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 *AMICI CURIAE* SENATOR JOHN MCCAIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the three-judge district court correctly rejected Appellant's as-applied constitutional challenge to 2 U.S.C. § 441b(b)(2)—the federal law requiring corporations to finance electioneering communications with funds from a separate segregated fund—on the ground that this Court's decision in *McConnell v. FEC* is dispositive.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Senator John McCain, Representative Christopher Shays, and Representative Martin Meehan, are three of the four principal sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[2] These Members of Congress have devoted enormous time and energy to ensuring that our federal campaign finance laws are meaningful and not subject to wholesale evasion. They worked for seven years to enact BCRA to close glaring loopholes in the then-existing system. They participated as intervening defendants in *McConnell v. FEC* to defend the constitutionality of those loophole-closing measures.

If the critical provisions contained in Title II of BCRA, at stake in this case, are not applied to advertisements like those that Wisconsin Right to Life, Inc. sought to air, then *amici*'s efforts will be gravely undermined. Corporations will once again obtain a roadmap to evading the long-standing ban on corporate expenditures to influence federal elections. *Amici* respectfully submit that the three-judge court correctly concluded that this Court's decision in *McConnell* is dispositive and reaffirms that Congress possesses the authority necessary to ensure that the federal campaign finance laws are meaningful and not routinely circumvented.

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Senator Russell Feingold, the fourth principal sponsor of BCRA, is not participating as *amicus* in this case because the WRTL ads refer to Senator Feingold.

STATEMENT OF THE CASE

A. Factual Background

This case involves three television ads that Appellant, Wisconsin Right to Life, Inc. ("WRTL"), sought to run shortly before the 2004 federal election in Wisconsin with funds from its corporate treasury. Although WRTL is a non-profit corporation, it accepts contributions from corporations. Jurisdictional Statement Appendix ("J.S. App.") 4a. Because WRTL's receipt of corporate contributions prevents WRTL from using its corporate treasury to finance expenditures on behalf of or opposed to candidates for federal office, 2 U.S.C. § 441b(b)(2), WRTL maintains a political action committee, the Wisconsin Right to Life Political Action Committee ("WRTL-PAC"), in order to make such expenditures. J.S. App. 5a. WRTL also endorses and opposes candidates for federal office. *Id.*

In 2004, WRTL targeted U.S. Senator Russell Feingold for defeat. J.S. App. 5a. The WRTL-PAC announced in the title to a March 5, 2004 press release its "*Top Election Priorities*: Re-elect President Bush . . . Send Feingold Packing."[3] Warning that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections," WRTL-PAC's Chair Bonnie Pfaff emphasized that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." FEC Ex. 4. The press release also noted that WRTL's three endorsed candidates for Feingold's Senate seat "all stated they would oppose a filibuster" if the Senate Judiciary Committee returned a favorable or neutral recommendation on a judicial nominee. *Id.*

Three weeks later WRTL itself issued a similar release subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Fein-

[3] Exhibit 4 to FEC's Exhibits Submitted in Support of Its Opposition to Plaintiff's Motion for a Preliminary Injunction ("FEC Ex.").

gold Packing!"[4] This release again clearly stated WRTL's "resolve to do everything possible . . . to send Russ Feingold packing." *Amici* Ex. C. WRTL continued to advocate Senator Feingold's defeat during the summer of 2004, and, in a July 14, 2004 news release, criticized Senator Feingold for his position on the filibuster of judicial nominees. FEC Ex. 16.

On July 26, 2004, as the September primary election neared, WRTL began using its corporate treasury funds to finance the three ads at issue here. J.S. App. 6a. The lead-in to each ad differs somewhat, but each criticizes a "group of Senators" for filibustering judicial nominees and preventing "a simple 'yes' or 'no' vote" and then requests the viewer to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* at 13a-17a. The ads, however, did not provide viewers with the phone number or address of either senator. *Id.* Because the three ads were broadcast on television, referred to a clearly identified candidate for federal office, and targeted the electorate of that candidate, the ads, if run during the statutorily prescribed period, would constitute "electioneering communications." 2 U.S.C. § 434(f)(3)(A)(i); BCRA § 201. Accordingly, federal law required WRTL to begin using its PAC funds to finance these advertisements starting on August 15, 2004, thirty days before the primary election. 2 U.S.C. § 441b(b)(2); BCRA § 203. Alleging that this statute could not constitutionally be applied to its advertisements, WRTL filed suit on July 28, 2004, seeking an injunction prohibiting the Federal Election Commission from enforcing the statute with regard to WRTL's advertisements.

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[4] Exhibit C in Support of the Memorandum of *Amici* Senator John McCain, Representative Christopher Shays, Representative Martin Meehan, Democracy 21, The Campaign Legal Center, and the Center for Responsive Politics in Opposition to Plaintiff's Motion for a Preliminary Injunction ("*Amici* Ex.").

