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 AMICI CURIAE OF NORMAN ORNSTEIN, THOMAS MANN AND ANTHONY CORRADO IN SUPPORT OF APPELLEE

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 04-1581

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 AMICI CURIAE OF NORMAN ORNSTEIN, THOMAS MANN AND ANTHONY CORRADO IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are three political scientists who have dedicated much of their careers to studying and analyzing Congress, federal elections, campaign finance, and American politics, and who have written extensively, both individually and jointly, on those subjects.[1]

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party. We further note that no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief, except for the Carnegie Corporation of New York, which provided a grant to Dr. Ornstein to support the filing of the brief.

Anthony J. Corrado, Jr., is a Professor of Government at Colby College and Co-Chair of the Board of Trustees of the Campaign Finance Institute. He served as an expert witness in *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case.

Thomas E. Mann is a Senior Fellow in Governance Studies at the Brookings Institution. He served as an expert witness in *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion in that case. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id*. at 148; *id*. at 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners who helped craft the McCain-Feingold legislation.

Stemming from their expertise and interest in federal elections and campaign finance reform, Dr. Ornstein and Dr. Mann have joined in the filing of briefs *amici curiae* in previous cases before this Court involving election law issues.[2] The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

This case involves an as-applied challenge to Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. That Act overhauled our federal election laws by amending, *inter alia*, the Federal Election Campaign Act of 1971, 2 U.S.C. § 431

---

[2] *See Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93 (2003) (Ornstein); *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, *supra* (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

et seq. *See McConnell*, 540 U.S. at 114. Among BCRA's amendments to FECA is a provision prohibiting corporations and unions from financing, with general treasury funds, "electioneering communication[s]"—*i.e.*, those communications referring to a federal office candidate and broadcast within 30 days of a primary or 60 days of a general election in the candidate's jurisdiction. *See* 2 U.S.C. § 441b(b)(2). Two years ago, in *McConnell*, this Court sustained most of BCRA's various provisions against constitutional challenge, including Section 203. *See* 540 U.S. at 203-209. The Court specifically rejected a First Amendment facial challenge to Section 203, holding that the provision was neither fatally overbroad nor fatally underinclusive. *Id.* at 207-208. The impact of that holding lies at the crux of the present appeal.

Appellant Wisconsin Right to Life (WRTL) alleges that it is a non-profit, non-stock ideological advocacy corporation organized under the laws of Wisconsin that the Internal Revenue Service recognizes as tax-exempt under Section 501(c)(4) of the Internal Revenue Code. *See* J.S. App. 4a. WRTL admitted below that it fails to qualify for any recognized exemption that would allow it to fund electioneering communications from its general treasury account because it neither meets the definition of a "qualified nonprofit corporation" under 11 C.F.R. § 114.10 nor fits the exception for 501(c)(4) corporations provided by 2 U.S.C. § 441b(c)(2). *See* J.S. App. 4a-5a. WRTL administers a segregated account for campaign-related activity in the form of a political action committee (PAC). *Id.* at 5a.

In 2004, United States Senator Russell Feingold of Wisconsin ran for reelection. *See id.* Senator Feingold's challengers raised his support for "filibusters" of the President's nominees for federal judgeships as a campaign issue. *Id.* In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and "announced that the defeat of Senator Feingold was a priority." *Id.* On July 14, 2004, WRTL issued a news release criticizing Senator Feingold's "record on Senate filibusters against judicial nominees." *Id.*

WRTL used a variety of non-broadcast communications to criticize Senate filibusters of judicial nominees. *See id.*

On July 26, 2004, WRTL began using its general treasury funds—rather than its PAC funds—to air three broadcast advertisements criticizing Senators' reliance on the judicial filibuster tactic and naming Senator Feingold. *See id.* at 5a-6a. In the "Wedding" advertisement, the listener hears a father interrupting his daughter's wedding ceremony to "share a few tips on how to properly install drywall." *Id.* at 13a. This set up is followed by the narrator opining that "[s]ometimes it's just not fair to delay an important decision" but, in Washington, "a group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote." *Id.* The narrator then urges the listener to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* WRTL's broadcast advertisements feature different plots but all three play on the same needless-delay theme and essentially convey the same message. *See id.* at 15a ("Loan"); *id.* at 17a ("Waiting").

Anticipating that airing these three advertisements constituted "electioneering communication[s]" under BCRA during the period between August 15, 2004, and November 2, 2004, WRTL filed suit against the Federal Election Commission in federal district court. *Id.* at 5a. WRTL alleged that BCRA's prohibition on the use of general treasury funds to finance electioneering communications is unconstitutional as applied to the funding of its broadcast advertisements and moved for a preliminary injunction. *Id.* at 6a.

The District Court denied WRTL's motion for preliminary injunction, concluding that WRTL's "showing" failed to meet the standard for granting such relief. *Id.* at 7a; *see also id.* at 11a ("[P]laintiff's case falls far short of the four-part test for the grant of a preliminary injunction."). As to WRTL's likelihood of success of the merits of its suit, the District Court concluded that this Court's rejection of a facial constitutional challenge to BCRA Section 203 "[j]ust last year" *in McConnell* "leaves no room for the kind of 'as applied' challenge that WRTL propounds." *Id.* at 7a. The

District Court drew this inference from the fact that the *McConnell* Court declined to consider the "back up" definition of "electioneering communication" that BCRA provided (in the event the primary definition of that term were deemed "constitutionally insufficient") once it " '*uph[e]ld all applications of the primary definition*.' " *Id.* (quoting *McConnell*, 540 U.S. at 190 n.73) (emphasis and brackets by the District Court). "The Court's deliberate declaration of its ruling as encompassing '*all applications* of the primary definition,' " the District Court reasoned, "suggests little likelihood of success for an 'as applied' challenge to some applications of that definition, such as the one plaintiff brings before us." J.S. App. 7a (quoting *McConnell*, 540 U.S. at 190 n.73) (emphasis and brackets by the District Court).

