No. 06-969 & 06-970

In The Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

and

SENATOR JOHN McCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, and REPRESENTATIVE MARTIN MEEHAN,

Appellant-Intervenors,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

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

BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS*[1]

Amicus National Rifle Association ("NRA") is a nonprofit voluntary membership corporation that qualifies as tax-exempt under 26 U.S.C. § 501(c)(4). Its approximately four million members are individual Americans who have come together for the common purpose of ensuring the preservation of rights under the Second Amendment. The NRA was a principal challenger of Title II of BCRA when that statute was last before this court. *See NRA v. FEC*, No. 02-1675, *decided with McConnell v. FEC*, 540 U.S. 93 (2003). The NRA was specifically targeted, by name, by sponsors of the Wellstone Amendment, BCRA § 204 (adding 2 U.S.C. § 441b(c)(6)), which was enacted for the purpose of extending Title II to nonprofit issue advocacy organizations. *See* 147 CONG. REC. S2847 (Mar. 26, 2001) (statement of Sen. Wellstone). The NRA was also the single largest victim of Title II's restrictions on electioneering speech, insofar as the NRA accounted for fully one third of the issue ads that were criminalized by BCRA. Since that decision four years ago, the political voices of the NRA's millions of members have been stifled by Title II, and *amicus* therefore respectfully urges this Court to overrule *McConnell*.

SUMMARY OF ARGUMENT

The decision in *McConnell v. FEC* should be reconsidered. The decision has not had time to become imbedded in our legal culture; indeed, the scope and meaning of

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

McConnell remain in flux due to this Court's unanimous recent decision permitting challenges to the statute as applied. *Stare decisis* is at its weakest when, as the decision below reveals, the governing decision has created an unworkable regime. In the face of the First Amendment's ancient and pervasive protection of political speech, the recently minted precedent of *McConnell* cannot stand.

As both a content-based restriction and a limit on independent political expenditures, Title II is subject to strict scrutiny – a level of review that it cannot survive because it was enacted by Congress with the openly avowed, and illegitimate, purpose of suppressing criticism of incumbent elected officials in the form of negative issue ads. Title II's restraint on "electioneering communications" is the modern equivalent of the 18th-century Sedition Act – an infamous criminal statute aimed at suppressing criticism of the government. Under the unanimous analysis of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), such a law cannot stand.

Title II must also be struck down because it is fatally overbroad. All the parties and the Members of this Court concur that there is no practical difference between issue advocacy and advocacy of the election or defeat of a political candidate. But Title II's defenders and the *McConnell* majority draw the wrong conclusion from this reality, reasoning that, if one cannot distinguish between protected speech and unprotected electioneering communications, then the State may outlaw all of it, and leave any speaker who seeks an exception for "real" issue ads either to bring an as-applied challenge or to speak and risk felony prosecution. The Constitution, we respectfully submit, requires the Court to put its thumb on the other

side of the scale, in favor of protecting speech, rather than suppressing it.

Nor can Title II be justified by the supposed need to prevent "corruption." Gratitude and responsiveness for political support are not signs of corruption – they are the hallmarks of democracy. This Court's precedents draw a line between advocacy organizations that fund their speech with individual dues and trade associations that fund their speech largely with contributions from business corporations. The former pose no danger of corrupting the political marketplace through wealth generated in the economic marketplace.

Title II's congressional supporters understood that requiring grassroots advocacy organizations to speak through political action committees would reduce the collective voice of their millions of members to a whisper, and experience since *McConnell* has borne that out. Such suppression of speech is impermissible under strict scrutiny if there is a less restrictive means of achieving the State's compelling purpose. Congress has already enacted such a less restrictive alternative, in the form of Section 203(b), the original Snowe-Jeffords provision, which was nullified by the Wellstone Amendment (Section 204 of BCRA). That provision would ensure that the political voices of advocacy groups are not unfairly amplified by corporate wealth generated in the economic marketplace, by permitting electioneering communications by advocacy groups like the NRA, so long as they are paid for exclusively with contributions from individual donors. In contrast, the Wellstone Amendment, by preventing such organizations from engaging in any "electioneering communications" for fear that a single corporate dollar might otherwise lend indirect assistance, suppresses far more

speech than necessary. With the less restrictive alternative of the Snowe-Jeffords provision at hand, Section 204 cannot survive strict scrutiny.

ARGUMENT

I. *STARE DECISIS* DOES NOT REQUIRE ADHERENCE TO *McCONNELL*.

When the Court misapplied the First Amendment in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), it promptly recognized its error and overruled the case just three years later. *See West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Similarly prompt correction is warranted now with respect to *McConnell v. FEC*, 540 U.S. 93 (2003). *Stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting), nor is it "rigidly required in constitutional cases," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Unlike cases where the Court appropriately adheres to an existing precedent despite its flaws, here there is no reason to shy away from righting a manifest constitutional error.