B. The Lower Court's Rulings

The three-judge district court (Sentelle, R. Roberts, Leon) denied WRTL's motion for a preliminary injunction on August 17, 2004. J.S. App. 4a-12a. In its unpublished Memorandum Opinion and Order of August 17, 2004, the district court held that WRTL was unlikely to prevail on the merits for two reasons. First, the district court concluded that this Court's decision in *McConnell* "leaves no room for the kind of 'as applied' challenge WRTL propounds before us." *Id.* at 7a. Second, said the court, "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 8a. After further briefing, the district court subsequently dismissed WRTL's as-applied challenge on May 9, 2005 "for the reasons set forth in its prior opinion."[5] *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

Amici urge this Court to hold that § 441b is constitutional as applied to WRTL's three ads. WRTL's ads directly implicate Congress's well-established interest in preventing corporate treasuries from being used to influence federal elections. Furthermore, the rule that WRTL urges this Court to adopt would functionally overrule this Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and would invite the wholesale evasion of the long-standing ban on the use of corporate treasury funds to influence federal elections.

Two years ago this Court held that Congress has a compelling interest in requiring corporations, including non-profit corporations, to finance electioneering ads with funds

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[5] On September 14, 2004, Chief Justice Rehnquist denied WRTL's application for an injunction pending appeal, noting that it would be an "extraordinary remedy, particularly when this Court recently held the Act facially constitutional, and when a unanimous three-judge District Court rejected applicant's request for a preliminary injunction." 542 U.S. 1305, 1305-1306 (Rehnquist, C.J., in chambers) (citations omitted).

from a segregated PAC account. *McConnell*, 540 U.S. at 204-211. Just as Congress may legitimately prohibit corporate treasury expenditures on ads that expressly advocate a candidate's election or defeat, it may also constitutionally require electioneering communications aired shortly before election day to be financed with funds from the corporation's segregated PAC account. This is true for two reasons. First, the vast majority of corporate-funded ads that are aired shortly before an election and that refer by name to a clearly identified candidate possess a readily apparent electioneering purpose and effect. Second, even in cases where the purpose of the ad is less clear, the availability of the segregated-PAC alternative provides corporations with a constitutionally-sufficient avenue for financing genuine issue ads. *Id.* at 206.

Under *McConnell*, WRTL cannot sustain an as-applied challenge to § 441b for two reasons. First, the record establishes that WRTL aired the ads in an attempt to influence a federal election. In the months leading up to WRTL's decision to air these ads, WRTL publicly proclaimed that one of its top two priorities was to defeat Senator Feingold, and it cited the filibuster issue as the linchpin for its opposition to his re-election. *See* FEC Exs. 4, 16; *Amici* Ex. C. Reflecting WRTL's electoral strategy, the three ads criticized a group of Senators for filibustering judicial nominees and urged voters to contact Senator Feingold without providing the senator's phone number or office address. J.S. App. 13a-17a. WRTL clearly intended to influence a federal election with corporate treasury funds. Accordingly, WRTL's ads implicated Congress's compelling interest in preventing the use of corporate funds to influence federal elections. *See McConnell*, 540 U.S. at 205 ("The . . . question—whether the state interest is compelling—is easily answered by our prior decisions regarding campaign finance regulation, which 'represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'").

As these facts vividly illustrate, ads that might appear on their face to be so-called "grassroots lobbying ads" are often in fact electioneering ads. Because WRTL's as-applied challenge rests on the nature of its ads, rather than WRTL's status as a non-profit corporation, sustaining this as-applied challenge would permit all corporations, even Fortune 500 companies, to use their treasuries to finance ads that, like WRTL's ads, possess an unmistakable electioneering purpose. Therefore, granting WRTL the exemption it seeks would effectively overturn *McConnell*, eviscerate Title II of BCRA, and open the floodgates for corporate (or union) treasury spending on federal elections.

Second, even if the intent of WRTL's ads were less than clear, this Court's decision in *McConnell* would still foreclose this as-applied challenge. *McConnell* explicitly held that the segregated-fund alternative represents a constitutionally-sufficient safety valve for corporations "in doubtful cases." 540 U.S. at 206. As this Court explained, § 441b does not constitute a "complete ban" on corporate electioneering communication expenditures. *Id.* at 204. Rather, the statute represents a sensible regulation that merely requires corporations to fund such communications with voluntary contributions from their members. *Id.*