The District Court found that the stock it put in the Court's declaration was buttressed by the fact that Section 203 was not among the four BCRA sections that the Court identified as possibly subject to future as-applied constitutional challenges. *See id.* at 7a-8a. According to the District Court, "the Court's deliberate upholding of 'all applications' stands in informative contrast to its explicit acknowledgement that other parts of the statute which it upheld against facial challenge might be subject to 'as applied challenges' in the future." *Id.* at 7a. While it recognized that the Court's omission did not "preclude the possibility" of an as-applied challenge to Section 203, the District Court concluded that, "in the face of the strength of the Court's holding with specific reference to these [other] provisions, we cannot possibly conclude that the plaintiff has made out a substantial likelihood of success on the merits." *Id.* at 8a.

The District Court's reading of this Court's decision in *McConnell*, however, was "but one reason" that it declined to find that WRTL's suit had any likelihood of success on the merits. *Id.* The District Court went on to observe that the facts involved in WRTL's as-applied challenge "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* The District Court explained that WRTL's advertisements seemed to confirm

the *McConnell* Court's suspicion that corporate funding of pre-election broadcast advertisements " 'will *often* convey [a] message of support or opposition' regarding candidates." *Id.* at 8a-9a (quoting *McConnell*, 540 U.S. at 239) (emphasis in *McConnell*) (brackets by the District Court). "Here, WRTL and WRTL's PAC used other print media and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media." J.S. App. 9a. WRTL's tack, the District Court further noted, "followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement, and the PAC announcing as a priority 'sending Feingold packing.' " *Id.* at 9a (citation omitted). The District Court also concluded that WRTL, in addition to having failed to establish a substantial likelihood of success on the merits, failed to meet the remaining elements of the standard for obtaining a preliminary injunction. *See id.* at 9a-11a.

Following its denial of WRTL's motion for preliminary injunction, the District Court dismissed WRTL's lawsuit with prejudice. *Id.* at 1a. The District Court held that, "for the reasons set forth in its prior opinion," this Court's decision in *McConnell* "foreclosed" WRTL's as-applied challenge to BCRA Section 203. *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

For nearly a century, Congress has sought to prevent corporations and unions from using general treasury funds to influence federal elections. BCRA indeed represents only "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell*, 540 U.S. at 115 (internal quotation marks & citation omitted). For its part, BCRA Section 203 only extends a longstanding prohibition against the use of corporate and union treasury funds for advertisements that expressly advocate the election or defeat of a federal candidate to cover a newly-defined form of communication—*i.e.*, electioneering

communications. Congress concluded, and record evidence demonstrates, this measure was needed to prevent corporations and unions from circumventing the pre-existing prohibition by funding advertisements with treasury revenues that, while falling short of express advocacy, were no less calculated to influence federal elections and likely had that effect. And in upholding BCRA Section 203 against a facial constitutional attack in *McConnell*, this Court foreclosed WRTL's present as-applied challenge to it. It upheld the prohibition on *all* advertisements meeting the statutory definition of electioneering communication, including so-called "grassroots lobbying," because those advertisements will *often* communicate a message of support for or opposition to a federal candidate. In any event, the three "grassroots lobbying" advertisements that WRTL sought to air during BCRA's pre-election blackout period constitute the very kind of communications that Congress sought to regulate with BCRA Section 203. They were likely designed to influence Senator Feingold's bid for reelection to the Senate and, if permitted to air, would likely have had precisely that effect.

ARGUMENT

I. BCRA SECTION 203 CLOSED A LOOPHOLE IN THE FEDERAL CAMPAIGN FINANCE REGIME THAT HAD BEEN EXPLOITED BY CORPORATIONS AND UNIONS IN PREVIOUS ELECTIONS.

"Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul." *Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 153 (2003). BCRA Section 203 and the definition of "electioneering communication" fall into the former category. Although BCRA Section 203 extends the prohibition on the spending of corporate and union general treasury funds in connection with federal elections to encompass a newly-defined form of communication, since the Court's seminal ruling in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "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 embedded in our law." *McConnell*, 540 U.S. at 203. Section 203 constitutes no more than a modification of pre-existing law needed to " 'plug [an] existing loophole' " in the prohibition on corporate and union general treasury expenditures in connection with federal elections. *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 582, 585 (1957) (*UAW*) (quoting S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. 38-39 (1947)).

1. This Court is mindful of the "historical prologue" of a challenged provision of federal election law. *Beaumont*, 539 U.S. at 156; *see UAW*, 352 U.S. at 570 ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). This Court has recognized that the prohibition against corporate and union general treasury expenditures in connection with campaigns for federal elected office has long been a cornerstone of federal election law. *See Beaumont*, 539 U.S. at 152-154; *McConnell*, 540 U.S. at 115-118. That restriction reflects an abiding concern with the ability of corporations and unions, if left unchecked, to use their state-sanctioned privileges and ability to aggregate wealth to obtain unfair political advantages. *See Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (*NRWC*); *UAW*, 352 U.S. at 585.

