No. 04-1581

In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* PROFESSOR FRANCES R. HILL, UNIVERSITY OF MIAMI SCHOOL OF LAW, IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST[1]

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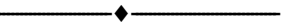
Much of Professor Hill's scholarship and public policy activities involve the use of exempt organizations as campaign finance structures. Professor Hill is a member of the Disclosure Task Force established by the Campaign Finance Institute. Professor Hill also serves as the Tax Program Director for the Campaign Legal Center, a nonpartisan, nonprofit organization which works in the areas of campaign finance**,** communications and government ethics.



SUMMARY OF ARGUMENT

Nonprofit corporations may not claim exemption from federal election law requirements by virtue of their exemption from federal income taxation. This Court has consistently held in its campaign finance related cases that nonprofit corporations are subject to the same requirements under federal election law as are taxable corporations. *See, e.g., Federal Election Comm'n (FEC) v.*

[1] No counsel for a party authored any part of this brief. Monetary contributions for the preparation and submission of this brief came only from funds of *amicus* in her capacity as a Professor of Law at the University of Miami School of Law. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

Beaumont, 539 U.S. 146, 160 (2003) ("*Beaumont*"). Nonprofit corporations enjoy the benefits of exemption from federal income taxation and, in the case of section 501(c)(3) organizations, contributors enjoy the benefit of the charitable contribution deduction.

The Court has long held that the favored tax status accorded exempt entities may be subject to conditions, and that different conditions may apply to different types of exempt entities. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), this Court held that the limitations imposed on lobbying by a section 501(c)(3) public charity did not violate the First Amendment. This Court has also long held that the benefits conferred on tax exempt entities may not be used to avoid the requirements and limitations of federal election law, and has rejected claims that these requirements violate the First Amendment when applied to nonprofit corporations. *See, Beaumont*, 539 U.S. at 163. Appellant Wisconsin Right to Life ("WRTL") and the section 501(c)(3) *amici* are advancing precisely the type of special claims based on their tax status that the Court has previously rejected.

WRTL rejects this Court's long-established position that a section 501(c)(4) organization can finance its electioneering communications through a PAC. WRTL adduces no principled reason for this position and instead simply states that it had more money available in its general treasury than in its federal PAC. This Court was not persuaded by an identical argument in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) ("*Austin*"), where the exempt Chamber of Commerce claimed the right to use treasury funds because its PAC had reached the limit on its maximum permissible expenditure. WRTL claims that its First Amendment lobbying

rights are burdened by the relatively greater difficulty of raising money for its PAC because contributors to the PAC are disclosed. This requirement relating to PAC contributors may, or may not in fact, be an inconvenience, but an inconvenience does not establish a Constitutionally impermissible burden.

WRTL and the section 501(c)(3) *amici* claim that tax exempt corporations pose no danger of circumvention or corruption because they have been formed to engage in laudable exempt activities. This argument amounts to the claim that the good intentions required of exempt entities and the good deeds of many exempt entities should create an irrebuttable presumption that all activities of all exempt entities are fully consistent with both election law and democracy. Unfortunately, this is far from the case and any such presumption is unsupportable, as the Court noted repeatedly in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) ("*McConnell*").

ARGUMENT

I. TAX EXEMPT CORPORATIONS ARE SUBJECT TO FEDERAL ELECTION LAW

WRTL bases its claims to exemption from the electioneering communications provisions of 2 U.S.C. § 441b on its status as a corporation exempt from federal income tax under 26 U.S.C. § 501(c)(4). Appellant's Brief at 21-22. Similarly, tax exempt *amici* supporting WRTL's claim base their arguments on their exemption from federal income tax under 26 U.S.C. § 501(c)(3). Brief of A Coalition of Public Charities as *Amici Curiae* in Support of Appellant at 7-8, 20-21. These arguments misconstrue the relationship

