Nos. 06-969 and 06-970

IN THE

# Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

*Appellant*,

—v.—

WISCONSIN RIGHT TO LIFE, INC.,

*Appellee*.

SENATOR JOHN MCCAIN, *et al.*,

*Appellants*,

—v.—

WISCONSIN RIGHT TO LIFE, INC.,

*Appellee*.

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

## BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE


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## STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws.

For the past three decades, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, from *Buckley v. Valeo*, 424 U.S. 1 (1976), where we represented our affiliate, the New York Civil Liberties Union, to *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), where the Court once again struck down expenditure limits as unconstitutional.

Of particular note, the ACLU appeared as both plaintiff and co-counsel in *McConnell v. FEC,* 540 U.S. 93 (2003), and as *amicus curiae* in *Wisconsin Right to Life, Inc. v. FEC (WRTL I),* 546 U.S. 410 (2006). This case represents the next chapter in that story.

With increasing frequency in recent years, the ACLU has relied on broadcast ads to promote its position on civil liberties issues. Those issues, and the need to discuss them, arise throughout the year. But those discussions are often most urgent, and the public most engaged, in the period preceding elections when crucial legislative votes are frequently scheduled.

Until passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91, the ACLU was free to determine the manner and content of its political

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[1] Counsel for Appellants in 06-970 has filed a general consent to amicus briefs in support of either party or no party. Letters of consent to the filing of this amicus brief from remaining counsel in these consolidated cases have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party has authored this brief in whole or in part, and no one other than *amicus* or its counsel has made a monetary contribution to its preparation or submission.

speech so long as it respected the limits on partisan political activity imposed by its tax-exempt status under the Internal Revenue Code and its own bylaws, and so long as it did not expressly urge a vote for or against a particular candidate. Under the BCRA, however, the ACLU is presumptively violating the law if it broadcasts any ad during a defined pre-election period that mentions the name of a federal candidate.

The question now before the Court is how and when that presumption can be overcome in an as-applied challenge to BCRA's otherwise categorical ban. The Court's answer to that question will have a substantial impact on the free speech rights of the ACLU and its members.

## STATEMENT OF THE CASE

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court addressed a facial challenge to numerous provisions of the BCRA, including § 203, which bars corporations and unions from engaging in "electioneering communications" with general treasury funds. 2 U.S.C. § 441b(b)(2). That prohibition applies to non-profit corporations as well as for-profit corporations.

An "electioneering communication" is defined by § 201 of the BCRA as any "broadcast, cable, or satellite communication" that: (1) refers to "a clearly identified candidate" for federal office; (2) is made during a blackout period that begins 60 days before a general election and 30 days before a primary election or party convention; and (3) is targeted at the candidate's constituency, except in the case of a presidential candidate, where the targeting requirement does not apply. 2 U.S.C. § 434(f)(3)(A).

The definition of an "electioneering communication" set forth in the BCRA was intended to close what Congress perceived as a loophole in prior law. Specifically, the pre-existing bar on corporate or union expenditures "in connection with a federal election," 2 U.S.C. § 441b(a), had

been construed to reach only ads that met the so-called "magic words" test – that is, ads that expressly urged voters to cast their ballot either for or against a specific candidate. Section 203 of the BCRA was designed to reach further and to prohibit what many in Congress perceived to be "sham" issue ads that omitted the "magic words," but were nevertheless intended to deliver a partisan message.

This Court accepted the legitimacy of that concern in *McConnell* when it upheld the facial validity of the BCRA's ban on "electioneering communications." At the same time, the Court recognized that some ads that fit within the literal definition of an "electioneering communication" do not in fact have an "electioneering purpose." *McConnell,* 540 U.S. at 206. The Court described those ads as "genuine" issue ads rather than "sham" issue ads. The Court further acknowledged that both the parties and the three-judge district court in *McConnell* had disagreed on how many ads fit within each category. No one, however, doubted the existence of such ads, including the staunchest proponents of the BCRA. In the end, this Court found it unnecessary to resolve that dispute in the context of the substantial overbreadth challenge that plaintiffs had presented in *McConnell.* Based on its review of the record, the Court was convinced that the "vast majority" of "electioneering communications" had an "electioneering purpose" and that was sufficient to defeat plaintiffs' substantial overbreadth claim. *Id.* at 206.

*McConnell* was decided in December 2003. Eight months later, Wisconsin Right to Life (WRTL) filed this action seeking a declaratory judgment that BCRA's ban on "electioneering communications" was unconstitutional as applied to three specific ads that it had been running on Wisconsin radio. It also sought a preliminary injunction that would allow it to continue broadcasting the ads specified in its complaint during the BCRA's blackout period, which

extended for 79 days from August 15 to November 2, 2004, because of the state's election calendar.[2]

WRTL's motion for a preliminary injunction was denied by the district court on the ground that this Court's decision in *McConnell* "leaves no room for the kind of 'as applied' challenge that WRTL propounds before us." *Wisconsin Right to Life, Inc. v. FEC*, 2004 WL 3622736 (D.D.C. 2004), at *2. WRTL's complaint was subsequently dismissed by the district court on the same grounds. *Wisconsin Right to Life, Inc. v. FEC,* 2005 WL 3470512 (D.D.C. 2005).