Congress made its initial foray into the arena of campaign finance regulation in 1907. It responded to President Roosevelt's call for a ban on corporate political contributions "not with half measures, but with the Tillman Act," which "banned any corporation whatever from making a money contribution in connection with federal elections." *Beaumont*, 539 U.S. at 153 (internal quotation marks & citation omitted). After this first step, Congress took another one in 1925 by extending the Tillman Act's prohibition on corpo-

rate contributions to encompass "anything of value" and by criminalizing the giving and receiving of corporate contributions. *See NRWC*, 459 U.S. at 209 (citing Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074). Congress later extended the coverage of this prohibition to include labor unions. *See NRWC*, 459 U.S. at 209 (noting that "union contributions in connection with federal elections were prohibited altogether" by the War Labor Disputes Act of 1943). And, later still, Congress extended the scope of this prohibition affecting corporate and union political activity to include not just contributions but also "expenditures." *See McConnell*, 540 U.S. at 117.

In its "steady improvement of the national election laws," Congress enacted FECA in 1972. *Id.* This statute, as this Court has explained, "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures." *Id.* at 118. Specifically, FECA Section 441b, which constituted "merely a refinement of th[e] gradual development of the federal election statute," *NRWC*, 459 U.S. at 209, made it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any" federal election. 2 U.S.C. § 441b(a); *see Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (*MCFL*) (Section 441b "prohibits corporations from using treasury funds to make an expenditure in connection with any federal election."). The term expenditure, as defined by FECA, included "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). While barring expenditures of general treasury funds, however, FECA "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." *McConnell*, 540 U.S. at 118; *see MCFL*, 479 U.S. at 241 (Section 441b "requires that any [corporate or union] expenditure for [a federal election] purpose be financed by voluntary contributions to a segregated fund."); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409-410 (1972).

2. FECA Section 441b's prohibition against corporate and union expenditures of "anything of value" in connection with federal elections was later modified by this Court in a way that, as discussed below, carried untoward consequences eventually prompting Congress to enact BCRA Section 203. In *MCFL*, this Court accepted the argument that FECA Section 441b "necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates" and held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 248-249. This requirement, the Court explained, stemmed from its own prior decision in *Buckley* v. *Valeo*, *supra*, which—in order to avoid vagueness and overbreadth concerns inhering in a different FECA provision touching on independent campaign expenditures—held that "expenditure encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' " *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 80). As the *MCFL* Court explained, *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." 479 U.S. at 249. The *Buckley* Court in fact specifically identified eight such "more pointed exhortations"—namely, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." 424 U.S. at 44 n.52. In the years since *Buckley*, the "express advocacy" limitation has become "known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

"As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.' " *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 525-526 (D.D.C.) (Kollar-Kotelly, J.) (footnote omitted), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003). More to the point, "corporations and labor unions could use their general treasury funds to pay for an advertisement *which influenced a federal election*, pro-

vided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement." *Id.* at 526 (emphasis added).

3. Those involved in the electioneering business have historically pressed the federal campaign finance law envelope. "[E]xperience demonstrates," this Court has said, "how candidates, donors, and parties test the limits of the current law." *Beaumont*, 539 U.S. at 155 (internal quotation marks & citation omitted). The prohibition contained in FECA Section 441b (qualified by the magic words requirement) proved no exception to this lesson of experience. In the years following this Court's decision in *MCFL*, corporations and labor unions tested FECA Section 441b's prohibition by making expenditures on advertisements that eschewed reliance on *Buckley*'s "magic words" but were no less effective at influencing federal elections than communications containing "pointed exhortations" of support for or opposition to candidates for federal office. "Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for 'issue advocacy' campaigns that avoided express advocacy but were designed to influence federal elections." *McConnell*, 251 F. Supp. 2d at 526 (Kollar-Kotelly, J.); *see also id.* at 201 (per curiam) ("It does not appear that prior to 1996, the practice of using issue advertising to influence federal elections was a widespread practice."); *id.* at 800 (Leon, J.) ("[C]orporations, interest groups, and unions began in 1996 to actively use treasury funds to sponsor issue advertisements that looked and sounded like campaign ads.") (internal quotation marks & citation omitted). Those advertisements "were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *McConnell*, 540 U.S. at 128.

4. During the issue advocacy boom of the late 1990s, "[c]orporations and unions spent hundreds of millions of

dollars of their general funds to pay for these ads." *Id.* at 127. The Annenberg Center for Public Policy, which has studied "issue advocacy" since the early 1990s, concluded that "the numbers of ads, groups, and dollars spent on issue advocacy * * * climbed" markedly from the 1996 to the 2000 election cycle. *McConnell*, 251 F. Supp. 2d at 879 (Leon, J.). It found that the 1995-96 election cycle saw about "$135 million to $150 million * * * spent on multiple broadcasts of about 100 ads." *Id.* Those numbers grew during the next election cycle: "[T]he Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million." *Id.* And during the "1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements." *Id.* In passing BCRA, the Annenberg Center's tracking of the rise of organizations' reliance on issue advocacy did not escape Congress's attention. *See* 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe) ("Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws."); *id.* at 2456 (statement of Sen. Snowe) (referencing 2001 Annenberg report).