The *McConnell* decision is only four years old and therefore certainly has not become imbedded in our "national culture." *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), which *had* become imbedded); *Randall v. Sorrell*, 126 S. Ct. 2479, 2490 (2006) (Breyer, J., joined by Roberts, C.J.) (declining to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976), because it has "promoted considerable reliance"). Indeed, the scope and meaning of *McConnell* are and will likely remain in flux, given this Court's unanimous decision in *Wisconsin Right*

to Life, Inc. v. FEC, 126 S. Ct. 1016, 1018 (2006) (*per curiam*), permitting challenges to the statute as applied. *Stare decisis* is particularly weak when experience has shown that "governing decisions" have created a legal regime that is "unworkable." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-46 (1985). This case involves no "property" or "contract rights where reliance interests" are at stake. *Payne*, 501 U.S. at 828. Therefore, overruling *McConnell* would disturb no reliance interests, but would instead bring coherence to this Court's First Amendment jurisprudence.

Precedent is more vulnerable where it "conflicts with a public sense of justice." *Id.* at 834 (Scalia, J., concurring, joined by O'Connor and Kennedy, JJ.). That is particularly true when what is at stake is freedom of speech, the one "fixed star in our constitutional constellation." *Barnette*, 319 U.S. at 642. Reflexive reverence for precedent is least appropriate in cases involving the *political* speech that lies at the very core of the First Amendment. *McConnell* should be overruled because it stands as "a positive detriment to coherence and consistency" in the law of the First Amendment. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

II. TITLE II OF BCRA CANNOT SURVIVE STRICT SCRUTINY BECAUSE IT WAS AVOWEDLY ENACTED TO SUPPRESS CRITICISM OF INCUMBENT GOVERNMENT OFFICEHOLDERS.

A. It is common ground that, as both a content-based restriction and a limit on independent political expenditures (rather than contributions), Title II is subject to strict scrutiny. *See Riley v. National Fed'n of the Blind*, 487

U.S. 781, 795 (1988); *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 440-41 (2001); *McConnell*, 540 U.S. at 205. To sustain a content-based restriction on political speech, the Government must establish that *the purpose that actually animated enactment* of the measure is compelling and is narrowly served by the restriction. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191 (1997). Therefore, neither the Defendants nor this Court may go beyond Title II's text and legislative history to discern and evaluate "the disease sought to be cured" by its limits on electioneering communications. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quotation marks and citation omitted). This is the first place where the Court erred in *McConnell,* because it ignored the undisputed record that laid bare Congress's avowed – and utterly illegitimate – purpose.

B. The majority opinion in *McConnell* treated Section 203 of BCRA as if it were "legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" 540 U.S. at 205 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)). The majority simply assumed, *without a single reference to the legislative history*, that this was Congress's purpose in Section 203. *See* 540 U.S. at 203-09. That was manifest error.

The legislative record made clear that Congress enacted Section 203 to stifle negative campaign ads based on their content. "Frequently an issue of this sort will

come before the Court clad, so to speak, in sheep's clothing" – sometimes a design to suppress speech "is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Senator McCain, BCRA's principal sponsor and the leading Incumbent Intervenor defending the statute here, put BCRA's goal in terms so plain that the majority in *McConnell* could evade Congress's intent only by resolutely refusing to examine the legislative record:

> I hope that we will not allow our attention to be distracted from the real issues at hand – how to raise the tenor of the debate in our elections. . . . No one benefits from negative ads. They don't aid our Nation's political dialog.

540 U.S. at 260 (Scalia, J., dissenting) (quoting remarks of Sen. McCain).[2] Senator Wellstone, who drafted the amendment that became BCRA Section 204, declared that " 'these issue advocacy ads are a nightmare. I think all of us should hate them. . . . [By passing the legislation] [w]e could get some of this poison politics off television.' " *Id.* at 260 (quoting remarks of Sen. Wellstone). Senators and Congressmen repeatedly lined up to stress that " '[t]his bill is about slowing the ad war. . . . It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate

[2] As in *McConnell* itself, the leading sponsors of BCRA (Sen. McCain, *et al.*) have intervened in this dispute as defendants in order to defend the incumbency-protecting statute that they authored and enacted. We refer to them and their brief herein as the Incumbent-Intervenors.