This Court then reversed in a *per curiam* opinion. *Wisconsin Right to Life v. FEC,* 546 U.S. 410 (2006). Characterizing its prior decision in *McConnell,* the Court explained that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *Id.* Accordingly, the Court remanded to the district court for further proceedings but without providing the district court with any further guidance on the standard for evaluating as-applied challenges to § 203 of the BCRA.[3]

On remand, the district court first held that the case was not moot despite the conclusion of the 2004 election cycle because the legal issues it raised were "capable of repetition, yet evading review." *Wisconsin Right to Life, Inc. v. FEC*, 466 F.Supp.2d 195, 202 (D.D.C. 2006). Turning to the merits, the court then ruled that the ads at issue were neither "express advocacy [n]or its functional equivalent," *id.* at 207, and thus could not constitutionally be barred by the BCRA.

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[2] The 2004 Democratic primary in Wisconsin took place on September 14th, so the 30-day blackout period began on August 15th. By the time the primary was held, the 60-day blackout period preceding the general election on November 2nd had already begun.

[3] Many of the arguments made in this brief were also made in the *amicus* brief submitted by the ACLU in *WRTL I.* They are repeated here because the Court's brief opinion in that case left many anticipated questions unanswered.

In reaching this conclusion, the district court limited its consideration to the actual language of the proposed ads, rejecting any effort to discern the speaker's intent by a broader inquiry into context as "both practically and theoretically unacceptable." *Id.* at 205. As the court noted, disputes about political ads will typically arise "during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Id.* The court also expressed grave misgivings about "delving into a speaker's subjective intent . . . when First Amendment freedoms are at stake." *Id.* at 206.

Rather than engage in such a "speculative" inquiry, the court evaluated WRTL's ads based on five objective factors. Specifically, the court considered whether the ads: (1) describe a legislative issue that is either currently pending or likely to be pending in the near future; (2) refer to the position of the named candidate on that issue; (3) ask the listener to do anything other than contact the candidate about the issue: (4) promote, attack, support, or oppose the named candidate; (5) refer to the upcoming election, candidacy, or political party of the named candidate. *Id.* at 207.

Based on its assessment of those factors, the court granted WRTL's motion for summary judgment.

## SUMMARY OF ARGUMENT

The ACLU is a nonpartisan membership organization. It does not engage in partisan political speech. It is, however, an active participant in public debate about civil liberties issues. It seeks to educate the public about its views on those issues, and to influence the decisions of lawmakers and policymakers. The ability to broadcast radio and TV ads to targeted audiences is an important part of the ACLU's advocacy strategy. Indeed, the sponsors of the BCRA chose to target those ads – as opposed, for example, to newspaper

ads that were left unregulated – precisely because of their communicative impact. The free speech rights of the ACLU are thus directly and significantly impaired by § 203 of the BCRA.

The First Amendment protects more than the speaker's right to choose what to say. It also protects the speaker's right to choose how to say it. For that reason, this Court has long held that the government must satisfy strict scrutiny whenever it regulates the content of speech. Likewise, the government must satisfy strict scrutiny whenever it deprives a speaker of access to an entire medium of communication. Section 203 of the BCRA undeniably does both.

Applying strict scrutiny, this Court nonetheless held in *McConnell* that § 203 of the BCRA was facially valid because of the government's compelling interest in preventing corporations and unions from using their general treasury funds – amassed for a different purpose and with the benefit of government conferred advantages – to influence the outcome of federal elections. But that fact cannot and does not justify applying § 203 in circumstances where its underlying interests manifestly do not apply. To rule otherwise, would be in effect to hold that First Amendment rights can be abridged even in the absence of any compelling justification.

This Court properly acknowledged as much when it upheld the right to bring as-applied challenges to § 203 of the BCRA at an earlier stage of this litigation. That right will largely disappear, however, if every as-applied challenge is converted into an open-ended inquiry into meaning and context, as appellants now propose, with the burden on the speaker to prove the lawfulness of its speech.

Either speakers will self-censor because they cannot avoid the time and expense of an as-applied challenge based on subjective and hence uncertain determinations, or the one federal court empowered to hear as-applied challenges to the BCRA will be quickly overwhelmed by the need to resolve

difficult constitutional questions requiring complex evidentiary findings in expedited fashion.[4]

Appellants downplay the significance of these concerns because they posit a world in which very few speakers will have credible as-applied challenges. Indeed, appellants' definition of a credible as-applied challenge is so narrow as to be non-existent. The illustration they offer is telling. According to appellants, a congressional candidate who owns a car dealership bearing his name should not prohibited by § 203 of the BCRA from advertising his car dealership while running for Congress. Brief of Appellants John McCain, *et al.*, at 40 n.27.