5. The rise in issue advertisements was not a coincidence but a strategy adopted by organizations intent on influencing campaigns for federal offices in light of the express advocacy limit read into Section 441b's expenditure prohibition. Two judges on the three-judge District Court convened to review the pre-enforcement challenge to BCRA specifically found that these organizations used issue advertisements with the hope of influencing federal elections. Based on her review of the evidence, Judge Kollar-Kotelly concluded that "[i]t is therefore uncontroverted that by the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits

and source limits." *McConnell*, 251 F. Supp. 2d at 528 (internal quotation marks, alteration and citation omitted); *see also id.* at 529 (finding that "the uncontroverted record demonstrates that since the 1996 election cycle, candidate-centered issue advertisements have been used by corporations and labor unions to influence federal elections with general treasury funds.").

Judge Leon similarly concluded that "the record more than adequately demonstrates[ ] that in the twenty-eight years since *Buckley*, corporations, unions, and interest groups have increasingly affected federal elections by funding out of their general treasuries uncoordinated 'issue ads' that either they, or a political party, ran in the months leading up to an election." *Id.* at 799. He further explained that, "[i]n order to avoid regulation as express advocacy, those so-called 'issue advertisements' did not contain certain 'magic words' designed to support or oppose a specific candidate's election or re-election." *Id.* at 800.

> The ads, however, were constructed in such a way that they simultaneously presented their sponsors' stand on an issue, identified a specific candidate's positions or track record thereon, and under the guise of admonishing the viewer to inform the candidate of his view, suggested that a candidate who takes (or has taken) the candidate's position should (or should not) be elected to that office. [*Id.*]

He concluded that the "factual record unequivocally establishes that [issue advertisements] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." *Id.*

6. The line that *Buckley* drew between express advocacy and issue advocacy, which was later imported into FECA Section 441b in *MCFL*, was not only easily and frequently circumvented but largely illusory from the start. *Buckley* itself signaled as much:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest. [424 U.S. at 42.]

Indeed, this Court in *McConnell* confirmed that the express advocacy test is a "functionally meaningless" one, 540 U.S. at 193, 217: "While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126.

Experience in fact powerfully demonstrated that the express advocacy test and the focus on "magic words" failed to identify accurately communications designed to influence elections for federal office. In *McConnell*, all three of the judges of the District Court agreed that few advertisements run by candidates, parties or interest groups rely on words of express advocacy. *See* 251 F. Supp. 2d at 303 (Henderson, J.); *id.* at 529 (Kollar-Kotelly, J.); *id.* at 874 (Leon, J.). A mere 4% of candidate advertisements during the 1998 election cycle contained "magic words," while only 5% did so during the 2000 election cycle. *McConnell*, 540 U.S. at 128 n.18. Judge Kollar-Kotelly concluded that "[t]he uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements." 251 F. Supp. 2d at 529. Indeed, "[t]he unrebutted expert testimony" in the District Court "demonstrate[d] that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the 'magic words' test." *Id.* at 608; *see also id.* at 529 (citing "[e]mpirical study demonstrat[ing] that modern campaign advertisements do not use words of express advocacy" and that "88.6 percent of candidate advertisements

in 2000 were technically undetected by the *Buckley* magic words test") (internal quotation marks & citation omitted).

The record before the District Court demonstrated that media professionals actually disfavored such heavy-handed tactics. One political consultant explained that it "is rarely advisable" given "the modern world of 30 second political advertisements" to use "such clumsy words as 'vote for' or 'vote against.' " *Id.* at 529-530 (Kollar-Kotelly, J.); *see also id.* at 305 (Henderson, J.); *id.* at 874-875 (Leon, J.). The "most effective" course, as "[a]ll advertising professionals understand," is to "lead[ ] the viewer to his or her own conclusion without forcing it down their throat." *Id.* at 529-530 (Kollar-Kotelly, J.); *id.* at 875 (Leon, J.); *see also McConnell*, 540 U.S. at 193 n.77 (noting that "political professionals and academics confirm that the use of magic words has become an anachronism"). "This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians." *McConnell*, 251 F. Supp. 2d at 530 (Kollar-Kotelly, J.). The express advocacy limitation of course proved no substantial obstacle for this "modern" electioneering approach.

Members of Congress themselves—some of them "seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years"[3]—confirmed that the "magic words" of express advocacy "do not distinguish pure issue advertisements from candidate-centered issue advertisements." *Id.* at 532 (Kollar-Kotelly, J.). Senator Russ Feingold, for example, opined that "[p]eople didn't need to hear the so-called magic words to know what these ads were really all about." 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001), while Senator John McCain explained that "th[is] Court's definition of 'express advocacy'—magic words—has no real

[3] *Buckley*, 424 U.S. at 261 (White, J., concurring in part & dissenting in part); *see also Colorado Republican Fed. Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours.").

bearing in today's world of campaign ads." 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001); *see also* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[E]ven a casual observer would concede that 'magic words' is a dramatically underinclusive test for determining what constitutes a campaign ad."). Many other federal lawmakers expressed similar views on so-called issue advocacy.[4]

7. The widespread practice of using soft money to fund issue advertisements designed to influence campaigns for federal office was further documented in the six-volume

