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

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Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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I. Campaign Finance Laws Cannot Be Used to Shield Incumbent Politicians from Grassroots Lobbying.

Can incumbent politicians shield themselves from grassroots lobbying about upcoming votes in Congress through campaign finance laws? The Federal Election Commission believes that politicians can do so, Brief for the Appellee 35-44 ("FEC Br."), and incumbent members of Congress enthusiastically agree. Brief of *Amici Curiae* Senator John McCain, et al. 18-22 ("McCain Br."). Through the prism of personal political ambition—most acutely, reelection—nearly everything affects federal elections. Some of those things are beyond the ability of Congress to directly regulate, e.g., the Katrina hurricane, finding Osama Bin Laden or Saddam Hussein's weapons of mass destruction, or population shifts in the U.S. However, the speech of citizens about their government is not so far removed from government restriction. As a result, between 1798 and 1801,[1] 1918 and 1921,[2] and most recently since 1974,[3] Congress has taken a very

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[1]The Sedition Act of 1798 forbade conspiring "with intent to oppose . . . measures of the government" and bringing either Congress or the President "into contempt or disrepute." 1 Stat. 596-97. James Madison "deplored especially the Sedition Act, 'levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian on every other right'" and viewed them "as palpable and alarming infractions of the Constitution." Ralph Ketcham, *James Madison* 396, 402 (1990) (citations omitted).

[2]The Sedition Act of 1918 punished anyone who did "willfully utter . . . or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States . . . or advocate, teach, defend, or suggest the doing of any [such] act." 40 Stat. 553.

[3]Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 ("FECA").

broad view of its ability to regulate, limit, and prohibit the speech of citizens about their government. While some of these efforts have been found consistent with sufficiently important or compelling governmental interests, some have not. Under a First Amendment regime of "Congress shall make no law,"[4] citizens are entitled to robust participation in their government, even if that participation influences elections. This is true here.

Congress, in adopting the 1974 Amendments to the FECA, imposed severe limits on the speech of candidates, citizens, and citizens groups. Activities that were "made by any person for the purpose of influencing any election for Federal office" were defined as a "contribution," 2 U.S.C. § 431(8)(A)(i), or an "expenditure," § 431(9)(A)(i), and then subjected to extensive regulation. If a group spent more that $1,000 on a "contribution" or an "expenditure," it was deemed a political committee, subject to extensive regulation. § 431(4)(A). If someone independently made an "expenditure" of over $250, the expenditure had to be reported to the government. § 434(c)(1). Furthermore, if a person made an expenditure "relative to a clearly identified candidate," the person could not spend more than $1,000. 18 U.S.C. § 608(e)(1) (Supp. IV 1970). And corporations and labor unions were prohibited[5] from making any "contribution" or "expendi

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[4]U.S. Const. amend. I.

[5]With respect to 2 U.S.C. § 441b, "prohibit" herein means that the corporation or labor union "is *not* free to use its general funds for campaign advocacy purposes," including for electioneering communications, but may use PAC funds for this purpose. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986) ("*MCFL*") (emphasis in original). "While that is not an absolute restriction on speech, it is a substantial one." *Id.; see also McConnell v. FEC*, 540 U.S. 93, 203-04 (2003) (describing the purpose of § 441b as "to *prohibit* contributions

(continued...)

ture" "in connection with" federal elections. 2 U.S.C. § 441b(a).

In its zeal to exercise the full extent of its perceived power to regulate speech that affects federal elections, Congress not only wrote broadly, but vaguely. Since the First Amendment demands that laws impinging on speech and association must be written precisely, *NAACP v. Button,* 371 U.S. 415, 438 (1963), this Court narrowly construed the vague terms "influence," "relative to," and "in connection with" in the FECA to encompass only speech that expressly advocated the election or defeat of a clearly identified candidate. *Buckley v. Valeo*, 424 U.S. 1, 44, 80 (1976); *MCFL*, 479 U.S. at 249. This narrow construction, necessitated by Congress's ill-considered use of vague terms to define the reach of its regulations, resulted in extensive use of "issue ads," as citizens and groups sought to influence their government, some with the intent or effect of influencing federal elections.