If that is the only constitutional limit on § 203, however, then the opportunity to bring as-applied challenges is largely a ruse. It would, for example, provide no relief to the ACLU if it wanted to broadcast an ad urging voters to contact their Senators about repeal of the Military Commissions Act during the blackout period, which for presidential candidates will begin in December of this year (30 days before the first presidential primaries) and continue throughout most of 2008.

Appellants argue that the district court has adopted a bright line rule that can be easily evaded and that will therefore undermine what Congress was seeking to achieve by its ban on "electioneering communications." There are several answers to this concern. First, the district court did not adopt a bright line rule; it identified a series of objective factors to be weighed in individual cases. Second, Congress has no constitutionally legitimate interest in banning political

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[4] There were 1,100 ads broadcast during the 2000 election cycle. *McConnell,* 540 U.S. at 128 n.20. It is not clear from the record how many were broadcast during the blackout period established by the BCRA, but it is fair to assume the percentage is reasonably high. By statute, constitutional challenges to the BCRA must be brought in the District of Columbia and heard by a three-judge district court, §403(a)(1), with direct appeal to this Court, § 403(a)(3).

speech that does not present the problems that § 203 was meant to address. Third, this Court has long held that speakers are entitled to know in advance whether their speech is lawful or not. Fourth, the risk of evasion is minimized by the multi-faceted test that the district court applied.

The specific factors identified by the district court need not be treated as the only constitutionally permissible solution to the constitutional conundrum created by § 203. If it chooses, this Court could rule that the interests asserted in § 203 simply do not apply to speech by nonprofit corporations organized under § 501(c)(4) of the Internal Revenue Code that is entirely funded by individual contributions, thus effectively reinstating the Snowe-Jeffords Amendment to the BCRA as a constitutional rule and relying on IRS to police any alleged transgressions of the tax laws.[5]

Given the arguments made by appellants, however, what is most important is for this Court to preserve the right to a meaningful as-applied challenge for constitutionally protected speech. Congress recognized the need for objective rules when it enacted § 203. The same need exists, and for the same reasons, when defining the constitutional limits of §203's reach. It is unrealistic to ask the judiciary to serve as a pre-screening board for thousands of ads. And, it is unfair to ask speakers who believe they are broadcasting "genuine" issue ads to speak at their peril because there is no way to know with assurance whether their ads will later be construed as prohibited "electioneering communications." A clearly defined safe harbor solves both problems. By minimizing the

[5] We recognize that this alternative would require the Court to revisit some of its conclusions in *McConnell.* But, it would also provide the greatest free speech protection while still respecting the underlying values that led Congress to pass the BCRA and this Court to uphold it against a facial challenge.

chilling effect on speakers, it also reduces the need for litigation in the vast majority of cases.[6]

## ARGUMENT

### ABSENT CLEAR RULES DEFINING THE PROPER SCOPE OF AN AS-APPLIED CHALLENGE, § 203 OF THE BCRA IMPOSES A DIRECT, SUBSTANTIAL, AND UNJUSTIFIABLE BURDEN ON THE ACLU'S CORE POLITICAL SPEECH

The ACLU was founded in 1920. In 87 years, it has never endorsed or opposed a candidate for elective office.[7] Nonetheless, because the ACLU is organized as a nonprofit corporation under § 501(c)(4) of the Internal Revenue Code, it is presumptively barred by the BCRA from broadcasting any ad that mentions the name of a federal candidate in the period preceding a primary or general election. In considering the proper scope of a potential as-applied challenge, it is critical to take into account the substantial burden that this statutory ban, as written, imposes on organizations like the ACLU, its members, and others in the general public who might hear and consider the organization's message.[8]

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[6] The ACLU agrees with appellee and the district court that this case is not moot, but we do not address that issue in this brief.

[7] ACLU Board Policy 519 categorically states: "The ACLU does not endorse or oppose candidates for elective office."

[8] For the ACLU, the burden imposed by § 203 is not ameliorated by the two possible escape routes this Court identified in *McConnell:* creating a Political Action Committee (PAC) or seeking designation as a *"MCFL"* corporation. *See FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986). Requiring the ACLU to speak through a PAC is not the equivalent of asking a group of demonstrators to reroute their march down Sixth Avenue rather than Fifth Avenue. PACs are associated in the public mind with partisan political activity. The formation of a PAC would therefore threaten one of the ACLU's most valuable organizational assets – its nonpartisan reputation as an impartial advocate for civil liberties. Furthermore, the detailed rules governing PAC contributions

## A. The BCRA Blackout Period Coincides With A Typically Intense Period Of Congressional Activity

The ACLU's sole mission is to preserve and protect civil liberties. In furtherance of that mission, we seek to influence the actions of federal officials on a regular and ongoing basis. Since 9/11, for example, we have frequently criticized the balance that federal officials have struck between liberty and security. We have met with executive branch officials to voice our concerns. And we have attempted to persuade Congress to recalibrate that balance in a variety of ways.