[4] *See, e.g.*, 148 Cong. Rec. H387 (daily ed. Feb. 14, 2002) (statement of Rep. Cardin) ("Currently, these [issue] ads which are clearly aimed at influencing an election can be worded in a way that they are deemed issue advocacy and are not subject to campaign spending limits or disclosure requirements."); 148 Cong. Rec. H410 (daily ed. Feb. 14, 2002) (statement of Rep. Kleczka) ("An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law."); 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001) (statement of Sen. Edwards) ("In fact, [issue advertisements] are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country."); 144 Cong. Rec. H6802 (daily ed. July 30, 1998) (statement of Rep. Shays) ("They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such."); 144 Cong. Rec. S1038-39 (daily ed. Feb. 26, 1998) (statement of Sen. Bryan) ("Independent expenditure ads are one of the very reasons the campaign system is out of control. We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy."). 143 Cong. Rec. S10125 (daily ed. Sept. 29, 1997) (statement of Sen. Collins) ("[T]he situation I have described [regarding 'issue' ads run by the AFL-CIO] has led to the biggest sham in American politics. Nobody in Maine believed that the AFL[-]CIO's negative ads were for any purpose other than the defeat of a candidate. Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections. The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham.").

report—spanning nearly 10,000 pages—that the Senate Governmental Affairs Committee (Committee), chaired by Senator Fred Thompson and led also by Ranking Member John Glenn, produced following its investigation into campaign finance law abuses during the course of campaigns for the presidency in 1996. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) (Thompson Report). This Court in *McConnell* characterized the Committee's findings as "disturbing." 540 U.S. at 122.

The Committee concluded that issue advertisements constituted "the second most significant loophole" in the preexisting campaign finance regime. Thompson Report at 5968 (minority views). The Committee "found such ads highly problematic for two reasons." *McConnell*, 540 U.S. at 131. First, because issue advertisements "accomplished the same purpose as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide." *Id.* Second, while the advertisements were "ostensibly independent of the candidates," they were "often actually coordinated with, and controlled by, the campaigns." *Id.* "The ads thus provided a means for evading FECA's candidate contribution limits." *Id.* The Committee's findings bear out these conclusions.

Looking broadly at the problem posed by issue advocacy, the Thompson Report found that both national parties used soft money to fund issue advertisements intended to influence the 1996 presidential election. The Democratic National Committee (DNC) spent $44 million on issue advertisements during the 1996 presidential election, while the Republican National Committee (RNC) spent $24 million. *See* Thompson Report at 4482; *id*. at 8294 (minority views). When Harold Ickes, President Clinton's Deputy Chief of Staff, was asked during the Committee hearings whether the average person would comprehend the DNC and RNC's issue advertisements as encouraging a vote for one of the presidential candidates, he responded that "I would certainly

hope so. If not, we ought to fire the ad agencies." *Id*. at 8286 (minority views).

The 1996 presidential candidates themselves tended to share this view toward issue advertisements funded by soft money. That President Clinton fully appreciated the impact of issue advertisements on his campaign for a second presidential term is apparent in his telling major contributors to the DNC that their contributions, which funded advertisements "run * * * through the Democratic party," rather than his campaign, "have made a huge difference." *Id.* at 62. Senator Dole's campaign deployed this strategy as well. The Report concluded that "there can be little doubt that the RNC's issue ads were intended to influence the outcome of a federal election." *Id.* at 4014. One of those advertisements, entitled "The Story," the Thompson Report concluded, "was nothing more than a biography of Bob Dole." *Id.* Senator Dole's campaign manager, Scott Reed, acknowledged that "[w]e went out in April and May and raised $25 million for the party, of which about $17, $18 or $19 million was put into party building ads, which were Bob Dole in nature." *Id.* at 8301 (minority views). In an interview with Ted Koppel of ABC News, Senator Dole explained that, while his campaign could not afford to fund advertisements lauding his candidacy, the RNC ran "generic" ads on his behalf. *Id.* at 4153-54. Questioned whether "Bob Dole for President" constitutes "generic spending," Senator Dole explained that such generic advertisements "never say[ ] that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture!" *Id.* at 4154.

The Thompson Report further detailed the extent to which the national parties coordinated their issue advertisements with the campaigns of their presidential candidates. As for the DNC, the report concluded that the White House essentially "operated the [DNC] party apparatus as a slush-fund for the President's re-election campaign." *Id.* at 23. The Clinton/Gore campaign and the DNC used the same consultants, pollsters and media producers, *id.* at 34, and even coordinated the day on which their respective advertisements

would run, *id.* at 118. Indeed, Dick Morris, a campaign advisor to President Clinton, stated that the President himself was so involved in the creation of all of the DNC and Clinton/Gore campaign advertisements that they essentially " 'became * * * the work of the President himself.' " *Id.* at 122. This "unprecedented" level of coordination, the Thompson Report concluded, led to the "oblitera[tion]" of any "distinctions remaining between the White House, the DNC, and [the] Clinton/Gore [campaign]." *Id.* at 107.

Similar findings were made in regard to the RNC and Senator Dole's campaign. The RNC's media campaign was controlled by Senator Dole's "campaign manager, chief fundraiser, media consultant, and pollster." *Id.* at 8297 (minority views). And "the criterion used by the RNC and the Dole campaign for deciding where to run issue ads was whether the ads would help Senator Dole win electoral votes." *Id.* at 8299 (minority views).

The Thompson Report further concluded that, just as the national parties exploited the issue-advocacy loophole, so, too, did corporations and unions. It found that such organizations spent "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." *Id.* at 3993. These advertisements—like the ones produced by the parties—were likewise intended to influence federal elections. *See id.* at 3997. They were indeed often coordinated with the campaigns of the 1996 presidential candidates or the national parties with which they were associated. *Id.* The Thompson Report found, for example, that "[e]vidence * * * indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 elections." *Id.*; *see also id.* at 49 ("White House aides and the AFL-CIO carefully reviewed each other's advertisements and coordinated their timing and placement."). Dick Morris additionally testified during the Committee hearings that an August 1995 meeting between representatives of the Clinton/Gore campaign, the DNC and

seven labor organizations constituted " 'a full briefing of us by them on their media plans.' " *Id.* at 128.