WRTL presents no reason why this Court should cast aside its established precedent other than the contention that WRTL has not been able to raise sufficient funds from individual supporters for purposes of running the ads—a fact that hardly counsels in favor of using general treasury funds to make up for that lack of support. WRTL and its *amici* also raise two issues that are irrelevant to this as-applied challenge. First, because WRTL is a 501(c)(4) corporation with an established PAC, this challenge does not concern the constitutionality of applying § 441b to a 501(c)(3) corporation that may not, consistent with the tax code, directly create a PAC. Second, the constitutionality of applying § 441b to a corporation that segregates funds it receives from other corporations from the funds it receives from individuals is also not at issue because the record contains no suggestion

that WRTL ever had such a separate account. Rather, WRTL chooses to accept corporate contributions, and deposits them with all its other revenue sources, thereby creating the risk that WRTL will serve as a conduit for the unlawful corporate funding of federal election activity. In short, § 441b constitutionally applies to WRTL and, in particular, to the ads it sought to run here.

ARGUMENT

I. CONGRESS AND THIS COURT HAVE LONG RECOGNIZED THE CORRUPTING INFLUENCE OF CORPORATE TREASURY EXPENDITURES ON FEDERAL ELECTIONS.

A. Congress's Century-Long Effort To Combat Corporate Corruption Warrants Considerable Deference.

Section 441b, the statute at issue, traces its roots to the Tillman Act of 1907, ch. 420, 34 Stat. 864. The Tillman Act represented Congress's sensible response to a national concern over the corrosive effect of corporate spending on elections, which received widespread attention during the election of 1904. *United States v. Automobile Workers*, 352 U.S. 567, 571-572 (1957). The defeated candidate for the presidency captured this popular concern when he said that "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?" *Id.* at 572 (quoting Hearings before House Committee on Elections, 59th Cong., 1st Sess. 12). President Theodore Roosevelt himself recommended in his 1905 message to Congress that "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law." *Id.* (quoting 40 Cong. Rec. 96). Congress, heeding this call, enacted the Tillman Act and thereby prohibited "any corporation . . . [from] mak[ing] a money contribution in connection with any election to any political office." *Id.* (quoting 34 Stat. 864).

Congress moved in 1925 to strengthen the Tillman Act through the adoption of the Federal Corrupt Practices Act,

which, in part, extended the prohibition on corporate contributions to cover "anything of value" and made the giving or receiving of corporate contributions a federal crime. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citing Federal Corrupt Practices Act of 1925, §§ 301, 313, 43 Stat. 1070, 1074). The Smith-Connally Act of 1943 temporarily applied the Corrupt Practices Act to labor unions. *Automobile Workers*, 352 U.S. at 578 (citing 57 Stat. 163, 167). Despite this statute, "Congress was advised of enormous financial outlays said to have been made by some unions in connection with the national elections of 1944." *Id.* at 579. After concluding that Congress intended the prohibition on contributions from corporate and union treasuries to cover expenditures, the House Special Committee to Investigate Campaign Expenditures recommended legislation clarifying that the Corrupt Practices Act covered "expenditures by the prohibited organizations in connection with elections." *Id.* at 582 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46). As the Court acknowledged, "it was obvious that the statute as [previously] construed could easily be circumvented through indirect contributions." *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 115 (1948). Shortly thereafter, Congress passed the Taft-Hartley Act, which implemented the Committee's recommendation in order to, as Senator Taft explained, "plug up a loophole which obviously developed, and which, . . . as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations." *Automobile Workers*, 352 U.S. at 583 (quoting 93 Cong. Rec. 6439).

"In early 1972 Congress continued its steady improvement of national election laws by enacting [the Federal Election Campaign Act]." *McConnell*, 540 U.S. at 117. As this Court recounted in *McConnell*, "[t]he law ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures, but expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *Id.* at 118.

Despite Congress's longstanding efforts to prevent corporate corruption of federal elections, corporations during the 1990s began using their general treasury funds to finance sham "issue" ads that in reality were designed and run with a clear electioneering purpose. This avenue for corporate circumvention arose out of this Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life* ("*MCFL*") where, in order to avoid constitutional vagueness problems with the former version of § 441b, this Court interpreted the statute to apply only to expenditures that expressly advocated a candidate's election or defeat. 479 U.S. 238, 249 (1986). On that interpretation, corporations quickly learned that simply by avoiding the magic words of express advocacy, corporations could freely spend money from their corporate treasuries to influence federal elections. As this Court later acknowledged, "the unmistakable lesson from the record" in *McConnell* was that the express advocacy "requirement is functionally meaningless" because the "absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." 540 U.S. at 193.