between tax exemption and federal election law. In effect, WRTL and the section 501(c)(3) *amici* claim that their tax exempt status should also exempt them from the electioneering communications provisions of section 441b. WRTL and the section 501(c)(3) *amici* do not challenge the limitations on either their election activity or their lobbying activity under federal election law, but claim only that no such limitation may be applied to electioneering communications under federal election law. As Congress has long recognized and as this Court has long held, tax exempt corporations are subject to federal election law. *See, e.g., Beaumont,* 539 U.S. at 160. A proper understanding of the process through which corporations become and remain tax exempt is inconsistent with the claims advanced by WRTL and the section 501(c)(3) *amici.* Federal tax requirements as administered by the Internal Revenue Service ("IRS") cannot be plausibly advanced as a substitute for enforcement of the requirements of federal election law in safeguarding the integrity of elections and of our democratic system.

A. Exemption From Taxation Is a Public Subsidy, In Exchange For Which Organizations Subject Their Activities To Certain Limitations

Congress has provided that exempt corporations may operate through numerous distinct forms, each of which is subject to different requirements. Once a corporation has chosen to operate under one of these forms, it is bound by the requirements applicable to that form. A section 501(c)(3) corporation may receive tax deductible contributions under 26 U.S.C. § 170, while a section 501(c)(4) organization may not. Legislative lobbying is limited for a

section 501(c)(3) organization, but is not limited for a section 501(c)(4) organization. A section 501(c)(4) organization may engage in some limited amount of participation or intervention in a political campaign, whether directly or through a separate segregated fund (a PAC), while a section 501(c)(3) organization may not.

This Court has held that exemption from taxation and the ability to accept tax deductible contributions are both subsidies indistinguishable from direct government outlays. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983). Taxation with Representation ("TWR") was formed through a merger of a section 501(c)(3) organization and a section 501(c)(4) organization. It claimed the First Amendment right to use tax deductible contributions for lobbying that exceeded the amount of lobbying consistent with section 501(c)(3) status. This Court rejected that claim on the grounds that exemption is a subsidy and the government is not required to subsidize the exercise of an otherwise protected right. The Court noted that the section 501(c)(3) organization could lobby through an affiliated section 501(c)(4) organization. In sum, this Court recognized that corporations seeking to engage in multiple activities could engage in tax planning consistent with their exempt status by forming a complex structure of related exempt corporations subject to the different requirements enacted by Congress.

WRTL has followed the lead of this Court in creating its own complex structure of related exempt entities to achieve its multiple objectives, including both lobbying and participation or intervention in political campaigns. According to its Web site, (http://www.wrtl.org), the WRTL section 501(c)(4) organization is related to a section 501(c)(3) organization, The Wisconsin Right to Life Education Fund

("WRTL Education Fund"), which itself includes what the Web site describes as a "restricted fund," denominated The Veritas Society ("Veritas"), which funds a large-scale program of broadcast ads that do not reference candidates for public office or elected officials. As a section 501(c)(3) organization, WRTL Education Fund may not, as a condition of its tax exempt status, "participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). WRTL also controls and operates Wisconsin Right to Life State PAC/Fed PAC ("State PAC/Federal PAC"), which are exempt from taxation under 26 U.S.C. § 527 as a "political organization." 26 U.S.C. § 527(e)(2). None of these organizations maintains an independent Web site but, instead, share the Web site at http://www.wrtl.org.

WRTL and its related entities evidence a sophisticated understanding of tax planning for maximum flexibility while enjoying the benefits of operating in corporate form, as well as the benefits of exemption from federal income taxation. WRTL also evidences a keen interest in securing for its contributors the benefit of the section 170 charitable contribution – which is available to those contributing to the section 501(c)(3) WRTL Education Fund and its restricted fund, Veritas. WRTL advises potential contributors on its Web site under the link headed "Tax deductibility" that "Your donation has tax implications." *See* http://www.wrtl.org/taxdeductability.htm. At the end of the Web page headed "Tax deductibility," WRTL advises potential contributors: "For professional counseling *contact our staff*." *See* http://www.wrtl.org/taxdeductability.htm (emphasis in original). WRTL is one component of a complex structure with a sophisticated understanding of the tax

implications of the multiple entities to which it is related, all of which are accessed through its Web site at http://www.wrtl.org.