the airwaves.'" *Id.* (quoting remarks of Sen. Cantwell).[3] Title II's supporters opined that negative attack ads were unworthy of First Amendment protection because they were not speech, but more akin to "crack cocaine," "drive-by shooting[s]" and "air pollution." *Id.* (citations and quotation marks omitted).[4]

> The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates. . . . We don't think that's right.[5]

Section 203's content-based restriction on political speech is particularly suspect because it was enacted by incumbent legislators to help them keep their jobs: it "*targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents." *McConnell*, 540 U.S. at 249 (Scalia, J., dissenting) (original emphasis). *See also id.* at 262-63. But "insulat[ing] legislators from effective electoral challenge" is not even a legitimate, let alone a compelling, governmental purpose. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403-04 (2000) (Breyer, J., concurring). *See also Randall*, 126 S. Ct. at 2492, 2496, 2499 (Breyer, J., joined by Roberts, C.J., and Alito, J.); *McConnell*, 540 U.S. at 323 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) ("That the Government would regulate [negative

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[3] The NRA submitted an exhaustive review of BCRA's extensive legislative history in *McConnell* in the form of two documents: as part of the Joint Appendix in *McConnell v. FEC*, No. 02-1674 ("JA") and an Appendix of Legislative History appended to NRA's briefs in *NRA v. FEC*, No. 02-1675 ("LH App."). Both are available in the Court's files.

[4] *See also, e.g.,* NRA Appendix in *NRA v. FEC*, No. 02-0581 (D.D.C.) ("NRA App.") 54-60; LH App. 1a-45a, 49a, 56a.

[5] *See* JA 936 (Sen. McCain Dep.) at p. 100.

issue ads] for this reason goes only to prove the illegitimacy of the Government's purpose.").

The record on this point is overwhelming and *undisputed.* In *McConnell*, the Government did not even try to contest that the legislative record manifests the impermissible purpose behind Title II. And the Incumbent Intervenors, far from denying that the statute's goal was to stifle the negative attack ads that they so disliked, unabashedly emphasized this purpose during their depositions in the *McConnell* litigation.[6]

C. Title II's restraint on "electioneering communications" is another example of the predictable and deplorable "standard practice" of the governors "us[ing] the criminal law to insulate themselves from disagreement" by the governed. ANTHONY LEWIS, MAKE NO LAW 52 (1991). Like Title II, the Sedition Act of 1798 was specifically aimed at stifling speech critical of the federal government and its elected members. Proponents of the Sedition Act in the 5th Congress, like BCRA's supporters in the 107th, decried "malicious calumnies against Government," speech designed to "inflame . . . constituents against the Government," publications "calculated to destroy . . . every ligament that unites . . . man to society and to Government," and "representations [that] are outrages on the national authority, which ought not to be suffered." NRA App. 111-13. Congressional opponents of the Sedition Act, like opponents of BCRA, argued then, as we do now:

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[6] *See*, *e.g.*, JA 939-40 (Sen. McCain Dep.) at p. 127; JA 914-15 (Sen. Jeffords Dep.) at p. 76; JA 906 (Sen. Jeffords Dep.) at p. 15; JA 910 (Sen. Jeffords Dep.) at p. 22; JA 972 (Rep. Meehan Dep.) at p. 54; JA 749 (Rep. Shays Decl.) ¶13.

> This bill and its supporters suppose, in fact, that whoever dislikes the measures . . . of a temporary majority in Congress, and shall . . . express his disapprobation and his want of confidence in the men now in power, is seditious and is liable to punishment. . . . If you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.[7]

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964), this Court unanimously observed that the Sedition Act, "because of the restraint it imposed upon criticism of government and public officials," had been universally condemned "in the court of history" as a blatant infringement on freedom of speech. If this judgment on the Sedition Act is correct, then Title II's modern version of it must fall.

D. Nor can Title II's limitation on electoral speech be reconciled with this Court's decision in *New York Times v. Sullivan*, which concerned a political advertisement run in THE NEW YORK TIMES by an "interest group" – the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad was found to refer to an elected official and to falsely criticize his handling of civil rights protests in Alabama. The issue was whether the First Amendment "limit[s] a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id*. at 256. Emphasizing that "[i]t is as much [the citizen's] duty to criticize

[7] NRA App. 114.

as it is the official's duty to administer," *id*. at 282, the Court held that the First Amendment prohibits such an action unless the public official can show that the defamatory statement was made with actual malice. The *Sullivan* Court's reasoning is equally dispositive of Title II.