Of course, incumbent politicians in Congress were deeply dissatisfied with this state of affairs and ultimately passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), including regulation of and restrictions on what was defined as an "electioneering communication." 2 U.S.C. § 434(f)(3)(A)(i). Here, Congress again

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(...continued)
or expenditures by corporations or labor organizations in connection with federal elections," *id.* at 203 n.86 (emphasis added), but rejecting that it is a "complete ban," since PAC funds may be spent for such purposes, *id.* at 204). The PAC option imposes substantial burdens on the funding of electioneering communications. WRTL Br. 40-42. Furthermore, if an electioneering communication is coordinated with an incumbent politician/candidate, such as a bill's sponsor, it would be subject to contribution limits and, thus, severely limited in the amount spent. § 441a(a)(7)(C).

wrote broadly,[6] but it did not write vaguely. *McConnell*, 540 U.S. at 194. Thus, the definition of "electioneering communication" was not subject to vagueness attack, as several provisions of the FECA had been, but in the facial challenge launched in *McConnell* the question was whether the definition was substantially overbroad. *Id*. at 205. The FEC and the BCRA's sponsors defended the definition of "electioneering communication" under this Court's decision in *Buckley*, which upheld the regulation of "express advocacy." *Id*. This Court found that "the vast majority of ads" were the "functional equivalent of express advocacy," *id*. at 206, and, as a result, the definition was not substantially overbroad. *Id*. at 207. This Court noted that "express advocacy" was not constitutionally required and, thus, did not define the outer limits of Congress's power to regulate under the First Amendment. *Id*. at 190-94.

But what is to be done about those ads caught up in the broad definition of "electioneering communication" that are not sham issue ads, but "genuine issue ads," which this Court found, *id*. at 206 n.88, and the FEC continues to acknowledge, FEC Br. 19, 23, 24, are not the functional equivalent of express advocacy? Of course, the normal remedy for the protection of speech not legitimately subject to government regulation through a facially valid statute is for the courts to bar the application of the statute to the protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). But the FEC argues that genuine issue ads still must be prohibited, even though they are not within the category of speech where there is a corporate corruption interest in prohibit-

[6]The only content requirement for an "electioneering communication" is that it "refers to a clearly identified candidate for Federal office." § 434(f)(3)(A)(i)(I). This means that all communications with this reference are captured, whether they concern a federal election or not.

ing them, because the ads may have been aired with the intent to influence elections, FEC Br. 17, or may have such an "incidental impact." *Id*. at 16; *see generally id*. at 40-44.

So we have come full circle. Incumbent politicians want to regulate or prohibit anything that might influence their election. This is as though there were nothing else going on in government other than the next election. In fact, day after day, government is exercising its lawmaking power over the People and the People want to influence the exercise of that power through lobbying their government. "Lobby groups," like WRTL, are established, under section 501(c)(4) and 501(c)(3) of the Internal Revenue Code, to educate and lobby on issues of public concern. Their primary purpose is not elections but influencing public policy, and they provide a voice for millions of persons of average means who want to join together in that effort. These groups use grassroots lobbying to enlist their fellow citizens in lobbying efforts.

Of course, elections and lawmaking often overlap. Congress is often in session within 30 days of the various primary elections held throughout the United States in election years. Furthermore, Congress is invariably in session within 60 days of a general election, when legislators often deal with the most significant and controversial matters. But reading the briefs of the FEC and its amici, one would have no idea that government was functioning during the blackout periods, or that the People would have any interest or right to influence those lawmaking activities. This can only be explained by the obsessive focus of incumbent politicians, and political consultants and commentators, on elections. However, the real work of government is not elections, but lawmaking, which is exactly what WRTL and numerous other advocacy groups are primarily created to influence.