Despite its organization as a complex structure and its operation of two PACs, (one state and one federal), and the operation of a related section 501(c)(3) organization with its own separate fund, WRTL claims that using its existing federal PAC to fund electioneering communications would impose an undue burden on its right to engage in grassroots lobbying. Brief for Appellant at 39-42. WRTL insists that its right to speak is impermissibly burdened unless it can use its general treasury funds to finance broadcast messages that it admits fall within the definition of an electioneering communication.

B. The Court Has Rejected Previous Claims that Tax Exempt Corporations Should Be Exempt from Federal Election Law

The electioneering communication provisions apply to communications paid for by any corporation, whether a taxable corporation or a tax exempt corporation. WRTL is a corporation that is funded in part by contributions from corporations. In holding that the electioneering communication provisions do not impermissibly burden the First Amendment rights of corporations, the Court in *McConnell* reaffirmed its well-established position that nonprofit corporations are corporations and that, by implication, their tax status is irrelevant to the corporation's First Amendment rights. *McConnell*, 540 U.S. at 209-10. The Court found in *McConnell*: "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in

federal elections has been firmly established in our law." *Id.* at 203. In *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982), this Court held that "[t]he statutory purpose of § 441b . . . is to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections." 459 U.S. at 201-02. Finally, this Court stated in *Beaumont*:

> In sum, our cases on campaign finance regulation represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. . . . In fact, we specifically rejected the argument made here, that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations.

Beaumont, supra, 539 U.S. at 155-57 (internal quotation marks omitted).

This Court has expressly rejected claims that nonprofit corporations do not present concerns about corruption or the appearance of corruption. This Court held in *Beaumont*:

> But concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from significant "state-created advantages," *Austin, supra,* at 659 (citations omitted) and may well be able to amass substantial "political 'war chests,'" *National Right to Work*, 459 U.S., at 207 (citations omitted). Not all corporations that qualify for favorable tax treatment under § 501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most

> politically powerful organizations, including AARP, the National Rifle Association, and the Sierra Club. (footnote omitted).

Beaumont, 539 U.S. at 159-60.

C. Federal Tax Law Restrictions Are Not A Credible Substitute for Federal Election Law Restrictions

The electioneering communication provisions of federal election law were enacted by Congress and upheld by this Court for the compelling governmental interests of preventing real and apparent corruption and circumvention of existing campaign finance restrictions. *McConnell*, 540 U.S. at 189-211. This Court in *Beaumont*, 539 U.S. at 155, citing *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 457 (2001), noted that "experience demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." This Court reached the same conclusion in *Austin*, *supra*, noting that a nonprofit corporation is capable of "serving as a conduit for corporate political spending." *Austin*, 494 U.S. at 664. Probing the limits of current law to enhance inducements to circumvention is precisely what WRTL and the section 501(c)(3) *amici* are asking this Court to sanction.

Tax exempt corporations present enticing opportunities for the kind of circumvention that both Congress and the Court identified as a threat to the integrity of federal election law as well as to the integrity of democratic public policy processes. Exempt corporations may

accept contributions from any person, foreign or domestic, including taxable corporations, labor unions, political parties, candidate campaign committees, or PACs, including PACs controlled by taxable corporations or by labor unions. Exempt corporations also may accept contributions in unlimited amounts from any contributor. If contributions are made to a section 501(c)(3) organization, the contributor may claim a charitable contribution deduction under 26 U.S.C. § 170. Exempt corporations are not required to disclose their contributors or their expenditures to the public. The only form of disclosure to the government is their annual information return submitted to the IRS, which in most cases is filed long after the election is over. Unlike federal campaign finance law, federal tax law does not restrict the sources and amounts of contributions to tax exempt corporations; nor does tax law require timely, detailed public disclosure of contributions to or expenditures by tax exempt organizations.

Federal tax law provisions are consistent with attracting broad funding for exempt activities, but they are inconsistent with preventing real and apparent corruption of the electoral process. Tax law is no substitute for election law, yet WRTL and the section 501(c)(3) *amici* here are seeking to use their tax exempt status to claim that their electioneering communications should be treated as lobbying subject only to federal tax law.