At the heart of the Court's unanimous ruling was its recognition that political speech is the lifeblood of democracy and that "debate on public issues should be uninhibited, robust, and wide-open." *Id*. at 270. That the political speech was contained in a paid advertisement was irrelevant; the First Amendment protects "persons who do not themselves have access to publishing facilities" no less than it protects the press. *Id*. at 266. Nor did the advertisement's false and defamatory nature suffice to deprive it of First Amendment protection, for "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id*. at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And the *Sullivan* Court emphasized, over and over again, that speech concerning the conduct of public officials and candidates for public office is essential to the vitality of democracy itself. Quoting James Madison, the Court said this: "The value and efficacy of this right [to vote] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id*. at 275 (citation omitted). Accordingly, until *McConnell* this Court had consistently held "that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976).

In the record before the Court in *McConnell* were thousands of the "negative attack ads" that Title II suppresses. To dispose of this case, it is enough to note simply that *every single one of them* would be protected by the First Amendment from a libel action brought by the attacked candidate. But Title II cuts even deeper into the heart of the First Amendment than did the defamation action invalidated in *Sullivan.* Title II goes beyond rendering speech actionable in tort; it *criminalizes* speech outright and punishes the speaker with imprisonment. Title II goes beyond just reaching and restraining false speech; it reaches and criminalizes *the truth*. Title II goes beyond just restraining political speech, it targets *electoral* speech about candidates for public office during the weeks before citizens go to the polls.

Title II's restrictions on electioneering communications thus violate the most fundamental postulates of free speech. In the face of the First Amendment's ancient, broad, deep and pervasive protection of political speech, the recently minted precedent of *McConnell* cannot stand. Adherence to a previous ruling is unwarranted when it "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Adarand Constructors v. Pena*, 515 U.S. 200, 231 (1995) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

III. TITLE II IS FATALLY OVERBROAD AND STRICT SCRUTINY THEREFORE MANDATES THAT IT BE STRUCK DOWN.

Until *McConnell*, *Austin v. Michigan Chamber of Commerce* was "the only time [the] Court had allowed the Government to exercise the power to censor political

speech based on the speaker's corporate identity." *McConnell*, 540 U.S. at 326 (Kennedy, J., dissenting). But

> *Austin* was based on a faulty assumption. Contrary to Justice Stevens' proposal that there 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," there is a general recognition now that discussions of candidates and issues are quite often intertwined in practical terms.

Id. at 327 (Kennedy, J., dissenting). Indeed, there is total unanimity on this point among both the parties and this Court. As the majority expressed it in *McConnell*, "'[i]t is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.'" 540 U.S. at 126 n.16 (quoting a former official of the NRA's Political Action Committee). Both the Government (SG Br. at 30) and the Incumbent Intervenors (Incumbents Br. at 35) take precisely the same position and support it by quoting precisely the same NRA official. This insight is hardly new. *See Buckley*, 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application").

Although there is, thus, agreement as a factual matter on the enormous breadth of Title II's criminalization of political speech, Title II's defenders and the *McConnell* majority draw the wrong conclusion from this. They reason that, if one cannot distinguish between constitutionally protected speech and electioneering communications that the government may restrict, then the *State may outlaw all of it*, and leave any speaker who thinks he

deserves an exception for "real" issue ads to bring an as-applied challenge or to speak and risk felony prosecution. This brings to mind the question put to Simon de Montfort's papal advisor during the Albigensian Crusade, when the crusading knights asked their leader how, once they stormed the town, they were to distinguish good, orthodox Christians from the Cathar heretics that were to be put to death. The papal legate replied: kill them all and let God sort them out.

This same harsh rule flows from this Court's decision in *McConnell*, and it gets the First Amendment precisely backwards. The Constitution, we respectfully submit, requires the Court to put its thumb on the *other* side of the scale, in favor of protecting speech, rather than restricting and chilling it. The error in *McConnell* is just that fundamental. "If protected speech is being suppressed, that must be the end of the inquiry." *McConnell*, 540 U.S. at 324 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). It "is no answer to say that" speakers "may bring as-applied challenges on a case-by-case basis. When a statute is as out of bounds as Section 203, our law simply does not force speakers to 'undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation.'" *Id.* at 336 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). The three-judge court below did the best it could in fleshing out the *McConnell* standard for employment in an as-applied challenge to Title II, and that effort yielded an eight-factor test through which political speakers must sift their speech before uttering a word. *Wisconsin Right to Life v. FEC*, 466 F. Supp. 2d 195, 204, 207 (D.D.C. 2006) (setting forth a 2-part, and then 6-subpart, test for applying *McConnell*). That the *McConnell* standard for distinguishing a felony from permissible speech is "unworkable" is

reason enough to depart from *stare decisis*. *Payne*, 501 U.S. at 827.