In the past few weeks, bills have been introduced in Congress to restore the right to habeas corpus that was repealed last year by the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600, passed during the 60 day blackout period preceding the 2006 congressional elections. Congress has also announced its intention to hold hearings on the recent report by the Justice Department's own Inspector General documenting serious abuses by the FBI in the use of National Security Letters authorized by the Patriot Act.[9]

As the ACLU has grown in size and budget, broadcast ads have become an increasingly important part of its advocacy strategy. The goal of such ads is two-fold. The first goal is to alert the public to important civil liberties issues. The second goal is to persuade the public to contact their elected representatives and urge those representatives to

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enhance the risk of diverting funds that would otherwise be available as general support for the ACLU's overall program. These burdens might have to be borne if the ACLU were in fact broadcasting "sham" issues ads designed to influence federal elections. It is not, *see* pp. 14-19, *infra,* and no one in the *McConnell* litigation, where the ACLU was a plaintiff, ever claimed otherwise. Under existing FEC rules, moreover, the ACLU simply not does qualify for "MCFL" designation even though it has never taken more than a *de minimis* amount of corporate contributions.

[9] *See* "A Review of the Federal Bureau of Investigation's Use of National Security Letters," Office of the Inspector General, U.S. Dep't of Justice (available at http://www.usdoj.oig/reports/FBI/index.htm).

take a position that supports civil liberties. The timing of these ads is never determined by the electoral calendar. But the electoral calendar often determines when issues are brought up for a vote on the floor of Congress. That phenomenon is both easy to explain and well understood. For obvious reasons, elected officials like to build a record of accomplishment just prior to elections. In addition, politicians often perceive a political advantage in forcing their opponents to cast a controversial vote just before elections are held.

The 60 days preceding the 2006 election were typical in this regard. Congress considered the following issues of longstanding concern to the ACLU, among many others.[10]

- On October 17th, the Military Commissions Act was signed into law, after votes in the Senate on September 28th and in the House on September 29th.
- On September 12th, a bill was introduced in the House barring domestic electronic surveillance except under FISA and Title III. H.R. 6056, 109th Cong. (2006). Numerous other, related bills were introduced in the House and Senate throughout the month.
- On September 14th, the House voted on a bill to deny attorneys' fees to prevailing plaintiffs in Establishment Clause cases. H.R. 2679, 109th Cong. (2006).
- On September 19th, the House voted on a bill to allow searches of students by schools. H.R. 5295, 109th Cong. (2006).
- On September 20th, the Senate Judiciary Committee held hearings on issues surrounding the creation of a federal reporter's privilege.

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[10] These congressional actions are recorded in weekly editions of the Congressional Quarterly, as well as daily editions of the Congressional Record. They are also available on-line at http://www.cq.com.

- On September 26th, the House International Relations Committee held hearings on ending human trafficking.
- On September 26th, the House voted on a bill to prohibit adults from assisting a minor across state lines to obtain an abortion under certain circumstances. S. 403, 109th Cong. (2006).
- On September 27th, a bill was introduced in the Senate to provide benefits to domestic partners of federal employees. S. 3955, 109th Cong. (2006).
- On September 28th, the House Committee on House Administration held hearings on electronic voting machines.

The congressional calendar was also filled with civil liberties issues in the 60 days preceding the 2004 election.

- On September 21st, the House voted on an amendment to prohibit the use of federal funds to enforce travel restrictions to Cuba. H.R. 5025, 108th Cong. (2004).
- On September 23rd, the House voted on a bill to strip the federal courts, including this Court, of jurisdiction to hear cases challenging the constitutionality of the Pledge of Allegiance. H.R. 2028, 108th Cong. (2004).
- On September 23rd, the Senate voted on an amendment directing the Secretary of Homeland Security to develop a plan to "integrate and consolidate" airline "no fly lists." S. 2845, 108th Cong. (2004).
- On September 28th, the House voted on an amendment to the Defense Authorization bill to expand federal hate crimes legislation. H.R. 4200, 108th Cong. (2004).

- On September 30th, Congress voted on a joint resolution to propose a constitutional amendment banning same sex marriage. H.R. J.Res. 106, 108th Cong. (2004).
- On October 5th, the House voted on a bill to require software companies to obtain permission from computer users before installing spyware programs that collect and distribute personal information. H.R. 2929, 108th Cong. (2004).
- On October 6th, the House voted on an amendment to fund grants to the states for DNA testing, including post-conviction testing for inmates. H.R. 5107, 108th Cong. 2004.
- On October 8th, the House voted on a series of amendments to the Intelligence Overhaul bill that authorized the death penalty for certain terrorist acts, and that altered the rules for the detention and removal of aliens from the country. H.R. 10, 108th Cong. (2004).