Applying the label of "grassroots lobbying" and thus shifting the treatment of electioneering communications from federal election law to federal tax law would mean that none of the limitations or enforcement mechanisms put in place under federal election law would apply to the electioneering communications financed by the general

treasury funds of tax exempt organizations. These organizations are enticing conduits for political operatives. An exemption from the electioneering communications provisions for tax exempt corporations would offer private interests around the world an unregulated mechanism for influencing federal elections.

Exempt corporations that opened their general treasuries to such contributions and used the contributions to finance electioneering communications in the name of "grassroots lobbying" would face little if any risk to their exempt status. The IRS is either reluctant to or lacks the resources to enforce existing tax laws against every tax-exempt organization, much less serving to protect the interests that led Congress to enact and this Court to uphold the electioneering communications provisions. Section 501(c)(3) contains an absolute prohibition on participation or intervention in a political campaign. Section 501(c)(4) entities can engage in some political activity, but such activity cannot become their principal purpose. In both cases, however, there is considerable uncertainty and controversy concerning the nature and scope of what constitutes political intervention. The IRS has issued no precedential guidance in this area for over twenty years, and tax lawyers rely to a remarkable extent on training manuals prepared by the IRS for use in training its auditors. In the five years since enactment of the electioneering communications provisions, the IRS has never addressed the question of whether financing electioneering communications falls within the scope of the section 501(c)(3) prohibition on political intervention or the section 501(c)(4) limitation on such activity.

Even in cases where tax law would treat the activity as prohibited participation or intervention in a political

campaign, the IRS has proved itself reluctant to revoke an organization's exempt status, and tax law does not require that it do so. While section 501(c)(3) would appear to require revocation of exempt status in such cases, 26 U.S.C. § 4955 has come to operate as an intermediate sanction that permits an organization to retain its exempt status if it pays an excise tax. This tax can be abated upon a promise to institute safeguards protecting against future use of treasury funds for participation or intervention in a political campaign, even if the organization recovers none of the funds already used for political purposes. 26 U.S.C. §§ 4955(f)(3) and 4962.

Even if the IRS were willing to revoke an organization's exempt status, it would be unlikely to do so before an election. There is no provision in tax law for the kind of public complaints that can be filed with the FEC under federal election law. *See* 2 U.S.C. § 437g (detailing the FEC complaint process). No private person has standing to challenge the exempt status of a tax exempt organization. Private persons can and do write to the IRS identifying activities of exempt organizations that appear to be inconsistent with their exempt status, but the IRS has no obligation to take account of such communications in any way.

In most cases, the IRS must wait until an exempt corporation files its annual information return long after the election is over. Congress has recognized that this timing issue gives exempt entities a virtual blank check during election campaigns. To address this problem, Congress enacted two provisions intended to permit the IRS, in defined situations and through defined procedures, to take action before an organization files its annual

information return. Section 6852(a)(1) provides for termination assessments in the case of "flagrant violations of the prohibition against making political expenditures." 26 U.S.C. § 6852(a)(1). Section 7409 provides that the IRS may seek "to enjoin any section 501(c)(3) organization from making further political expenditures and for such relief as may be appropriate to ensure that the assets of such organizations are preserved for charitable or other purposes specified in section 501(c)(3)." 26 U.S.C. § 7409. The IRS has never used its authority under section 7409. While any actions taken under section 6852(a)(1) would not be a matter of public record, it does not appear that the IRS has used its authority consistently under this provision even in cases involving express advocacy of the election or defeat of a clearly identified candidate for public office.

Even if the IRS were to revoke an organization's exempt status, the organization retains its rights to seek a declaratory judgment that the revocation was in error. 26 U.S.C. § 7428. Such proceedings remain in the courts for a considerable period, which extends the period during which an organization may, presumably, claim that its exempt status supports characterization of its electioneering communications as lobbying.