Congress responded to this pattern of evasion by enacting BCRA § 203, which amended § 441b to require corporations to finance all "electioneering communications" with funds from a separate PAC account. To alleviate the vagueness problem that plagued the "in connection with" requirement of the 1972 Act, while plugging the loophole opened by the express advocacy test, the statute objectively defined "electioneering communications" to include any "broadcast, cable, or satellite communication" that:

> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within--
>
> > (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> >
> > (bb) 30 days before a primary or preference election, or a convention or caucus of a political

> party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i); BCRA § 201. In short, BCRA's amendment of § 441b reflected Congress's judgment, dating back a century, that "the special characteristics of the corporate structure require particularly careful regulation." *National Right to Work*, 459 U.S. at 210.

B. This Court Has Repeatedly Deferred To Congress's Judgment That Corporate Electioneering Expenditures Require Careful Regulation.

This Court has never questioned Congress's decision to require corporations to finance electioneering expenditures with segregated PAC funds. To the contrary, the Court has repeatedly said that Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautions advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." *National Right to Work*, 459 U.S. at 209 (internal citation omitted); *see also McConnell*, 540 U.S. at 117; *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 n.9 (2003) ("Judicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'").

This Court first considered the constitutionality of § 441b in *National Right to Work*, 459 U.S. at 209-10. In holding that § 441b could constitutionally be interpreted to limit PAC solicitations to members with "some relatively enduring and independently significant financial or organizational attachment," *id.* at 204, this Court explained that two

important interests underlie § 441b: (1) "ensur[ing] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions," and (2) "protect[ing] the 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." *Id.* at 207-208. Finding that these interests supported application of § 441b to membership corporations as well as traditional stock corporations, this Court stated that "[w]hile § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation." *Id.* at 209-210.

This Court reaffirmed the important interests underlying § 441b in *MCFL*, 479 U.S. at 238. As the Court explained there, "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *Id.* at 257. The *MCFL* decision correctly recognized that § 441b represents an attempt to alleviate this threat to the political marketplace "[b]y requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending." *Id.* at 258.

This Court concluded, however, that these compelling interests did not justify application of § 441b to MCFL, a non-profit corporation that did not accept corporate contributions. As the Court emphasized, "it is [MCFL's] policy not to accept contributions from [business corporations or labor unions]." 479 U.S. at 264. This fact was critical to the Court's holding because a no-corporate-contributions policy "prevents such [non-profit] corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.*

This Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990), confirmed that a nonprofit corporation could avoid § 441b's modest requirements only by eschewing corporate contributions. *Austin* rejected an as-applied challenge to a Michigan statute forbidding corporate political expenditures, brought by a nonprofit corporation that, unlike MCFL but like WRTL here, accepted contributions from for-profit corporations. In distinguishing the facts of *Austin* from those in *MCFL*, this Court explained that an exemption for a nonprofit corporation that received contributions from for-profit corporations would permit "[b]usiness corporations [to] circumvent the Act's restriction by funneling money through the [nonprofit corporation's] general treasury." *Id.* at 664. Thus, "[b]ecause the [nonprofit corporation] accepted money from for-profit corporations, it could, absent application of [the Michigan statute], serve as a conduit for corporate political spending." *Id.*

Following the precedent laid down in *National Right to Work* and *MCFL*, the *Austin* Court also upheld the constitutionality of the Michigan statute's requirement that corporations finance independent expenditures with funds from a segregated account. 494 U.S. at 658. Recognizing the established principle that "'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form,'" *id.* at 659 (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985)), this Court concluded that the Michigan statute appropriately aimed at the "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. Thus, *Austin* eliminated any doubt that the compelling government interest in preventing corporate corruption of the electoral process extended to expenditures as well as direct candidate contributions, for "[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." *Id.*

This Court also recognized in *Austin* that the Michigan analogue to § 441b represented a narrowly-tailored strategy for addressing corporate corruption of candidate elections because it permitted corporations to participate in the electoral arena through the establishment of segregated PAC funds. *Id.* As this Court explained:

> We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views. . . . [T]he Act does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds. Because persons contributing 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.

Id. at 660-661 (emphasis in original). And just as this Court had done in *National Right to Work*, the *Austin* decision refused to find the Michigan statute overbroad on account of its application to all corporations, including those without substantial wealth. After all, the "potential for distortion justifie[d] [the Michigan statute's] general applicability to all corporations." *Id.* at 661.

This Court has continued to adhere to the principle that Congress's regulation of corporate involvement in the electoral process warrants considerable deference. *See Beaumont*, 539 U.S. at 156-163. In *Beaumont*, a non-profit advocacy corporation unsuccessfully brought an as-applied challenge to § 441b. In rejecting the notion that nonprofit corporations do not pose a threat to the political marketplace, this Court reaffirmed that the potential for abuse justified Congress's decision to apply § 441b to nonprofit corporations. This Court reasoned that nonprofit corporations, "like their for-profit counterparts, benefit from significant 'state-

created advantages,' and may well be able to amass substantial political 'war chests.'" *Id.* at 160 (citations omitted). Because "[n]ot 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 the AARP, the National Rifle Association, and the Sierra Club," this Court recognized that Congress could constitutionally require nonprofit 501(c)(4) corporations to finance direct candidate contributions through segregated PAC funds. *Id.* This was particularly true because, as the Court had said before, § 441b does not represent a "ban" on corporate political activity, but rather "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Id.* at 163.