Members of Congress are influenced by the views of their constituents when voting on legislation. Mobilizing constituent support is therefore a principal lobbying tactic for advocacy organizations like the ACLU. Broadcast ads are an effective tool for accomplishing that end. To be effective, however, the ads must be targeted to run in the districts of pivotal legislators. Very few advocacy organizations can afford to spend their limited resources running broadcast ads in congressional districts where they will have little impact on the final outcome. The ACLU certainly cannot. In addition, broadcast ads are most effective when they include a call to action: urging constituents to contact their legislative representative. Finally, there is little point in running an ad unless the legislation discussed in the ad is under active consideration by Congress.

Unfortunately, the same characteristics that made a broadcast ad effective – namely, a targeted appeal for constituents to contact a specifically identified legislator prior to a scheduled vote – are precisely the characteristics that render the ad unlawful under the BCRA if the legislator is running for reelection and is mentioned in the ad by name or even just by title (*i.e.*, "call your senator" or "call your representative"). The reach of that ban is magnified, moreover, in a presidential election year because there is no targeting requirement for presidential candidates. Thus, an ad asking the Illinois constituents of Senator Obama, or the New York constituents of Senator Clinton, or the Arizona constituents of Senator McCain to contact their respective senator about an upcoming vote on pending legislation would be barred by the BCRA if it was broadcast 30 days before New Hampshire presidential primary even if the ad was never broadcast in New Hampshire.

**B. The ACLU's Use Of Broadcast Ads**

Section 7(a) of the Military Commissions Act, adopted by Congress just prior to the 2006 election, amends the general federal habeas corpus statute, 28 U.S.C. § 2241, by providing: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

The ACLU has made repeal of that provision one of its top legislative priorities. To further that goal, the ACLU is broadcasting the following radio ad in selected states:

> Its been happening.
>
> Slowly, but surely.
>
> The federal government. Our government. Stripping away our most fundamental Constitutional rights.

> Eavesdropping on Americans, without a warrant. Searching the homes of Americans … who have nothing to do with terrorism.
>
> It's true.
>
> And, last year, Congress even passed legislation eliminating the right of certain people to challenge their unlawful imprisonment. Called habeas corpus.
>
> Undermining the right to due process, and a fair trial.
>
> Now, you can help restore our Constitution …
>
> and reassert the very rights that make us unique as Americans …
>
> by urging Congress to support the "Restoring the Constitution Act."
>
> Call Senator _____ today at _____.
>
> Tell him/her we'll never give up the rights that define us as Americans
>
> Never.
>
> Not on our watch.

An equivalent ad, broadcast last October when Congress was first debating the Military Commissions Act, would have violated the express terms of the BCRA. This precise ad, rebroadcast next year after the presidential campaign primary season has begun, would also very likely violate the express terms of the BCRA (depending on whether any of the named senators were also presidential candidates at the time).

This example is not unique. For instance, in October 2004, right in the middle of the BCRA's blackout period, Congress was considering a bill to implement the recommendations of the 9/11 Commission. The bill included several anti-immigrant provisions that the Commission had

never sought and, indeed, opposed. In seeking to have those amendments dropped from the bill, the ACLU broadcast an ad in Spanish and English in five targeted states with significant immigrant populations. The ad began by stating:

> It doesn't matter if you were the first generation to arrive here.
>
> Or if it was your parents or great-grandparents who came here for a better life.
>
> We all feel a great sense of pride to live in the United States of America.
>
> And, when terrorists attacked us on September 11th, we were one nation.

The ad then ended by urging listeners to call their senator and "[a]sk him to protect our rights by opposing the anti-immigrant amendments in the 9/11 bill."

The language of the ad was identical in all five states except for the senators named in the tag line. Because none of the senators was running for reelection, the ACLU's ad was outside the strictures of the BCRA. Had any of the senators been running for reelection, the ACLU's ad would have been a federal crime. Notably, the list of senators included both Democrats and Republicans.

In both June and August 2005, the ACLU broadcast additional radio ads focused on the Patriot Act. The June 2005 ads ran in a total of twelve states and targeted four senators and eight representatives, each of whom was strategically selected as a potentially critical vote in the Patriot Act reauthorization battle. The August 2005 ads ran in ten states and targeted four senators and nine representatives. One ad, a 60 second spot, was entitled "Concerned Patriots." The test of the ad focused on provisions of the Patriot Act that the ACLU opposed on civil liberties grounds and that public opinion polls had identified as particularly troublesome to the American public.

> How would you like if someone were to sneak into your home and search through your possessions? What if someone secretly helped themselves to your personal medical records or financial statements – without your knowledge or consent? You'd want to call the authorities, right?
>
> Now, what if I told you the people who did this were the authorities? This is one example of what's wrong with the Patriot Act as it currently stands.
>
> Unfortunately, right now the federal government is trying to make the Patriot Act permanent and expand it – even though it contains several provisions that violate our fundamental freedoms.
>
> These provisions give the courts the power to let the federal government secretly search our homes without letting us know for weeks, months, or even longer.
>
> Last time I checked, the Constitution was supposed to stop that kind of thing. Luckily, we still have the First Amendment so we can make our voices heard to correct the Patriot Act before it becomes permanent.