In short, federal tax law is no substitute for federal election law. Efforts to shift the regulation of federal election advertising to the IRS undermine the public's legitimate interest in the orderly administration of election law.

II. ELECTIONEERING COMMUNICATION PROVISIONS DO NOT BURDEN THE FIRST AMENDMENT RIGHTS OF TAX-EXEMPT CORPORATIONS

A. The Electioneering Communication Provisions Are Narrowly Drawn to Address a Compelling State Interest

The Court in *McConnell* held that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *McConnell, supra*, 540 U.S. at 206. The Court's reasoning encompassed ads having "an electioneering purpose." *Id.* Noting the disputes among the parties and the judges on the District Court over "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose," the Court found the dispute constitutionally irrelevant by noting that "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.*

B. WRTL's Broadcast Communications Are Electioneering, Not Lobbying

WRTL invokes tax law to claim that its electioneering communications are lobbying and then, by implication, argues that the characterization for purposes of federal tax law should control for purposes of federal election law. Brief for Appellant at 21-22. This claim fails on both grounds. The electioneering communications at issue here

are not lobbying for federal tax law purposes, and there is no reason to limit the reach of federal election law to the definitions applicable under federal tax law.

WRTL claims that characterization of its electioneering communications should be based exclusively on the text of the electioneering communication and rejects claims that such characterization depends on contextual facts and circumstances. Brief for Appellant at 33. This claim allows WRTL to exclude from consideration its targeting of its electioneering communications to the voters of Wisconsin and its choice to run the electioneering communications in close temporal proximity to the primary election in which it had endorsed all the Republican Party candidates seeking to defeat the incumbent Democrat explicitly referenced in the electioneering communications. WRTL claims that its long history of electoral opposition to the incumbent Democrat should be irrelevant as well. Nothing in the applicable tax law principles supports these claims.

Characterization of activities for federal tax law purposes requires that lobbying be distinguished from both education of the public and participation or intervention in a political campaign. These three types of activities overlap, and the IRS has provided little guidance on how to determine what the appropriate characterization is when a particular communication could fit into more than one category for federal income tax purposes. In these cases, the IRS will consider all of the facts and circumstances. The IRS has not yet provided any guidance at all relating to broadcast communications that are electioneering communications for purposes of federal election law. But, the available guidance in other areas strongly suggests that contextual factors will be centrally considered. As the section 501(c)(3) *amici* themselves admit, "[t]he

context of the activity weighs alongside the activity itself; communications that would alone be considered lobbying can become impermissible political intervention if conducted in a context of partisanship." Brief of A Coalition of Section 501(c)(3) Organizations as *Amicus Curiae* in Support of Appellant at 16. Congress and this Court have both found that temporal proximity to an election creates a context of partisanship that cannot be ignored in characterizing these broadcast communications, consistent with the applicable provisions of federal election law.

WRTL and the section 501(c)(3) *amici* claim that lobbying is a readily defined category with clear boundaries. Brief for Appellant at 20-24; Brief of A Coalition of Public Charities as *Amicus Curiae* in Support of Appellant at 11-12. This is far from the case. Experience with section 527 organizations that claim they are not required to register with the FEC as political committees supports the idea that activities which would be treated as lobbying for purposes of section 501(c)(4), will be treated by the IRS as electioneering for purposes of section 527. Because section 527 organizations must operate for the purpose of influencing the outcome of elections, the IRS has found that grassroots lobbying conducted by such organizations "will have a political purpose even though they do not expressly advocate the election or defeat of any particular candidate." I.R.S. Private Letter Ruling 9725036 (March 24, 1997). This exercise in recharacterization of, in at least some cases, the very same communication with an identical text, strongly supports the idea that the characterization of a lobbying activity is fluid and uncertain, contrary to the claims advanced by WRTL.

Even if the electioneering communications at issue here could be characterized as lobbying using the definitions of federal tax law, WRTL would be unable to sustain its claim that lobbying communications are properly accorded a higher level of constitutional protection under the First Amendment than are other forms of political speech. This Court has specifically rejected imposing a hierarchy of constitutional protections of the kind WRTL advances. The Court in *McConnell* cited with approval the conclusion in *Buckley* that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *McConnell*, 540 U.S. at 205, citing *Buckley*, 424 U.S. at 48.