Groups backing Republican candidates similarly used issue advertisements in an attempt to influence federal elections. For instance, The Coalition: Americans Working for Real Change, a group formed to counter issue advertisements aired by the AFL-CIO, produced issue advertisements nearly identical to advertisements run by the National Republican Congressional Committee (NRCC), a division of the RNC, aired them at the same time as the NRCC's advertisements and "in districts where the Republican incumbent's seat was vulnerable." *Id.* at 8944 (minority views). Another group, Triad Management Services, "channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' " *Id.* at 4569 (minority views). "By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." *Id.* They became "surrogates" by which the RNC "was able to circumvent federal campaign finance laws." *Id*. at 5979 (minority views). This was so because whereas "a political party [that] broadcasts issue ads * * * is required to pay for them with a combination of hard dollars and soft dollars," when "an outside group runs such ads, there are no such restrictions—even if the funding comes from the RNC." *Id.*

The Thompson Report concluded that repairs to the campaign finance laws must involve restrictions on issue advocacy. "The majority expressed the view that a ban on the raising of soft money by national party committees would effectively address the use of union and corporate general treasury funds in the federal political process only if it required that candidate-specific ads be funded with hard money." *McConnell*, 540 U.S. at 132; *see also* Thompson Report at 4492. The minority similarly recommended "reforms addressing candidate advertisements masquerading as issue ads." Thompson Report at 9394 (minority views); *see also McConnell*, 540 U.S. at 132.

8. "*Buckley*'s express advocacy line [did] not aid[ ] the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 193-194. The legislative process culminating in the passage of BCRA spanned more than six years and generated multiple reform bills introduced in Congress. *See McConnell*, 251 F. Supp. 2d at 434 (noting that "the legislative process took over six years of study and reflection by Congress") (Kollar-Kotelly); *id.* at 434 n.1 (listing campaign finance bills introduced in Congress during six-year period preceding enactment of BCRA). This process was influenced by the failings of the pre-BCRA campaign finance regime brought to light by the Thompson Report as well as the reforms that the report proposed.[5] Senator Feingold, for example, opined that, "in the wake of the Thompson investigation, we reluctantly concluded that we need to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002). Senator Glenn similarly noted that the Thompson Report "showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless" and that the legislation under consideration "goes a long way to address[ing] th[is] abuse." 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998).

9. BCRA Section 203 directly combats the well documented problem of issue advertisements that skirted the express advocacy limitation but nevertheless had the purpose and likely effect of influencing campaigns for federal elected office. That section extended FECA's pre-existing prohibition on the use of corporate and union general treasury funds

[5] The House and Senate bills that ultimately became BCRA were not accompanied by the customary explanatory committee reports. Members of Congress frequently relied on the Thompson Report's findings in floor debates on BCRA, however. *See, e.g.*, 147 Cong. Rec. S3138 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("The 1997 Senate investigation collected ample evidence of campaign abuses, the most significant of which revolved around the soft money loophole.").

to finance communications influencing federal elections—which prohibition, in light of this Court's narrowing statutory construction in *MCFL*, previously was limited to those expressly advocating election or defeat of a particular candidate—to cover any "electioneering communication." 2 U.S.C. § 441b(b)(2). BCRA contained two definitions of the new statutory term that Congress coined, a primary and a back-up definition. Only BCRA's primary definition is relevant here. It identifies electioneering communications as (1) any "broadcast, cable or satellite communication" that (2) "refers to a clearly identified candidate for Federal office"; (3) is made within either 60 days preceding a federal general election, or 30 days preceding a federal primary election, for the office the candidate seeks; and (4) is "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i), meaning that the communication must be received by 50,000 or more persons in the "relevant congressional district or state." *McConnell*, 251 F. Supp. 2d at 212 (per curiam). "Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204.

Congress's new term—"electioneering communication"—is carefully calculated to identify (and block) corporate and union general treasury expenditures on broadcast advertisements intended to influence federal elections that escaped detection under *Buckley*'s express advocacy radar. "By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy," as Judge Kollar-Kotelly explained, "Congress adopted a definition of electioneering communication that rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job * * * of distinguishing between candidate-centered issue advertising and pure issue advertising." *McConnell*, 251 F. Supp. 2d at 569. Indeed, she found that "the uncontroverted record establishes that pure issue

advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the advertisement is run in a competitive race." *Id.* at 567.

Each criterion of Congress's new term is bottomed on empirical evidence. *First*, the definition of electioneering communication takes aim only at media "found by Congress to be problematic." *Id.* at 569. "The records developed in [the BCRA pre-enforcement] litigation and by the Senate Committee adequately explain the reasons for this legislative choice." *McConnell*, 540 U.S. at 207. As Judge Kollar-Kotelly explained, the evidence developed in the context of the pre-enforcement challenge to BCRA "demonstrates that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections." *McConnell*, 251 F. Supp. 2d at 573. She quoted the views of experts and media consultants that confirmed that "broadcast advertising is the most prevalent form of communicating candidate-centered issue advocacy." *Id.* at 569. The Thompson Report further evidenced Congress's finding that "corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell*, 540 U.S. at 207. *See* Thompson Report at 4465, 4474-4481; *id.* at 7521-7525 (minority views).