Depending on the venue, listeners were then asked to call either their representative or their named senator and "[l]et him know [Congress] need[s] to make these crucial changes before renewing the Patriot Act." The ad was narrated by Bob Barr, a well-known conservative and former Republican congressman from Georgia. The American Conservative Union and the Americans for Tax Reform joined with the ACLU in paying for the ad, although both organizations disagree with the ACLU on numerous other policy issues. The only thing that saved these ads from being

a crime under the express terms of the BCRA is that they were not broadcast during the BCRA's blackout period.

At the same time that the ACLU was running its broadcast ads, it was also running print ads. For example, in October 2004, the ACLU placed ads in both the Albuquerque Daily Journal Tribune and the Santa Fe New Mexican concerning the proposed anti-immigrant amendments then pending in Congress. The ad asked readers to register their opposition by contacting President Bush and Senator Domenici, whose office phone numbers were listed.

Although the subject matter of the print ads paralleled the subject matter of broadcast ads that were running simultaneously, they were not interchangeable. Broadcast and print ads reach different audiences and have different impact. To the extent that budget permits, the ACLU pursues a comprehensive and integrated communications strategy to promote its civil liberties principles and influence relevant legislative decision-making in Congress. Optimally, that strategy includes both print and broadcast ads. It also includes the Internet, direct mail, press releases, news conferences, public appearances, and publications, among other communications strategies.

For the ACLU, this combination of earned media and paid media has nothing to do with electing or defeating particular candidates. That is not our interest or intent, and the organization has an 87-year history to substantiate that claim. Any commentary on public issues could conceivably affect the electoral choices of some voter. But to treat every comment on public issues as an "electioneering communication" – assuming it meets the definition set out in the BCRA – is to stand the First Amendment on its head.

To be sure, the ACLU could avoid the prohibitions contained in the BCRA by altering its message, its medium, or its messenger. Under the First Amendment, however, those choices should be the ACLU's to make, and not the government's. This Court began recognizing those concerns

in *WRTL I* when it held that §203 of the BCRA could not be treated as a categorical ban insulated from all as-applied challenges. *Accord NAACP v. Button,* 371 U.S. 415, 438 (1963)("Broad prophylactic rules in the area of free expression are suspect."). It is essential now to complete that process by establishing clear as-applied limits on the legitimate scope of § 203.

### C. The Need For Clear Lines Distinguishing Between Lawful and Unlawful Broadcast Ads

This case presents the Court with two very different models for adjudicating as-applied challenges to the otherwise absolute ban on "electioneering communications" set forth in § 203 of the BCRA. Appellants insist on the need for a contextual inquiry that goes beyond the "four corners" of the proposed ad to determine the speaker's subjective intent and the likely impact of the ad on potential voters. The district court chose instead to rely on a set of objective criteria for reviewing the text of a proposed ad and determining whether it is intended and likely to influence the outcome of a federal election, and thus within the proper scope of § 203.

Appellants do not quibble with the district court's specific criteria; their objection is that only an inquiry into subjective intent that examines each ad in its broader context can fully close the loophole for "sham" issue ads that § 203 was meant to address. According to appellants, the district court's approach is no more likely to succeed in ending the practice of "sham" issue ads than this Court's earlier effort to define "express advocacy" by reference to a set of so-called "magic words." *Buckley,* 424 U.S. at 44 & n.52. Hence, appellants argue, the district court's approach must be rejected for the same reason that Congress rejected the "magic words" test in § 203, and this Court rejected it in *McConnell.* Appellants are wrong for several reasons, and the cure they propose is worse than the disease.

At the outset, the test developed by the district court for judging as-applied challenges to § 203 does not depend on the presence or absence of specific "magic words." Rather, it examines the text of a proposed ad in its entirety. The question of whether the ad "promotes, attacks, supports or opposes" the named candidate – which most clearly corresponds to the old "magic words" test – is only one factor among several and not dispositive. The principal objection to the "magic words" test was that it could be easily evaded by omitting the words "Vote For" or their equivalent from an ad that seemed clearly intended to influence an election. For better or worse, that would not be enough to mount a successful as-applied challenge under the district court's approach.

The district court's effort to clearly mark the boundary between lawful and unlawful speech, moreover, is entirely consistent with the approach followed by Congress in drafting § 203. Whatever else may be said about the language of § 203, Congress was at least clear in its prohibitions. The district court can hardly be faulted for trying to maintain a similar clarity for speakers seeking to determine whether the strictures of § 203 can constitutionally be applied to a particular ad.