C. WRTL May Fund Electioneering Communications Through Multiple Strategies Readily Available to It

Appellant claims that the electioneering communications provisions burden its First Amendment rights to speak and to petition the government because it cannot use its general treasury funds to pay for broadcast communications during the statutorily defined periods before primary and general elections. Appellant does not deny that it could fund such broadcast communications through its existing PAC, but it claims that doing so constitutes an impermissible burden on its First Amendment rights. Appellant notes that it has more money in its general treasury than it has in its PAC. It claims that raising money for the PAC is more difficult than raising money for the section 501(c)(4) organization's general treasury, in part because contributions to a PAC are subject to contribution

limits and contributors to the PAC are subject to disclosure.

Alternatively, WRTL suggests that it would be willing to establish a separate fund within its general treasury fund to which only qualified individuals could contribute and for which contributions would not be subject to any limit. Brief for Appellant at 30 and 32. This fund would permit WRTL to operate as a hybrid organization that enjoys the benefits of having a quasi-*MCFL*-type element embedded within it while at the same time permitting it to continue to accept corporate contributions or to engage in unrelated trade or business activities. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). This hybrid structure would constitute a "*MCFL*-lite" structure that did not require a section 501(c)(4) organization to make the choice between corporate funding and independent expenditures that the Court mandated in *MCFL*. This is the same choice that the Court required with respect to electioneering communications in *McConnell*. Far from characterizing this choice as an impermissible burden on a constitutional right, the Court in *McConnell* found the ability to make the choice to operate through a PAC or an *MCFL*-type entity alleviated any danger of an impermissible burden. *McConnell*, 540 U.S. at 209-11.

D. Section 501(c)(3) *Amici* Are Not Uniquely Burdened by the Electioneering Communication Provisions

The section 501(c)(3) *amici* claim that their First Amendment rights are uniquely burdened because a section 501(c)(3) organization, unlike a section 501(c)(4) organization, cannot establish a PAC. Brief of the Alliance

for Justice as *Amicus Curiae* in Support of Appellant at 27. The Court in *Taxation with Representation*, *supra*, rejected the claim that lobbying limits placed on section 501(c)(3) organizations violated their First Amendment speech rights. The Court reasoned:

> Both tax exemption and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax that it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to those charitable organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

Taxation with Representation, 461 U.S. at 544.

In his concurrence, Justice Blackmun agreed that the First Amendment does not require that lobbying be subsidized. *Id.* at 551. He found that the ability of section 501(c)(3) organizations to engage in unlimited lobbying with nondeductible contributions through a controlled section 501(c)(4) organization cured any First Amendment concerns.

The section 501(c)(3) *amici* could establish a controlled section 501(c)(4) organization that, in turn, could finance electioneering communications through its own controlled PAC. Alternatively, the section 501(c)(3) *amici*

could establish a separate section 501(c)(4) organization that itself satisfied the requirements this Court established in *MCFL*, including the requirement that it be funded solely by qualified individuals, as *amicus* Alliance for Justice observes. Brief for the Alliance for Justice as *Amicus Curiae* in Support of Appellant at 22-23. As this Court held in *McConnell,* an *MCFL*-type organization can use its treasury funds to finance electioneering communications.

The section 501(c)(3) *amici* reject both of these alternatives. The reason adduced is that doing so would impose an undue administrative burden on the section 501(c)(3) organization. This claim is surprising in light of the common use of complex structures of multiple types of exempt and taxable entities. Tax law provides clear guidance for these commonly used structures. The section 501(c)(3) *amici* also claim that either of these alternatives would burden their speech rights because contributions to a section 501(c)(4) organization are not deductible by the contributors. This reasoning is inconsistent with the Court's subsidy analysis in *Taxation with Representation.*