The precedents of this Court recognize that more than elections are happening in government and have affirmed a robust role for citizens and citizens groups in commenting on the actions of public officials in office, *New York Times v. Sullivan*, 376 U.S. 254 (1964), and on controversial public policies, *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980), and in influencing the lawmaking role of government. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 675-78 (1990) (Brennan, J., concurring). This Court, in *McConnell*, reiterated this distinction, pointing out that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," which "sets [the BCRA] apart from the statute in *Bellotti*—and, for that matter . . . *McIntyre*." *McConnell*, 540 U.S. at 206 n.88.[7]

While it is certainly true that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *Buckley*, 424 U.S. at 42, this is a justification for rigorous court scrutiny to protect citizens' participation in the ongoing debates about government. So there are three options here. Since both grassroots

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[7]The FEC acknowledges this distinction in passing, FEC Br. 41 (citing *Bellotti* for the proposition that "corporate 'electioneering,' as defined by statute, poses distinct dangers to the integrity of the electoral process that other forms of corporate advocacy do not present"), and the BCRA's sponsors seem oblivious of this line of cases or have turned a blind eye to their own lawmaking role and the legitimate role of citizens in influencing it. *See generally* McCain Brief.

lobbying and express advocacy might influence federal elections, one could (1) protect both grassroots lobbying and express advocacy from government restriction, *McConnell*, 540 U.S. at 326-28 (Kennedy, J., dissenting), (2) prohibit both, as the FEC and incumbent politicians want, FEC Br. 43 ("[A]ny restrictions that BCRA imposes on the financing of advertisements that in fact have no electioneering purpose are simply the incidental byproduct of Congress's need to employ a bright-line rule to prevent corporate treasury funds from being used to influence federal elections."), or (3) recognize a distinction between them. *McConnell*, 540 U.S. at 206 n.88; *Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other."). This Court's precedents recognize a distinction that demands protection for grassroots lobbying from prohibition by campaign finance laws.

II. *McConnell* Did Not Preclude As-Applied Challenges to the Electioneering Communication Prohibition, and a Grassroots Lobbying Exception Is Workable.

The FEC argues, by oft-repeated[8] terms, (1) that *McConnell* upheld "all applications" of a "bright-line," "prophylactic" electioneering communication prohibition, and (2) that WRTL proposes an "unworkable" intent test and/or "no test" at all for grassroots lobbying, which will lead to "fact-intensive" litigation.

But narrow tailoring proscribes prophylaxis, bright lines are desirable only to protect free expression and speakers (not the FEC), and *McConnell* expressly upheld

[8]The FEC uses "all applications" 9 times, "bright-line" 13 times, "prophylaxis" 12 times, "intent" test 9 times, "no" test 7 times, and "fact-intensive" (similar phrases) 5 times in its Brief.

the prohibition because "genuine issue ads" were not sufficiently "substantial" in number for facial invalidation of the electioneering communication prohibition.

And WRTL has never proposed an intent test for grassroots lobbying, and it rejects such a test as truly unworkable. No test is actually required to resolve this case because WRTL's broadcast ads are plainly grassroots lobbying. If this Court wishes to exempt all grassroots lobbying, WRTL has identified several factors appropriate for such a test.

A. *McConnell* Did Not, and Could Not, Bar As-Applied Challenges.

In the district court in *McConnell*, the FEC argued that this Court must apply facial, First Amendment substantial overbreadth analysis to BCRA's electioneering communication definition:

> [N]one of these plaintiffs . . . has described particular advertisements, referring to clearly identified candidates for federal office, that they plan to run in proximity to one or more federal elections, to which they contend BCRA's application would be unconstitutional. Accordingly, to prevail, the Title II plaintiffs must establish that BCRA's regulation of electioneering communications could never be applied in a valid manner, or is substantially overbroad.

FEC Br. 131, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) (citations and internal quotation marks omitted). The FEC conceded overbreadth, but insisted that it was not substantial, so that the definition must be upheld facially, and as-applied challenges should later be employed to cure overbreadth in cases of the present sort:

> the definition's overbreadth is no more than two to six percent—a far cry from the substantial overbreadth necessary to invalidate a statute on

> its face. Even if a few genuine issue ads will be subject to BCRA's regulation of electioneering communications, the Court cannot conclude that [BCRA] is substantially overbroad and must assume that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Id. at 161 (citations and internal quotation marks omitted). Before this Court, the FEC repeated the same argument: "To the extent that the definition is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis, where a court would at least have the benefit of adjudicating the applicability of Title II to a concrete controversy." FEC Br. 105-06, *McConnell*, 540 U.S. 93 (No. 02-1674) (emphasis in original).[9]

Now that this Court in *McConnell* has employed the very analysis that the FEC and the BCRA's prime sponsors requested by applying a *Broadrick* substantial overbreadth analysis to facially uphold the prohibition, *McConnell*, 540 U.S. at 205-07, the FEC insists that as-

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[9]The Intervenor BCRA sponsors also advised this Court in *McConnell* that it should allow as-applied challenges later:

> Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law . . . . These corporat[ions] . . . are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.