In short, even before this Court considered the constitutionality of BCRA's amendments to § 441b, the Court had repeatedly recognized Congress's legitimate interest in regulating corporate treasury expenditures. Moreover, the constitutionality of applying § 441b to non-profit corporations like WRTL that accept corporate contributions was well established. Finally, this Court's decisions had found that the segregated-PAC option represented a constitutionally sufficient method for corporations (with the sole exception of direct expenditures by nonprofit advocacy groups that accept no corporate funding) and unions to participate in the electoral process.

C. *McConnell* Reaffirmed Congress's Important Interest In Regulating Corporate Expenditures Designed To Influence Federal Elections.

Because BCRA's amendment of § 441b effectively furthered Congress's compelling interest in preventing corporate treasuries from influencing federal elections (and avoided constitutional vagueness issues), this Court upheld that provision against a facial challenge in *McConnell*. 540 U.S. at 204-207. The *McConnell* decision recognized that the issue whether Congress had a compelling interest in regulat-

ing corporate expenditures on electioneering communications was "easily answered by our prior decisions . . . , which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (internal citations and quotations omitted).

In an attempt to distinguish these prior cases, the *McConnell* "plaintiffs argue[d] that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." 540 U.S. at 205-206. Just as Wisconsin Right to Life argues here, the National Right to Life Committee asserted there that BCRA's "'electioneering communication' restrictions would eliminate . . . [a] whole category of speech, [which] is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. . . . buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to 'Call Representative Swing-Vote and ask for her to vote for the bill sponsored by Representatives Commonweal and Controversy.'"[6] The National Rifle Association ("NRA") and other BCRA challengers likewise argued that § 441b would improperly prohibit corporations from financing ads that urged voters to contact Members of Congress to support or oppose legislation.[7]

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[6] Reply Brief for Plaintiffs-Appellants/Cross-Appellees The National Right to Life Committee 6, *National Right to Life Comm. v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1733).

[7] Brief for Appellants The National Rifle Association 36-37, *National Rifle Ass'n v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1675); *see also* Brief of AFL-CIO Appellants/Cross-Appellees 19, *AFL-CIO v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1755) (arguing that "§ 203 precludes . . . communications that . . . [c]all upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so"); Opening Brief of the "Business Plaintiffs" 18, *Chamber of Commerce v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1756) (asserting that "many issue ads conclude by asking

In support of his unsuccessful contention that BCRA unconstitutionally banned grassroots lobbying, Senator McConnell attached two ads to his brief that cannot be meaningfully distinguished from the ads WRTL sought to run. Both of the featured ads commented on actual legislative issues, and neither commented on the candidate's fitness for office, expressly criticized the candidate, or urged voters to support or oppose the candidate. The first ad read:

> Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets, draining American jobs. Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal. Tell Congressman Paul to vote 'No' and keep China on probation until this label stands for fairness. Paid for by the AFL-CIO.[8]

Senator McConnell's brief also included the following ad, which urged voters to contact a candidate without expressly criticizing the candidate's position:

> It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough. Call Harry Reid and John Ensign tell them no matter who goes to Washington you want them to cut

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viewers to contact candidates and express support for or opposition to legislation or policy positions").

[8] Brief for Appellants/Cross-Appellees Senator Mitch McConnell 51, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1674).

> your taxes. Otherwise they'll be nothing left but the crumbs.[9]

Responding to the challengers' argument that such electioneering communications did not implicate Congress's compelling interest, this Court explained that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the 30- and 60-day periods preceding federal primary and general elections] if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. Reviewing the record, this Court concluded that the "the vast majority of ads clearly had such a purpose." *Id.* Moreover, the record established that political parties and candidates appreciated the "issue advocacy" run by nonprofit corporations and directed donors to support such activities. *Id.* at 129. Indeed, the testimony of campaign professionals demonstrated that these so-called "issue ads" represented the most effective type of campaign advertising. *Id.* at 126-127. In short, having considered arguments and exemplary ads indistinguishable from those presented here, this Court both concluded that electioneering communications implicate Congress's compelling interest in preventing corporations from influencing federal elections and rejected the contention that BCRA's definition of "electioneering communications" is too broad because it encompasses such ads.