The section 501(c)(3) *amici* argue that their claim to use their treasury funds to finance electioneering communications is supported by their nature as public charities. Brief of A Coalition of Public Charities as *Amicus Curiae* in Support of Appellant at 24 (describing section 501(c)(3) organizations as "structurally unable to serve as vehicles for corporate political activity"). *Amicus* Alliance for Justice claims that section 501(c)(3) organizations "do not engage in the types of activities that might justify governmental intrusions on speech." Brief of the Alliance for Justice as *Amicus Curiae* in Support of Appellant at 4. Certain section 501(c)(3) *amici* claim that lobbying is part of the

charitable mission of section 501(c)(3) organization. Brief of A Coalition of Public Charities as *Amicus Curiae* in Support of Appellant at 19-20. This is not the case under federal tax law. Lobbying is a permissible activity for a section 501(c)(3) group, subject to limits, but it is not an exempt activity that itself would support exempt status as a section 501(c)(3) organization. Indeed, tax law contains no requirement that lobbying be substantially related to an organization's exempt purpose. Like unrelated trade or business activity, lobbying is permissible only if limited. In no circumstances does lobbying itself support section 501(c)(3) exempt status.

III. FUNDING ELECTIONEERING COMMUNICATIONS WITH TREASURY FUNDS BURDENS THE SPONSORING ORGANIZATION'S MEMBERS' ASSOCIATIONAL RIGHTS

The associational rights of an organization derive from its members, as this Court found in *Beaumont,* 539 U.S. at 161, n. 8 ("corporation's First Amendment speech and association interests are derived largely from those of their members"). *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1956). The Court has long held that the regulation of corporate political activity protected "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *FEC v. National Right to Work Comm.*, 459 U.S. at 208, cited in *Beaumont*, 539 U.S. at 154. A well-established line of cases has established the associational rights of members in organizations and has not permitted organizations to give

unfettered reign to the choices made by organizational managers.

Members' associational rights are particularly burdened when organizational managers propose to use general treasury funds for electioneering. This Court held in *Beaumont* that "[t]he PAC option allows corporate political participation with the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, see §§ 432-34, without jeopardizing the associational rights of advocacy organizations' members. . . ." *Beaumont*, 539 U.S. at 163. Similarly, this Court in *Austin* held that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Austin*, 494 U.S. at 658.

These risks are consistent with the reasons that the limitations or prohibitions on participation or intervention in political campaigns are a condition for exemption from federal income taxation. A candidate for public office necessarily takes positions on a broad range of issues. Any individual's voting decision represents a balance among issues and judgments about a candidate's character and constituency service. In sum, a voting decision is based on multiple factors. As such, voting choices defy easy explanation, despite the efforts made by political operatives and academics to develop models that can reliably predict voting behavior and election outcomes. There is no reason to think that all the members of WRTL who paid dues into the general treasury to support the organization's efforts to educate the public on its issues also want their contributions

used to elect or defeat particular candidates. Concerns about milk prices in America's Dairyland or about support for education or about foreign policy may have been, to some members of WRTL, more compelling components of their voting decision than a candidate's position on the issue espoused by WRTL.

The PAC option, which WRTL rejects solely on the grounds of lack of funding in its own PAC, protects the associational rights of members who paid dues to an advocacy organization but did not contemplate that their dues would be used for electioneering communications. As this Court found in *Austin, supra*, regarding the option to fund election activities through a PAC, "[b]ecause persons contribute to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views." *Austin*, 434 U.S. at 660-61. The portrait of a membership organization as an association of persons whose views on an issue compel a lockstep, unreflective voting decision is inconsistent with the First Amendment associational rights that this Court has been at pains to protect.

WRTL relies on *MCFL* in claiming unfettered managerial discretion in the name of the First Amendment right of association. This reading of *MCFL* cannot be reconciled with the facts or this Court's reasoning in that case. This Court in *MCFL* tightly defined the requirements for the exception from section 441b of the campaign finance laws. *MCFL,* 479 U.S. at 258. This Court in *Austin* held that each of these three requirements for *MCFL* status was "'essential' to our holding" and refused to extend to the Michigan State Chamber of Commerce the same treatment

on grounds that it did not satisfy the precise requirements this Court articulated in *MCFL*. *Austin*, 494 U.S. at 662.