Redacted Brief for Intervenors 64, *McConnell*, 540 U.S. 93 (No. 02-1674).

applied challenges are precluded by *McConnell*.[10] In making its neither-then-nor-now argument, the FEC ignores most of WRTL's arguments in a studied attempt to redirect the Court's attention away from the FEC's own *Broadrick* argument to a newfangled "prophylaxis" claim.[11]

First, the FEC's Brief makes no mention of Article III and this Court's adjudication principles, which govern whether WRTL may now be deprived of its due process right to an as-applied challenge to the electioneering communication prohibition. *See* WRTL Br. 11-13.

Also absent is a response to WRTL's explanations of the obvious meanings of two statements in *McConnell*, on which the FEC particularly relies; the first at page 190 n.73 ("We uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition.") and the second at page 239 (restrictions on all electioneering communications were upheld facially because they "*often* convey [a] message of support or opposition"). *See* WRTL Br. 13-15. The FEC twice even misstates what the Court said in footnote 73 in an effort to make its case. *See* FEC Br. 14 ("challenged BCRA *provisions* [not "*definition*"] were valid in *all* their applications" (emphasis on "provisions" added)), 21 ("*restrictions*

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[10]The FEC should be estopped from now asserting that as-applied challenges are precluded. In similar situations, where a party has argued clearly inconsistent positions and has persuaded a court to rely on the former (especially where that party would gain an unfair advantage thereby), this and other courts have employed judicial estoppel to deny reliance on the second, inconsistent argument. *See New Hampshire v. Maine*, 532 U.S. 472 (2001); *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469 (6th Cir. 1988); *Fieldwork Boston, Inc. v. United States*, 344 F. Supp. 2d 257 (D. Mass. 2004).

[11]The FEC never mentioned "prophylaxis" in its *McConnell* Brief justifying the "electioneering communication" provision.

on the funding of 'electioneering communications' . . . are constitutional in '*all* applications'") (emphasis on "restrictions" added).

Absent from the FEC Brief is any discussion of the Court's statement in *McConnell*'s footnote 88 that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *See* WRTL Br. 13.

Absent is any mention of the key analytical statement in *McConnell* requiring proven functional equivalence to express advocacy before government regulation is permissible:

> [P]laintiffs['] argu[ment] 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 . . . . *fails to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent* of express advocacy.

540 U.S. at 205-06 (emphasis added). *See* WRTL Br. 33-39. Instead, the FEC misleadingly states that this Court found that "the vast majority" of ads captured by the electioneering communication definition "were intended to influence electoral outcomes." FEC Br. 10 (citation omitted); *see also id.* at 27.

Also absent is any citation to language in *McConnell* saying that the challenged prohibition was "narrowly tailored," which would be necessary to support the FEC's assertion that "this Court . . . upheld a bright-line rule as narrowly tailored . . . in *McConnell*." FEC Br. 43. This Court never said that the prohibition was narrowly tailored, choosing instead to leave narrow tailoring issues for as-applied challenges (as the FEC expressly urged,

infra) and facially upheld the prohibition because the overbreadth of the prohibition, reaching beyond functional equivalents of express advocacy to genuine issue ads, was not "substantial." *McConnell*, 540 U.S. at 207.

These failures to respond to critical arguments should be decisive in WRTL's favor. But the radical nature of what the FEC does argue should also be decisive.