In any event, the Court found that corporations' ability to finance such ads with funds from segregated PAC funds undermined the contention that § 441b impermissibly burdened corporate speech. *Id.* at 204-206. Acknowledging the possibility that the definition of "electioneering communications" might cover some unidentified genuine issue ads, this Court concluded that this possibility did not cast doubt on § 441b's constitutionality because "corporations and unions may finance genuine issue ads during those time frames by

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[9] Appendix to Brief for Appellants/Cross-Appellees Senator Mitch McConnell 4A, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1674).

simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206. In sum, *McConnell* upheld § 441b for two reasons: First, the overwhelming majority of ads covered by the electioneering communications test—like the ads at issue here—are designed to, and in fact do, influence a federal election. Second, in close cases where the intent or effect of the ad is less clear, corporations may continue to run such ads by financing them with funds from a segregated PAC fund—as WRTL was free to do.

II. SECTION 441b CONSTITUTIONALLY APPLIES TO WRTL'S THREE ADS.

This Court's decision in *McConnell* effectively forecloses this as-applied challenge. *McConnell* precludes a corporation from arguing that its speech is entitled to more protection than express advocacy or other types of electioneering communications that Congress clearly may regulate within the bounds of the First Amendment. *See* 540 U.S. at 205. Moreover, *McConnell* conclusively establishes that Congress has a compelling interest in applying § 441b's source restrictions to any ads that are intended to influence a federal election and would almost certainly have that effect. *See id.* at 206. As with the ads this Court considered in *McConnell*, there can be no doubt that the advertisements at issue here had the purpose and likely effect of influencing a federal election. And, as in *McConnell*, any doubt that might have existed regarding the nature of these ads could easily have been avoided "by paying for the ad from a segregated fund." 540 U.S. at 206.

A. WRTL's Ads Deserve The Same Degree Of Constitutional Protection As Ads Expressly Advocating A Candidate's Election Or Defeat.

Although WRTL and its *amici* spill considerable ink arguing the First Amendment value of WRTL's ads, the issue in this case is not whether WRTL's ads constitute speech that is worthy of constitutional protection. This Court's determination that Congress may constitutionally regulate

both express advocacy and electioneering communications did not rest on any notion that such speech lacked constitutional value. *See McConnell*, 540 U.S. at 205. Unlike the challengers here, the *McConnell* plaintiffs did not even attempt to "contend that the speech involved in so-called issue advocacy is any more core political speech than are words of express advocacy." *Id.* Indeed, this Court confirmed that ads expressly advocating a candidate's election or defeat fall within the core of the First Amendment for "'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,' and '[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.'" *Id.* (internal citations omitted). WRTL's ads deserve the same level of constitutional protection—no more, no less—that this Court has afforded express advocacy.

Accordingly, WRTL's as-applied challenge must rest not on the ground that its speech is uniquely valuable vis-à-vis express advocacy or other forms of electioneering communications, but on the ground that (1) its ads do not implicate the same compelling interest that led this Court to uphold the corporate source requirements in the context of express advocacy and electioneering communications, and (2) that the segregated-PAC option does not represent a constitutionally sufficient opportunity for WRTL to disseminate its message. Because WRTL's ads had an electioneering purpose and WRTL has an established PAC, this as-applied challenge fails.

B. WRTL's Ads Had An Electioneering Purpose.

It is settled that Congress may require corporations to use segregated PAC funds to finance ads that have an electioneering purpose. *See McConnell*, 540 U.S. at 205-206. In rejecting the notion that Congress's compelling interest in regulating corporate express advocacy did not extend to corporate electioneering communications, this Court stated that "[t]he justifications for the regulation of express advo-

cacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206. This holding comported with this Court's long-standing recognition that Congress's purpose in § 441b "is to prohibit contributions or expenditures by corporations . . . in connection with federal elections." *National Right to Work*, 459 U.S. at 201. *McConnell* merely reaffirmed that "unusually important interests underlie the regulation of corporations' campaign-related speech." *McConnell*, 540 U.S. at 206 n.88. Corporate electioneering ads fall within the scope of Congress's well-established compelling interest in (1) regulating "'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas,'" and (2) preventing circumvention of valid campaign finance regulations. *Id.* at 205 (quoting *Austin*, 494 U.S. at 660).

WRTL unsuccessfully attempts to characterize the purpose of its ads as "genuine grassroots lobbying," not electioneering. It asserts that its ads only urged voters to call Senator Feingold (a candidate WRTL openly opposed) on the judicial filibuster issue (an issue WRTL used to advocate for Senator Feingold's defeat). Thus, concludes WRTL, "Grassroots lobbying ads . . . have nothing to do with elections." Br. for Appellant 25.