Second, the definition of electioneering communication encompasses only messages that refer to clearly identified candidates for federal elected office. During the pre-enforcement challenge, "[f]ederal officeholders and candidates * * * testif[ied] that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election." *McConnell*, 251 F. Supp. 2d at 534 (Kollar-Kotelly). These politicians' intuitions were confirmed by political consultants' "uncontroverted testimony that when

designing pure issue advertisements, it was never necessary to reference specific candidates for federal office in order to create effective ads." *Id.* at 628 (internal quotation marks & ellipsis omitted). As Judge Kollar-Kotelly explained, moreover, the rather obvious "flip side of this coin * * * is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election." *Id.*

Third, the 30 and 60 day pre-election blackout periods applicable to electioneering communications also strongly correlate to the periods during which advertisements aimed at influencing federal elections are most likely to air—the time period, not surprisingly, immediately preceding a federal election. Judge Kollar-Kotelly concluded that "[t]he uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election." *Id.* at 564-565; *see also id.* at 630. Her opinion includes a graph showing that the number of issue advertisements rises as an election day nears and dramatically spikes in the weeks immediately preceding an election. *Id.* at 564. As one media consultant testified: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections." *Id.* at 561. This consultant confirmed the common-sense proposition that, "[f]rom a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." *Id.* And, in *McConnell*, this Court similarly concluded that, although "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [30 and 60 day] preelection time spans but had no electioneering purpose is a mater of dispute * * * the *vast majority* of such ads clearly had such a purpose." 540 U.S. at 206 (emphasis added) (citations omitted).

Fourth, the definition of electioneering communication is keyed to messages that are targeted to the electorate relevant

to the candidate to which the message refers. This component of the definition accounts for the fact that messages that "target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." *McConnell*, 251 F. Supp. 2d at 633 (Kollar-Kotelly). Officeholders and candidates confirmed that the point of issue advertisements delivered to a candidate's electorate is to influence the election. *Id.* at 534.

Acknowledging that "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference," 540 U.S. at 117 (internal quotation marks & citations omitted), this Court upheld Congress's corrective measure embodied in BCRA Section 203, and BCRA's primary definition of "electioneering communication" on which it relies, against constitutional attack in *McConnell*, *see id.* at 189-194, 203-209.

The deference that this Court in *McConnell* showed Congress is especially appropriate "in [this] area where it enjoys particular expertise." *Id*. at 185 n.72. And showing Congress such deference comports with this Court's admonition that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). So too in this case, the Court owes "no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Id*.

II. *McCONNELL* FORECLOSED WRTL'S AS-APPLIED CHALLENGE TO BCRA SECTION 203 IN REJECTING A FACIAL CHALLENGE TO THAT PROVISION.

WRTL maintains that this Court, in *McConnell*, left open the possibility of an as-applied First Amendment challenge to

BCRA Section 203 for so-called "grassroots lobbying." *See* Appellant's Br. at 13-15. WRTL fundamentally mistakes the import of this Court's upholding of BCRA Section 203—as well as the related primary definition of "electioneering communication"—in the face of a facial First Amendment challenge. In *McConnell*, the Court concluded that there is no "inviolable First Amendment right to engage" in issue advocacy and that, given the constitutional and practical irrelevancy of the issue/express advocacy dichotomy, Section 203 imposed a permissible—indeed slight—burden on that speech right. *McConnell*, 540 U.S. at 190. The Court did not ignore that the prohibition on electioneering communications would encompass some *bona fide* issue ads—"grassroots lobbying" in WRTL's nomenclature—but concluded that that burden was minimal and outweighed by the need for an "easily understood and objectively determinable" rule to replace the defunct express advocacy test. By holding Section 203 constitutional in not some—but *all*—of its applications, this Court therefore precluded the very type of as-applied constitutional challenge WRTL now brings.

1. The Court in *McConnell* made clear that nothing inherent in the First Amendment compels special treatment of issue advocacy. The Court in fact flatly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." *McConnell*, 540 U.S. at 194; *see also id.* at 195 (noting "failed argument that BCRA * * * improperly extend[s] to both express and issue advocacy").

The *McConnell* Court held that the distinction between issue and express advocacy that was introduced in *Buckley* and perpetuated in *MCFL* is of a statutory construction—not a *constitutional*—pedigree. *Buckley* and *MCFL* hewed to no "constitutionally mandated line," *id.* at 190, but created and implemented the express advocacy requirement to cure vagueness and overbreadth concerns with previous federal election laws. The *McConnell* Court confirmed repeatedly that the "express advocacy restriction was an endpoint of statutory construction, not a first principle of constitutional

law." *Id.* at 190; *see id.* at 191-192 ("[A] plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command."); *id.* at 192 ("[T]he concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities."); *id.* at 192 ("[O]ur decisions in *Buckley* and *MCFL* were specific to the statutory language before us."). The express advocacy limitation thus "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.* at 192-193. As the Court pointed out, issue advocacy is entitled to no greater First Amendment protection than express advocacy. *See id*. at 205 (citing *Buckley*, 424 U.S. at 48, and *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)).