The FEC insists that "prophylaxis" is appropriate in strict scrutiny. FEC Br. 14-15, 17-24. The FEC uses "prophylaxis" synonymously with "a clear bright-line rule that correlates *closely*, though admittedly *not precisely*, with intent to influence federal elections," *Id.* at 15 (emphasis added). Because prophylaxis would permit the prohibition to be "closely" tailored to a compelling interest, rather than narrowly (i.e., "precisely") tailored, it defines an intermediate scrutiny,[12] which is plainly the antithesis of narrow tailoring and strict scrutiny.[13]

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[12]In fact, the FEC's support for "prophylaxis" rests explicitly on this Court's contribution limits cases, FEC Br. 25, where heightened, not strict, scrutiny is applied. *McConnell*, 540 U.S. at 231. *See also MCFL*, 479 U.S. at 260 (explaining that "a broad prophylactic rule" is appropriate for restrictions on contributions, but not for "political speech warranting the highest constitutional protection"). Further, the FEC's reference to *Austin* having foreclosed as-applied challenges, FEC Br. 25, is simply incoherent in light of *MCFL*, which *Austin* reaffirmed, not overruled. *Austin*, 494 U.S. at 661-62.

[13]As this Court has stated:

> [N]arrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g.*, *Consolidated Edison Co.,* 447 U.S. at 537-38. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP*, 371 U.S. at 438 (citations omitted).

(continued...)

Nonetheless, the FEC represents that "much of the dispute among the [*McConnell*] parties concerning the [electioneering communication] restrictions centered on the degree of prophylaxis in BCRA's primary definition and on whether any prophylaxis was permissible under the First Amendment," *id.* at 13, and asserts that this Court approved a broad prophylactic rule, while applying strict scrutiny to this restriction on core First Amendment expression. *Id.* at 14.

What is the FEC's evidence that this Court actually did this? The FEC claims that "[t]he Court in *McConnell* nevertheless sustained BCRA's bright-line approach and held that the challenged BCRA provisions were valid in *all* their applications." *Id.* (emphasis in original). As the FEC tells the story, even though this Court was fully aware of "pure issue advertisements," it nonetheless "squarely held that the definition is constitutional in *all* its applications." *Id.* at 17 (emphasis in original). So, says the FEC, while ordinarily as-applied challenges would be permitted after a facial challenge was rejected, "in this case the prophylactic nature of the provision at issue, the pointed constitutional challenge to such prophylaxis, and the reasoning of the Court in *McConnell* in rejecting that challenge necessarily preclude subsequent as-applied attacks." *Id.* at 18.

But the narrow-tailoring prong of strict scrutiny precludes prophylaxis here, as already noted. And WRTL explained why *McConnell's* footnote 73's "all applications" statement was only saying that there was no need to look

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[13](...continued)
Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988). *See also In re Primus,* 436 U.S. 412, 432-33 (1978) (cautioning that "First Amendment freedoms need breathing space to survive, [and] government may regulate in [this] area only with narrow specificity"); *Edenfield v. Fane,* 507 U.S. 761, 777 (1993); *United States v. Robel*, 389 U.S. 258, 266 (1967).

at the backup definition of "electioneering communications," because the Court had upheld the primary definition as to all applications *in the statute*, not in all future as-applied challenges. *See* WRTL Br. 13-15. Thus, the FEC's argument relies exclusively on a misstatement of what this Court meant in facially upholding "all applications" of the "electioneering communication" definition in the statute.

Moreover, there is a straightforward explanation for what the Court did in *McConnell*. In *McConnell*, this Court was faced with a facial challenge, which required the Court to determine if the prohibition on corporate expenditures for electioneering communications was substantially overbroad. Finding that it was not, there was nothing else to decide, particularly as-applied challenges that had not been brought.

Bright lines are extolled by the FEC, which argues that *McConnell* precluded as-applied challenges, because this Court had supposedly agreed that a broad, bright-line test was necessary. The FEC argues that WRTL's proposed grassroots lobbying exception will "multiply litigation," "substantially complicate the administration of federal restrictions on corporate and union electioneering," and introduce "vagueness." FEC Br. 34. Bright-line tests are important, of course, to protect free expression under the First Amendment, but they are to protect speakers from vague laws, not to protect enforcement officials or to enhance the reach of speech prohibitions beyond their justifiable bounds. They do not justify abandoning the fact-sensitive scrutiny required in narrow tailoring.