That assertion—which turns on the false premise that any given ad is exclusively either a form of lobbying or electioneering—is not accurate as a general matter and certainly is not credible on the facts of this case. Leading up to the airing of the WRTL ads, WRTL publicized its intention to defeat Senator Feingold in the 2004 election, a clear electioneering purpose. *Amici* Ex. C. Both WRTL and its WRTL-PAC proclaimed that the defeat of Senator Feingold represented one of WRTL's top priorities in the 2004 election. *Id.*; *see also* FEC Ex. 4. In connection with its strategy to defeat Feingold, WRTL openly endorsed all three of Feingold's Republican opponents. FEC Ex. 4. WRTL's

public statements of opposition to Feingold, and its support for Feingold's opponents, emphasized Feingold's position on judicial filibusters as a key justification for opposing Feingold in the 2004 election. *Id.*; *see also Amici* Ex. C; FEC Ex. 16. Moreover, "candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue." J.S. App. 5a (Three-Judge Court's Findings of Fact). Having joined with Feingold's opponents in calling for the senator's defeat because of his support for filibusters, WRTL in its ads pointedly reminded voters that a "group of Senators" was unjustifiably blocking qualified nominees from a confirmation vote and specifically named Senator Feingold as one of two senators voters should contact. *Id.* at 13a-17a. WRTL's so-called "grassroots lobbying" ads failed to include, however, Senator Feingold's phone number or office address. *Id.*

This record establishes that WRTL intended to defeat Feingold, and that it intended to do so on the basis of Feingold's filibuster position when it ran the three ads at issue here. WRTL's ads implemented the organization's electoral strategy by focusing voters' attention on judicial filibusters and tying the need for action on that issue to Senator Feingold, a candidate whose re-election WRTL had repeatedly opposed because of his position on judicial filibusters. In short, WRTL's ads had an electioneering purpose.

WRTL suggests that so-called "lobbying ads" that refer to a candidate for federal office can be easily distinguished from electioneering.[10] That position, however, conflicts not

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[10] WRTL purports to find support for this contention in comments that the principal sponsors of BCRA, including *amici*, submitted to the FEC in the rulemaking implementing Title II of BCRA. Br. for Appellant 24-25 n.19. WRTL fails to note, however, the FEC rejected the proposal, as well as other similar proposals, because it found that they would have exempted communications that "could well be understood to promote, support, attack, or oppose a federal candidate." 67 Fed. Reg. 65,201 (Oct. 23, 2002). Moreover, WRTL erroneously equates a proposed (and rejected) regulatory standard with a constitutional standard. And, in making its argument, WRTL incorrectly equates ads that refer to a specific

just with the facts of this case, but also with this Court's longstanding recognition that electioneering and lobbying often overlap. *See Buckley v. Valeo*, 424 U.S. 1, 42 (1976). As this Court said in Buckley, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.*; *see also McConnell*, 540 U.S. at 126 & n.16.

WRTL asserts that the content of its ads, viewed in a vacuum, reveals no electioneering purpose. But the lesson of this nation's experiment with the express-advocacy test is that corporate ads that identify a candidate and that are run shortly before an election almost always are intended to influence electoral outcomes and do affect elections, even if the ads stop short of explicitly advocating a candidate's election or defeat. *See McConnell*, 540 U.S. at 206. Just as "Congress is not required to ignore historical evidence regarding a particular practice or to view conduct in isolation from its context," *id.* at 153, this Court need not and should not artificially confine its analysis in the manner WRTL suggests, particularly when the surrounding circumstances reveal such an obvious intent to influence a federal election. This Nation's recent experience with the abuse of the "magic words" test leaves no doubt that, if WRTL's proposed exception to § 441b were adopted, it would create a new blueprint for the widespread evasion of the federal campaign finance laws.

C. The Segregated-Fund Option Provides WRTL With A Constitutionally Sufficient Opportunity To Finance Its Ads Without Banning Any Speech By The Corporation.

Section 441b does not prohibit corporations from speaking. Congress has only sought to regulate "the temptation to use corporate funds for political influence" by requiring corporations to finance electioneering communications with

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candidate for office by name—as WRTL sought to do here—with ads that refer generically to "your Congressman" or "your Senator."

funds from a segregated PAC fund. *Beaumont*, 539 U.S. at 163. Accordingly, WRTL and its amici are "simply wrong in characterizing § 441b as a complete ban." *Id.* at 162.

This Court has already concluded that the segregated-fund option provides corporations with a constitutionally sufficient opportunity to finance ads, even when the nature of the corporation's ad is unclear. *McConnell*, 540 U.S. at 206. As *McConnell* reaffirmed, the "Court's unanimous view" has been that "[t]he ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy." *Id.* at 203. Extending this view to electioneering communications, this Court reasoned that, regardless of what percentage of electioneering communications constituted non-electioneering ads in the past, "in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, *or in doubtful cases by paying for the ad from a segregated fund.*" *Id.* at 206 (emphasis added). Thus, even if WRTL's electoral intent in running the three ads were less than clear, § 441b could constitutionally require WRTL to finance its ads with funds from its segregated PAC.

