, *e.g.*, *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974). Those decisions are not directly controlling here, since they involved the more common situation in which a three-judge panel is mandatory in certain circumstances and wholly unavailable in the absence of those circumstances. Here, the three-judge court in this case was properly convened after appellant elected that procedure, and no subsequent events have occurred that would justify the court's dissolution.

Whatever Congress's original purposes in enacting Section 1253, the better reading of Section 1253's text is that appellant's suit, which was assigned to a three-judge court only because appellant voluntarily elected that option, and which could have been adjudicated by a single judge, was not "required" to be decided by a three-judge court. Cf. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (Stevens, J., concurring in part and concurring in the judgment) (finding preemption based

on statute's plain text while conceding that the result was not contemplated by the enacting Congress). Appellate jurisdiction is therefore lacking in this Court.

1. In resolving issues concerning its appellate jurisdiction under Section 1253, this Court has applied a rule of narrow construction under which doubtful questions are resolved against the statute's applicability. In *Goldstein* v. *Cox*, 396 U.S. 471 (1970), the Court explained:

> This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirements of the Act would defeat the purposes of Congress to keep within narrow confines our appellate docket. That canon of construction must be applied with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court. In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored, and this Court above all others must limit its review of interlocutory orders.

Id. at 478 (citations, brackets, ellipsis, and internal quotation marks omitted). In *Gonzalez*, the Court reaffirmed that "only a narrow construction" of Section 1253 "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." 419 U.S. at 98; accord *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975) (per curiam) (*MTM*).

Consistent with that established rule of construction for Section 1253, this Court should hold that the instant suit was not "required by any Act of Congress to be heard and determined by a district court of three

judges." 28 U.S.C. 1253. Although a plausible argument might be advanced that, from the perspective of the district court, this suit was "required" to be adjudicated by a three-judge court because appellant was entitled to such a forum as of right, that reading of Section 1253 is not compelled by the statute's text. The more natural reading of the statute would lead to the conclusion that an elective three-judge panel is not one that is "required." And "[i]n the absence of clear and explicit authorization by Congress," ambiguous statutory language should not be construed to expand this Court's mandatory jurisdiction, particularly over appeals from interlocutory rulings. *Goldstein*, 396 U.S. at 478.

2. Although orders issued by a three-judge district court are rarely subject to review by a court of appeals, this Court has recognized that the relevant jurisdictional statutes will sometimes produce that result. In several cases, this Court has held that it lacked jurisdiction over various appealable orders that were in fact issued by three-judge courts, based on the Court's determinations that those cases were not "required" to be decided by such tribunals. See, *e.g.*, *Gonzalez*, 419 U.S. at 98-101; *Moody*, 387 U.S. at 100-104; *Bailey* v. *Patterson*, 369 U.S. 31, 32-34 (1962) (per curiam). The Court has observed that, in cases where Section 1253 is inapplicable, the relevant three-judge court orders may be reviewed by the courts of appeals. See, *e.g.*, *MTM*, 420 U.S. at 804; *Gonzalez*, 419 U.S. at 99.

The mere fact that a three-judge court was convened and denied appellant's request for a preliminary injunction therefore is not enough to establish that Section 1253 vests this Court with jurisdiction over the instant appeal. Nor is it sufficient that a three-judge court was *properly* convened in this case pursuant to appellant's

election. In *MTM*, the Court held that "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." 420 U.S. at 804. The Court in *MTM* did not question that a three-judge district court had been properly convened, but rather relied on the principles of narrow construction discussed above (see p. 5, *supra*) in holding that Section 1253's grant of appellate jurisdiction is limited to merits-based injunctive rulings. See 420 U.S. at 804. Appellant's exercise of its statutory entitlement to elect a three-judge court therefore is not a sufficient ground for holding that the case was "required" to be heard by a three-judge tribunal.

3. The text of Section 1253 and the rule favoring its narrow construction are sufficient to decide this case. But a consideration of Congress's broader purposes behind BCRA's judicial-review provision buttresses the conclusion that jurisdiction is lacking. In resolving questions concerning Section 1253's scope, this Court has looked in part to whether the Court's exercise of appellate jurisdiction over particular categories of three-judge court orders would further Congress's purposes in adopting the three-judge court mechanism. Thus, the Court in *MTM* observed that, if Section 1253 is construed not to encompass appeals from three-judge court orders denying injunctive relief on non-merits grounds, "the congressional policy behind the three-judge court and direct-review apparatus—the saving of state and federal statutes from improvident doom at the hands of a single judge—will not be impaired." 420 U.S. at 804; see *Gonzalez*, 419 U.S. at 97.

Although that holding is not directly controlling here (since the district court's denial of preliminary injunctive relief in this case was based on its view that appellant's claims lack merit), the purposes underlying BCRA's judicial-review provisions likewise will not be frustrated if interlocutory appeals like this one are held to be cognizable by the courts of appeals rather than by this Court. With respect to constitutional challenges commenced after December 31, 2006, Congress evidently perceived no necessity to have such suits adjudicated by a three-judge court, since it limited the mandatory application of the BCRA judicial-review provisions to suits filed on or before that date. See BCRA § 403(d)(2), 116 Stat. 114.[1] When the plaintiff in a post-