In *MCFL*, this Court expressly rejected a similar call by the FEC to uphold the bright-line prohibition of

electioneering by *all* corporations,[14] found in § 441b. Instead, this Court held that the bright-line prohibition on all corporations could not be constitutionally applied to *MCFL*-corporations, which exhibited certain characteristics, 479 U.S. at 263-64,[15] since "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Id.* at 265. Further, in *McConnell*, this Court recognized the first as-applied exemption to the "electioneering communication" prohibition itself by holding that it could not be constitutionally applied to *MCFL*-corporations. *McConnell*, 540 U.S. at 211.

In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), the presumption that all political party expenditures were always coordinated with their candidates, coupled with a strict spending limit on such expenditures, created a very bright line, but this Court rejected that bright line as inconsistent with free expression guarantees. Instead, this Court found the

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[14] *MCFL* was not the first as-applied challenge to § 441b this Court has upheld. In *United States v. CIO*, 335 U.S. 106, 123-24 (1948), this Court held that the ban on corporate and union expenditures did not apply to the CIO News, which was distributed to union members and subscribers. The FEC rule on this membership communication exemption hardly qualifies as bright line. *See* 11 C.F.R. § 100.134.

[15] The FEC now calls this exception a "bright line," after arguing against it in *MCFL* on bright-line grounds. But it does so for the same reasons, to enhance the reach of government's speech prohibition. Defending the corporate prohibition meant that all corporations' speech would be banned, including *MCFL*-corporations where the prohibition was not justified. And by now defending a narrow and wooden definition of the characteristics that exempted *MCFL*-corporations from the ban, *see* 11 C.F.R. § 114.10(c), fewer non-profit corporations would benefit from the prohibition's exemption. *See* WRTL Br. 31 n.24.

FEC's coordination presumption invalid and held that the "Party Expenditure Provision" was unconstitutional as applied to independent expenditures. *Id.* at 623-24. That coordination must be proven, not presumed, is consistent with First Amendment narrow-tailoring protections, but it is certainly not a bright line. Rather, it is a multi-factor, somewhat vague, test.[16]

Throughout the *McConnell* litigation, those supporting the electioneering communication definition argued that they could prove that the substantial portion of the speech captured was in fact election-related, not a prophylaxis. Examining the evidence, this Court agreed that they had done so. That leaves the acknowledged capture of speech that has nothing to do with elections. Under strict scrutiny, as-applied challenges are required to sort out the misapplications of the bright-line rule because there is no prophylaxis in narrow tailoring.

B. If Needed, Workable Tests Separate Grassroots Lobbying from Electioneering.

The FEC's essential argument against recognition of a grassroots lobbying exemption is that WRTL proposed an "unworkable" "intent" test and/or "no test" for grassroots lobbying, which would lead to "fact-intensive" litigation.

In fact, WRTL has proposed that a grassroots lobbying exemption should be based exclusively on the content of the communication, just as "electioneering communication" and "independent expenditure" is defined, WRTL Br. 35-39, and WRTL referred to the IRS's definition of "grassroots communication," *id.* at 21, which the FEC ignores in saying that "no test" has been proposed. WRTL

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[16] *See* 11 C.F.R. §§ 109.20, 109.21; FEC Notice of Proposed Rulemaking, Coordinated Communications, 70 Fed. Reg. 73946 (Dec. 14, 2005).

has never proposed an *intent* test and rejects such a test as truly unworkable; it would lead to the "fact-intensive" litigation that the FEC claims to despise. Instead, the FEC itself wants to litigate the purported subjective intent of WRTL behind its grassroots lobbying ads based on the activity of its PAC, FEC Br. 11-14, which argument WRTL opposed (and to which the FEC has provided virtually no response). WRTL Br. 35-39. Furthermore, approval of the FEC's intent or incidental effects test[17] would grant Congress authority to restrict, year-round, myriad activities[18] by the People as they seek to participate in their government. This Court has already rejected such a test.[19]

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[17]The FEC refers approvingly to regulation of speech which has the intent and/or effect of influencing elections 17 times.