Likewise, nothing in *McConnell* supports appellants' position here. *McConnell* held that the "magic words" test was a matter of statutory construction and could therefore be overruled by Congress. But the issue in this case is not about preserving the "magic words" test. It is about preserving the more fundamental holding in *Buckley,* left undisturbed by *McConnell,* that vague campaign finance rules threaten free speech, whether that vagueness is embodied in the underlying regulations or the procedures developed for enforcing them. 424 U.S. at 43.[11]

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[11] *Cf. Manual Enterprises v. Day,* 370 U.S. 478, 497 (1962)(Brennan, J., concurring)("We risk erosion of First Amendment liberties unless we

The *Buckley* Court explained that threat by quoting from *Thomas v. Collins,* 323 U.S. 516, 535 (1945), a case having to do with efforts to regulate union solicitation.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question of both 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 the 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 these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

*Buckley,* 424 U.S. at 43.

As the district court correctly recognized, converting every as-applied challenge to § 203 into an unconstrained inquiry designed to probe the speaker's intent for engaging in core political speech suffers from the same "constitutional deficiencies." *Id.* It can have only one of two consequences. Either it will cause speakers to self-censor by steering "far wider of the unlawful zone" than might actually be required because they cannot be certain in advance of what is permitted. *Speiser v. Randall,* 357 U.S. 513, 526 (1958). Or, it will encourage speakers to litigate every potential claim, placing an impossible burden on the one district court that

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train our vigilance upon the methods whereby [speech] is condemned no less than upon the standards whereby it is judged.").

Congress has authorized to hear these claims, *see* n. 4, *supra,* especially under the tight time constraints imposed by BCRA's blackout period. Having to litigate under such exigent circumstances also increases "the possibility of mistaken fact-finding inherent in all litigation," *id.,* thus compounding the First Amendment injury.[12]

Those risks are mitigated by clear and objective rules announced in advance that enable speakers to know with assurance what can be said. That is precisely what the district court attempted to do in this case, and what appellants have criticized. They have not, however, offered a constitutionally credible alternative.

Senator McCain takes the most extreme position. In his view, a speaker must demonstrate that his proposed broadcast ad is fundamentally different "in kind" from the so-called "sham" issue ads that prompted Congress to enact § 203. Revealingly, however, Senator McCain is only able to identify two examples of broadcast ads that would qualify for this exception. One is the previously described ad of a political candidate who also runs a car dealership. *See* p.7, *supra.* The other example, which is equally idosyncratic, would permit an ad by a consulting company that wished to promote its expertise in corporate compliance with the Sarbanes-Oxley Act at the same time that Representative

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[12] The potential scope of such as-applied litigation was aptly summarized by the district court:

> Of course, to discern whether the sponsoring organization of these issue ads had the primary, or even ancillary, subjective intention to affect the election of the named candidate, the FEC would, by necessity, have to depose, at a minimum, the "decision maker[s]" of the organization in advance of the advertisement's airing. Moreover, to determine whether a particular ad that was intended to affect the election actually was likely to do so, would additionally require the retention of expert witnesses, on both sides, to speculate as to such.

466 F.Supp.2d at 205.

Oxley was running for reelection. Brief of Appellants John McCain, *et al.,* at 40 n.27.

While Senator McCain talks about the need to review broadcast ads "in context," his approach to as-applied challenges would eliminate them entirely in all but name only. According to Senator McCain, "an as-applied challenge should succeed only if the plaintiff can show that the ad itself and the circumstances of its creation and airing demonstrate that there is *no* reasonable prospect the ad is likely to influence the election." *Id.* at 39 (emphasis added). That is an impossible standard to meet. *Any* discussion about issues could conceivably influence an election, which, after all, is about issues as well as candidates. It is not surprising, therefore, that the two examples of permissible ads that Senator McCain has identified do not address political issues at all. For Senator McCain, the critical dividing line is not between "sham" issue ads and "genuine" issue ads, but between ads that discuss issues and those that do not. Only in the latter circumstance, would he allow a candidate's name to be mentioned during the pre-election blackout period created by the BCRA.

Such a cramped view cannot be reconciled with either *McConnell* or the First Amendment. All parties in *McConnell* agreed, and the evidence indisputably showed, that § 203 barred some ads that were never intended to influence the outcome of federal elections. The dispute among the parties in *McConnell* was over how many ads fit into each category. The lowest estimate came from the Brennan Center, which was a strong proponent of the BCRA. A study it commissioned in anticipation of the litigation concluded that only 7% of corporate and union ads naming a federal candidate and broadcast during the blackout period were "genuine" issue ads. *McConnell v. FEC,* 251 F.Supp.2d 176, 309 (D.D.C. 2003). The methodology supporting this study was sharply contested, and other evidence in the record placed the figure significantly higher. *Id.* at 309-12.

Ultimately, the *McConnell* Court found it unnecessary to resolve the dispute because it concluded that plaintiffs had not satisfied the substantial overbreadth test. 540 U.S. at 206.