[1] BCRA § 403(a)'s provisions for expedited judicial review were intended to facilitate resolution of constitutional challenges well in advance of the 2004 election. See, *e.g.*, 147 Cong. Rec. 5145 (2001) (statements of Sens. Hatch, Feingold, and Dodd) (discussing agreement among proponents and opponents of BCRA regarding need for expeditious judicial review). BCRA § 403(d) was added as part of a correcting resolution after BCRA was passed but before the President signed the bill. See H. Con. Res. 361, 107th Cong., 2d Sess. (2002); 148 Cong. Rec. 3947 (2002) (statement of Sen. McConnell); *id.* at 3951 (Senate passage of H. Con. Res. 361). In what appears to be the only recorded congressional explanation of that provision's purpose, Senator McConnell characterized BCRA § 403(d) as "providing a sunset provision for expedited review in the D.C. court so that plaintiffs who live on the west coast do not forevermore have to come to Washington, DC, to challenge provisions of the act." *Id.* at 3947. Senator McConnell also caused to be reprinted in the Congressional Record (see *ibid.*) a letter from FEC Chairman Mason and Commissioner Smith, who noted that, if no sunset provision were adopted, "Section 403 would require convening of a three-judge panel and expedited appeal to the Supreme Court for actions filed years in the future." *Id.* at 3948. That letter suggested that "Congress may wish to set a time limit for these special

2006 challenge does not elect to have the BCRA judicial-review provisions apply, any appeal from the district court's grant or denial of a preliminary injunction indisputably must be taken to the court of appeals rather than to this Court. Congress therefore evidently did not regard the availability of an interlocutory appeal to this Court as essential to the effective implementation of the statutory scheme.

If this Court holds that the district court's denial of a preliminary injunction is not appealable to this Court under 28 U.S.C. 1253, that denial may still be reviewed by the court of appeals, see 28 U.S.C. 1292(a)(1), and ultimately by this Court via a petition for certiorari, see 28 U.S.C. 1254(1). Indeed, given this Court's traditional argument calendar, the courts of appeals may be better positioned to provide expeditious appellate review of preliminary-injunction orders issued at times when this Court is not scheduled to hold oral argument. Cf. *Gonzalez*, 419 U.S. at 99 (explaining that, in appeals from three-judge court orders denying injunctions, "the courts of appeals might in many instances give more detailed consideration to [non-merits] issues than this Court").[2]

---

review provisions and allow normal judicial procedures to govern constitutional claims raised in subsequent years." *Ibid.*

[2] If this Court holds that the instant appeal should be dismissed for lack of jurisdiction, the government will likewise be unable to appeal directly to this Court if a future plaintiff elects the three-judge court procedure under BCRA § 403(d)(2) and the court issues a preliminary injunction against enforcement of the challenged BCRA provision. The Congress that enacted BCRA, however, evidently did not regard it as essential that the government be permitted to appeal to this Court from a preliminary injunction in a post-2006 challenge, since Congress authorized the plaintiff rather than the government to decide whether such a suit will be heard by a three-judge court, and a preliminary injunction

4. Finally, dismissal of the instant appeal for lack of jurisdiction will not deprive appellant of the benefits of its election under BCRA § 403(d)(2). Because appellant elected for its suit to be adjudicated under the provisions of BCRA § 403(a), 116 Stat. 113, a three-judge court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114, and the district court's "final decision" in this case will be reviewable by appeal to this Court pursuant to BCRA § 403(a)(3), 116 Stat. 114. Even if the instant interlocutory appeal is dismissed, appellant therefore will receive every procedural safeguard specified in BCRA § 403(a) itself.[3]

To be sure, in suits filed on or before December 31, 2006, the right to appeal certain interlocutory orders to this Court under 28 U.S.C. 1253 was an indirect consequence of the jurisdictional scheme established by Con-

---

issued by a single judge is reviewable only in the court of appeals. If Section 1253 is construed to vest this Court with jurisdiction over the instant appeal, plaintiffs in future BCRA challenges, but not the government, will be able to insist on a procedural regime that includes direct appeal to this Court from interlocutory district court orders. Absent statutory language that unambiguously compels that result, the asymmetry of such an approach counsels against its adoption.

[3] When this Court has concluded in prior cases that it lacked appellate jurisdiction under 28 U.S.C. 1253, the Court has sometimes vacated the relevant order of the district court and remanded for entry of a fresh order from which a timely appeal could be taken to the court of appeals. See, *e.g.*, *MTM*, 420 U.S. at 804; *id.* at 804 n.8 (citing cases). In the instant case, the district court decision from which appellant seeks to appeal was issued on January 15, 2008. J.S. App. 2a-19a. Appellant's time for filing a notice of appeal under generally applicable procedures therefore will expire on March 17, 2008 (March 15, 2008, is a Saturday). See Fed. R. App. P. 4(a)(1)(B), 26(a)(3). Appellant therefore still has time to file a protective notice of appeal to the D.C. Circuit to preserve its appellate rights in the event this Court finds its own jurisdiction lacking.

gress for resolving constitutional challenges to BCRA. See pp. 2-3, *supra*. Section 1253 was applicable to such cases, however, not because the three-judge court procedures were *utilized*, but because they were *exclusive*, see BCRA § 403(d)(1), 116 Stat. 114—*i.e.*, because they were "required." In later-filed suits where the three-judge court procedures are optional rather than mandatory, a plaintiff's right to elect those procedures therefore does not carry with it a right to pursue an interlocutory appeal to this Court.

* * * * *

The appeal should be dismissed for lack of jurisdiction. In the alternative, for the reasons explained in the FEC's motion to dismiss or affirm, the appeal should be dismissed for lack of a substantial federal question, or the judgment of the district court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2008