[18]James Madison condemned the Sedition Act because "[t]o prohibit the *intent*, then was to prohibit the 'actual excitement' of derogatory attitudes toward government, which, further, was to prohibit *discussion*, and finally, to protect the administration against criticism even when it 'deserves the contempt or hatred of the people.'" Ketcham, *James Madison* at 402 (citation omitted) (emphasis added).

[19]This Court expressly eschewed any subjective intent or effect test in *Buckley*, 424 U.S. at 43 (citations and quotation indicators omitted) (emphasis added):

> Whether words intended and designed to fall short of invitation would miss that mark is a *question both of intent and of effect.* No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In

(continued...)

Actually, no test is required here because the proposed broadcast ads are plainly grassroots lobbying[20] and the prohibition fails strict scrutiny as applied to them. This Court could simply declare the prohibition unconstitutional as applied to the broadcast ads in this case and leave for future cases the identification of factors essential to an as-applied grassroots lobbying exception.

But WRTL believes a decision establishing more general guidelines would be helpful and has requested that this Court distill the factors vital to its decision, as it did in *MCFL*. 479 U.S. at 263-64. So WRTL returns to discussing appropriate elements for such a test. *See* WRTL Br. 21.

Preliminarily, WRTL has never proposed a test based on the unique "details of WRTL's broadcast ads," WRTL Br. 4 n.4, so the FEC's claim, FEC Br. 15, that WRTL proposes a "16-factor test" is wrong. Rather, WRTL cited the IRS definition of "grass roots lobbying communication," which is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements": (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation." 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii). Since a general grassroots lobbying exception should apply to both legislative and executive branch actions, this should be made clear in any rule. Further, to prevent any risk of an attempt to influence an election, a grass-

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(...continued)

> these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

[20]While contact information for the two Senators was not provided in the ads, viewers were invited to visit befair.org, which prominently displayed all the contact information for both Senators.

roots lobbying communication should not mention the pending election, the incumbent politician's candidacy, or the identity of any challenger. This would provide a workable definition for grassroots lobbying and avoid *McConnell*'s concerns about "sham issue ads."

Furthermore, BCRA's prime sponsors proposed a useful, but more restrictive, test. *See* WRTL Br. 24 n.19. This test properly includes both legislative and executive branch matters, but prohibits the naming of the incumbent politician/candidate (even though he or she could be clearly referred to, such as saying something like "please contact Senator Kohl and your other Senator"), and prohibits stating his or her position on the matter that is the focus of the grassroots lobbying. Judge Leon provided, from the *McConnell* record, a compelling explanation of why naming an incumbent politician/candidate must be permitted. *See* WRTL Br. 44 n.31.[21]

But what all these tests have in common is that they demonstrate that the FEC is wrong when it says that no further exceptions should be permitted to the electioneering communication prohibition, beyond those already recognized by FEC rulemaking[22] and by this Court in *McConnell*, because a grassroots exception could not be confined. A grassroots lobbying exception, however, could be readily cabined and would not permit the sort of sham issue ads this Court found problematic in *McConnell*.

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[21]This model could be further refined, as explained at Jurisdictional Statement 28-29, which demonstrates that an exceptionally bright line can be drawn to separate genuine grassroots lobbying from "sham issue ads." While WRTL would be able to broadcast its three proposed ads, and substantially similar ones, under this ultra-bright-line test, WRTL does not believe that the Constitution requires such a narrow test.

[22]11 C.F.R. § 100.29, *as amended* 70 Fed. Reg. 75713 (Dec. 21, 2005).

Moreover, the right of the people to self-government in a Republican system of representative government, protected by the First Amendment rights of expression, association, and petition, compel the recognition of such an exception.

Conclusion

This Court should find the electioneering communication prohibition unconstitutional as applied to grassroots lobbying generally, or as applied to the three broadcast advertisements here. Alternatively, the prohibition should be declared unconstitutional as applied, if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals).[23] The case should be remanded for entrance of an appropriate injunction.

Respectfully submitted,

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[23]This is the segregated fund option that Congress established for those who could lawfully make electioneering communications.