It is equally unnecessary to resolve that dispute here, but for the opposite reason. Even accepting the Brennan Center's figure for present purposes, approximately 75 of the 1,100 ads broadcast during the 2000 election cycle, *see* n.4, *supra,* would qualify as "genuine" issue ads. Yet, none of those ads could have prevailed in an as-applied challenge under Senator McCain's theory. The justification accepted in *McConnell* for banning "electioneering communications" was that such ads "are the functional equivalent of express advocacy." *Id.* at 206. That is not true of "genuine" issue ads, by definition, and a standard for as-applied challenges that does not distinguish between the two cannot be deemed constitutionally sufficient.

Unlike Senator McCain, the FEC candidly acknowledges "the infeasibility of determining on an ad hoc, case-by-case basis, whether particular advertisements discussing issues of public concern are actually intended to influence federal elections." Brief of Appellant FEC, at 30. It further recognizes the need "to identify through clear, objective, and easily applied criteria – criteria that do not require courts to make judgment calls based on fine parsing of the nuances of an advertisement's text – a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect." *Id.*

The logic of the FEC's position falls apart, however, when it suggests that the necessary clarity can be found in § 203 of the BCRA. Section 203 clearly defines the term "electioneering communications," but it provides no guidance at all for determining when an as-applied challenge to that definition should be upheld. Nor does the FEC ever explain why the difficulties inherent in determining a speaker's intent based on an advertisement's text are

ameliorated by a contextual search for evidence of intent beyond the "four corners" of the ad.

In the end, appellants would rather over-censor "genuine" issue ads than run the risk that any "sham" issue ads might be aired. That approach, however, turns the First Amendment "upside down." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002). Constitutionally protected speech cannot be criminalized merely because it resembles constitutionally unprotected speech. *Id.*.[13] If that is true for the sexually explicit speech at issue in *Free Speech Coalition*, it is certainly true for political speech that lies at the core of the First Amendment, for reasons this Court has frequently explained.

First, "speech concerning public affairs is more than self-expression, it is the essence of self-government." *Connick v. Meyers,* 461 U.S. 138, 145 (1983), *quoting Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Second, speech cannot be curtailed because of its proximity to an election. *Mills v. Alabama,* 384 U.S. 214 (1966). Third, freedom of speech necessarily "embraces . . . the liberty to discuss publicly and truthfully all matters of public concern . . . ." *Thornhill v. Alabama,* 310 U.S. 88, 101 (1940). Fourth, neither the fact that the speech appears in a paid advertisement, *New York Times v. Sullivan,* 376 U.S. 254 (1964), nor the corporate status of the speaker, *First National Bank v. Bellotti,* 435 U.S. 765 (1978); *Consolidated Edison Co. of New York v. Public Service Comm'n of New York,* 447 U.S. 530 (1980), provides a justification for suppressing speech on matters of public concern. Fifth, the Constitution protects the right of individuals to amplify their voice

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[13] The ban on broadcast ads not only deprives speakers of their First Amendment rights without any constitutionally adequate justification, it deprives the public of information that can be useful in understanding the policy decisions facing government. Without that information, it is plainly more difficult for the public to participate intelligently in the process of democratic decisionmking.

through group association, *DeJonge v. Oregon,* 299 U.S. 353 (1937). Thus, the government must utilize "sensitive tools," *Speiser,* 357 U.S. at 525, when it seeks to limit such associational activity, even if the association chooses to incorporate, like the ACLU, as a nonprofit entity.

The approach followed by the district court below is plainly more "sensitive" to First Amendment concerns than the broad contextual inquiry advocated by appellants because it avoids a subjective and potentially open-ended inquiry into the speaker's intent. But even the approach adopted by the district court risks suppressing more speech than necessary. It is not entirely clear, for example, how the various factors identified by the district court will be weighed against each other if they do not all point in the same direction. It is also not clear why it should be permissible to ask voters to contact their representative about a specified issue but impermissible to ask voters to urge their representative to reverse a previously expressed position on the same issue.

As an alternative, this Court can and should take the opportunity to reconsider its ruling on the Snowe-Jeffords Amendment. The Snowe-Jeffords Amendment was adopted as § 203(b) of the BCRA. Contrary to the seemingly absolute language of § 203(a), it permitted nonprofit corporations organized under § 501(c)(4) of the Internal Revenue Code, like the ACLU, to engage in "electioneering communications" if those communications were funded by individuals and governed by certain disclosure rules. Section 204 of the BCRA, known as the Wellstone Amendment, then negated what the Snowe-Jeffords Amendment had seemingly allowed by reinstating the prohibitions of § 203(a) for § 501(c)(4) corporations.

In *McConnell,* this Court held that the Wellstone Amendment was controlling as a matter of legislative intent, subject to the judicially imposed caveat that it could not apply to *MCFL* corporations. *See* n.8, *supra.* That decision may well have been correct as a matter of legislative

construction. But, as a matter of First Amendment law, the Snowe-Jeffords Amendment provides a more narrowly tailored response to the asserted congressional interests by leaving the IRS in charge, as it has always been, of policing the line between permissible and impermissible partisan activity by nonprofit entities.

## CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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