McConnell concluded that imposing such a "constitutional boundary" would be a fool's errand in any event. The Court confirmed in *McConnell* what *Buckley* recognized all along: A constitutional principle premised on a supposed distinction between issue and express advocacy would be of dubious value as that distinction makes no real-world difference. The Court explained that the idea that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy" conflicts with its "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193. That requirement, based on the "unmistakable lesson" of the District Court litigation, was indeed "functionally meaningless." *Id.* Not only are advertisers adept at avoiding use of *Buckley*'s magic words, but, even if permitted to use those verbal formations, they would "seldom" choose to do so. *Id.* That language-based restriction thus did little to help Congress stamp out corruption and its appearance in federal politics. *See id.* at 194.

2. Recognizing "that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled," *id.* at 204-205, the *McConnell* Court held that

the interests justifying Section 203's prohibition on electioneering communications funded with corporate and union treasury revenues required upholding Section 203's constitutionality in all applications, including the one at issue in this case, *see id.* at 190 n.73, 204-208. The Court directly countered the claim that the prohibition was unconstitutional because it encompassed some *bona fide* issue ads by explaining that, "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in the absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion" and, moreover, "amply justifie[d] Congress's line drawing." *Id.* at 207. While, as WRTL points out, the Court entertained the "assum[ption] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *id.* at 206 n.88, the Court found that the burden imposed by BCRA Section 203 is one that corporations and unions are relieved of easily enough, *id*. at 207. The Court recognized that corporations and unions had the option to fund such advertisements during pre-election blackout periods "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; *see also id.* at 204 ("Because corporations can still fund electioneering communications with PAC money, it is simply wrong to view the provision as a complete ban on expression rather than a regulation.") (internal quotation marks omitted). It is therefore no surprise that, rather than highlighting the possibility of as-applied challenges in this BCRA context as it did in several others, the Court instead noted that it was upholding BCRA's regulation of electioneering communications in "*all* applications." *Id.* at 190 n.73 (emphasis added). Later in its opinion, the Court indeed specifically acknowledged the preclusive effect that its holding had for later as-applied challenges in characterizing it as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey a message of support or opposition." *Id*. at 239.

3. The very flexibility of our language doomed the use of *Buckley*'s express-advocacy test for accurately identifying corporate and union general-treasury-funded communications that were intended and had the likely effect of influencing federal elections. *McConnell* recognized that Congress's regulation of federal elections with a statute that is neither vague nor overboard indeed need not "toe the same express advocacy line" drawn in *Buckley*. *McConnell*, 540 U.S. at 192. Unlike that "functionally meaningless" line, the new one that Congress drew with BCRA consists of components that are "both easily understood and objectively determinable." *Id*. at 194. If this standard is qualified by an exception for "grass-roots lobbying" that otherwise meets the statutory definition of an electioneering communication deemed constitutional in *McConnell*, the virtues of Congress's new line will be lost by reintroducing a large measure of indeterminacy (given the flexibility of our language) into a test keyed to objective, empirically-based factors. As "experience demonstrates," candidates, donors, and parties will undoubtedly "test the limits" of this novel exception. *Beaumont*, 539 U.S. at 155 (internal quotation marks & citation omitted). And the creation of that new exception can be expected to lead to a renaissance in the circumvention of the longstanding prohibition against the use of corporate and union general treasury funds to influence federal elections that prompted Congress to act in the first place.

III. WRTL'S BROADCASTS ARE NOT GRASS ROOTS LOBBYING IN ANY EVENT.

1. In ruling on WRTL's preliminary injunction motion, the District Court properly surmised that—even if an as-applied challenge to Section 203 were viable for issue advocacy falling into the category of "grassroots lobbying"—WRTL's broadcast advertisements "fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating." J.S. App. 8a. The timing and substance of WRTL's planned broadcasts belie any notion that they are intended as "grassroots lobbying" and instead confirm that they subtly—but nevertheless clearly—suggest a vote against

Senator Feingold based on his perceived stance on the judicial filibuster issue. Thus these broadcast advertisements are of the type "functionally identical" to express advocacy messages that Congress, through BCRA, sought to bring within the ambit of the federal campaign finance regime—an effort this Court approved of in *McConnell*.

2. The three advertisements that WRTL sought to air during the pre-election blackout period would, as this Court warned, lead any objective observer to conclude that they are likely designed to "convey [a] message" opposing a candidate for federal office—namely, Senator Feingold. *McConnell*, 540 U.S. at 239. As the District Court noted, WRTL's PAC announced that Senator Feingold's defeat was a priority and, toward that end, endorsed three candidates running against him. J.S. App. 5a. WRTL itself issued a news release critical of his record on the judicial filibuster issue. *See id.* Despite using other, non-broadcast media to convey its anti-judicial-filibuster message, however, WRTL only turned to the broadcast media (and its advertisements playing on the needless-delay theme) in the run up to the BCRA pre-election blackout period. *See id.* at 5a, 9a. And all of the broadcast advertisements that WRTL sought to air during that blackout period connect Senator Feingold to a "group of U.S. Senators * * * blocking qualified [judicial] nominees from a simple 'yes' or 'no' vote" by encouraging the listener (or, in the case of the "Waiting" advertisement, viewer) to contact Senator Feingold and tell him "to oppose the filibuster." *Id.* at 13a ("Wedding"); *see also id.* at 15a, 17a. Thus "[t]he notion that th[ese] advertisement[s] w[ere] designed purely to discuss the issue of [judicial filibusters] strains credulity." *McConnell*, 540 U.S. at 194 n.78.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amici Curiae

DECEMBER 2005