While WRTL admits that it does not fit within the facts that the Court found essential in *MCFL*, it claims that it is almost like *MCFL* and that, as a constitutional matter, almost like *MCFL* should be close enough. Brief for Appellant at 31. In particular, WRTL dismisses the importance of having a policy stating that the organization will not accept contributions from corporations. Brief for Appellant at 31-32. Yet, this Court found the existence of such a policy a critical factor in its reasoning in *MCFL* and in distinguishing *MCFL* from the Chamber of Commerce in *Austin*. A policy of refusing corporation contributions is crucial in protecting the associational rights of individual members. The prohibition on the use of corporate treasury funds to finance PACs serves the same purpose. The policy prohibiting corporate contributions to PACs and to *MCFL*-type section 501(c)(4) organizations is the core mechanism ensuring that the marketplace of political ideas reflects support by voters and potential voters. Claims that organizations that are almost PACs or almost *MCFL* organizations ignore and disregard the rights of their members, which are the core of the associational rights protected under the First Amendment. WRTL complains that soliciting funds for its PAC only from persons who are members of WRTL is a "time-consuming, cumbersome process." Brief for Appellant at 41. This, however, is the very process that should characterize the operation of a nonprofit, tax-exempt membership organization.

The fact that the PAC controlled by WRTL did not possess sufficient funds to pay for the electioneering communications strongly suggests that the dues-paying members of WRTL did not choose to fund candidate

endorsements at the same level at which they chose to support the activities of WRTL itself. The relatively greater amount of money in the general treasury of WRTL indicates membership preferences. WRTL complains about the greater difficulty of raising money for the PAC compared with raising money for the general treasury of WRTL. This reality reflects a choice made by members. Such a choice is not an impermissible burden on a constitutional right but the very essence of the members' constitutional rights in action. Far from supporting WRTL's claim to use its treasury funds for electioneering communications, the facts set forth by WRTL indicate that §441b is protecting members' First Amendment rights of association.

IV. PERMITTING EXEMPT CORPORATIONS TO AVOID COMPLIANCE WITH FEDERAL ELECTION LAW ERODES THE INTEGRITY OF TAX LAW AND UNDERMINES PUBLIC CONFIDENCE THAT EXEMPT ORGANIZATIONS ARE OPERATING IN THE PUBLIC INTEREST

The claims advanced here by Appellant WRTL and the section 501(c)(3) *amici* would erode public confidence that nonprofit tax-exempt organizations are operating in the public interest and not in the private interest of candidates for public office and those organization managers who wish to use general treasury funds to support them. The entire structure of the tax law applied to exempt organizations is designed to ensure that the subsidy represented by exemption is used to benefit public interests, not private interests. Benefits to political parties and candidates for public office have been treated as private benefits for purposes of federal tax law. *American Campaign Academy v. Comm'r,* 92 T.C. 1053 (1989).

The leading academic theory of why certain organizations are exempt from federal income taxation is based on the importance of the prohibitions on various types of private benefit set forth in federal tax law. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax,* 91 Yale L. J. 54 (1981); *Reforming Nonprofit Corporation Law,* 129 U. Penn. L. Rev. 500 (1981). Although this tax-based structure is far from perfect, it represents the only meaningful way to address issues of transparency and accountability in exempt organizations. Members, contributors, and beneficiaries of tax exempt organizations all depend on the integrity of federal tax law to ensure that those organizations serve the public interest rather than private interests.

Appellant and the section 501(c)(3) *amici* urge this Court to enshrine in federal election law provisions that will exacerbate the consequences of corruption and appearance of corruption as a matter of federal election law and will, at the same time, exacerbate the lack of transparency and accountability of exempt organizations that has been a central concern under federal tax law. The integrity of federal tax law can be safeguarded if WRTL and the section 501(c)(3) *amici* who support WRTL avail themselves of the several options already available to them to fund their electioneering communications without using treasury funds for an activity treated as a private benefit under federal tax law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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