Although WRTL does not dispute that, as a general matter, the segregated fund option represents a constitutionally sufficient alternative, it argues that its own PAC contained insufficient funds to finance these three advertisements. WRTL blames its PAC's fundraising failure on "inadequate time to raise sufficient funds" to finance the three ads at issue here. Br. for Appellant 41. Yet, WRTL knew no later than March 5, 2004, when it announced its plans to defeat Senator Feingold, that it might have a need for PAC expenditures six months in the future. *See* FEC Ex. 4.

This lack of support for WRTL's electoral positions, or WRTL's poor fiscal planning, hardly undermines the adequacy of the PAC alternative or justifies using general treasury funds in place of PAC funds. This Court has never

accepted the notion that the applicability of § 441b can turn on the size of a particular PAC's checkbook. *See Beaumont*, 539 U.S. at 157 ("specifically reject[ing] the argument ... that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations"); *see also Austin*, 494 U.S. at 661 (upholding application of state statute similar to § 441b to all corporations including ones that "may not have accumulated significant amounts of wealth"); *McConnell*, 540 U.S. at 227 ("'[p]olitical "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly the same resources'") (citation omitted). Nor should the Court embrace the idea that the constitutionality of applying § 441b to a particular corporation turns on the corporation's effectiveness at fundraising or its failure to plan ahead. If WRTL's position became law, corporations and labor unions would have the perverse incentive to circumvent § 441b by simply declining to solicit contributions for their PACs.

Aside from the PAC alternative, § 441b also provides corporations with numerous other avenues for disseminating their messages. WRTL could have run the ads at issue if it merely refrained from referring to Senator Feingold. It could have run its ads, and could have used its corporate treasury funds to finance those ads, if it simply used newspapers, billboards, direct mail or any other type of non-broadcast communication medium. And, it could have—and did—use corporate treasury funds to broadcast its ads outside the 60-day period before the general election and the 30-day before the primary election. Rather than avail itself of these alternatives, WRTL sought to use its corporate treasury funds to run broadcast ads that were intended to influence a federal election and, if aired, would almost certainly have done so. Under these circumstances, and this Court's clear holding in *McConnell*, § 441b's segregated fund requirement constitutionally applies to WRTL's advertisements.

D. WRTL And Other Non-Profit Advocacy Corporations Can Avoid § 441b's Requirements Altogether By Declining To Accept Corporate Contributions.

WRTL is subject to § 441b's segregated-fund requirement only because it chooses to accept contributions from corporate treasuries. Under the *MCFL* exemption, non-profit advocacy corporations, like WRTL, may generally use their own corporate treasuries to finance electioneering communications. *See McConnell*, 540 U.S. at 209-211. This exemption does not apply, however, when the non-profit organization receives corporate treasury contributions, for then the non-profit corporation has the potential to "serv[e] as [a] conduit[] for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264.[11]

Repeating an argument unsuccessfully raised by the NRA in *McConnell*,[12] WRTL suggests that this Court should rewrite § 441b to permit WRTL to finance its electioneering communications with funds received from non-corporate contributors without establishing a segregated

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[11] Senator McConnell argues, as an *amicus curiae*, that "small nonprofit corporations often lack the financial resources and manpower necessary to satisfy" the requirements for establishing a PAC. *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant 10-11. Putting aside the fact that WRTL had a PAC—and thus that issue is not before the Court—this Court has repeatedly recognized that the "regulatory burden" of operating a PAC does not give rise to a constitutional problem, except in the limited case of direct expenditures by so-called *MCFL* corporations. *McConnell*, 540 U.S. at 210-211 & n.91; *Beaumont*, 539 U.S. at 163; *National Right to Work*, 459 U.S. at 201-202. The argument also ignores the fact that a non-profit organization that is "formed for the express purpose of promoting political ideas" can avoid the relatively minimal burden of creating a PAC by declining to accept corporate contributions, and thus avoiding the risk that it will be used as a conduit for unlawful electioneering. *MCFL*, 479 U.S. at 264.

[12] Brief for Appellants The National Rifle Association at 28-33, *National Rifle Association v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1675).

PAC fund. Because WRTL did not pay for or seek to pay for its ads with non-corporate dollars, WRTL's proposal amounts to a request for an advisory opinion. Indeed, the record contains no suggestion that WRTL ever segregated its corporate from its non-corporate funds. In any event, money under these circumstances is fungible, and segregating non-corporate funds will not prevent WRTL from indirectly using corporate funds to finance electioneering communications. In short, there is no factual basis here for any as-applied challenge based upon the type of funds used to finance WRTL's ads.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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