The Government nevertheless contends that BCRA's definition of "electioneering communications" passes constitutional muster because it employs bright (albeit broad and sweeping) lines to define "a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect." SG Br. at 30. This makes for an alarming comparison with the class of criminal syndicalism communications that the State may outlaw, which is phrased in parallel terms: a state may criminalize incitement to violence only when the defendant's "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). That is a much narrower category of communication and a much tougher standard for the State to meet, despite the fact that advocating violence, in contrast to political speech, is not at the core of the First Amendment. Thus the Government's reading of *McConnell* is that the Constitution guarantees more elbow-room for a speaker to advocate the violent overthrow of the government than to advocate removal of that same government by means of the electoral process. This is a world turned upside down.

IV. TITLE II CANNOT BE JUSTIFIED BY THE NEED TO PREVENT *AUSTIN*-STYLE "CORRUPTION" BECAUSE CONGRESS ITSELF ENACTED A LESS RESTRICTIVE ALTERNATIVE.

Even if, contrary to what BCRA's legislative sponsors themselves said, preventing *Austin*-style "corruption" were the purpose of Title II, that purpose is insufficiently compelling to excuse the statute's abridgement of freedom

of speech because a less restrictive means of achieving the congressional goal is available. This is an alternative and independent basis for overruling *McConnell*.

Defendants do not (and cannot) dispute that Title II is subject to strict scrutiny, so they attempt to cast Title II as designed to achieve the compelling government purpose of preventing actual or apparent political corruption. But there is *absolutely nothing* in the legislative record of Title II indicating that Congress limited electioneering communications to protect office holders from the corrupting influence of "sham" issue ads. To the contrary, as demonstrated above, the statute was aimed at "negative attack ads" that supposedly demean the political process.

Despite Congress's remarkable candor about its goal of protecting candidates from televised criticism during election campaigns, the majority in *McConnell* ignored that purpose and instead launched its analysis "with rhetoric that suggests a conflation of the anticorruption rationale with the corporate speech rationale." 540 U.S. at 290 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). "The conflation appears designed to cast the speech regulated here as unseemly corporate speech." *Id.* at 290-91. Thus "[t]he majority begins with a denunciation of direct campaign *contributions* by corporations and unions" and "then uses this rhetorical momentum as its leverage to uphold" BCRA's restrictions on *independent expenditures*, even by non-profit grassroots advocacy organizations. *Id.* at 339-40 (emphasis added). The Court should reexamine the basic premises of its analysis in *McConnell*.

A. Gratitude For Political Support Is Not Corruption.

The notion of "political corruption" that the majority embraced in *McConnell* is a world apart from the record of "*quid pro quo*" deals that anchored the Court's regulation of campaign contributions in *Buckley*. *See* 424 U.S. at 26 & n.28. For the *McConnell* Court, "*any* conduct that wins goodwill from or influences a Member of Congress" is *ipso facto* "corruption." 540 U.S. at 294 (Kennedy, J., dissenting) (emphasis added). This, we are told, is a matter of simple "common sense." *Id.* at 152 (joint opinion of Stevens and O'Connor, JJ.). Likewise, mere "access, without more," is proof positive of "corruption" that taints both the independent expenditures made in support of a candidate's policies and the candidate to whom the advocacy group making the expenditures gains access. *Id.* at 294 (Kennedy, J., dissenting). "Access, in the Court's view, has the same legal ramifications as actual or apparent corruption of officeholders." *Id.*

But this is not "corruption" – this is the democratic process. To be sure, elected officials are indeed grateful for any support for their campaigns, whether it takes the form of the ballot of a single constituent, or the endorsement of an organization with millions of members, or television ads extolling a candidate's virtues and decrying his opponent's vices. And those who provide such support do indeed expect that, if the campaign is successful, the official will cast votes in a way that reflects the shared political ideals that inspired the support in the first place.[8]

[8] It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the

(Continued on following page)

But there is nothing "malign" in this, nor in the "proclivity of [an] officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents." 540 U.S. at 259 (Scalia, J., dissenting). Political allies who raise their voices in support of particular causes and hence in support of a candidate who promotes those causes "will have greater access to the officeholder, and he will tend to favor the same causes as those who support him (which is usually *why* they supported him). That is the nature of politics – if not indeed human nature." *Id.*

Thus the *McConnell* Court saw "corruption" in the natural functioning of our representative democracy. Prior to *McConnell*, this Court had repudiated such a notion of "corruption." "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *FEC v. NCPAC*, 470 U.S. 480, 498 (1985).

B. Independent Expenditures By Grassroots Advocacy Groups Pose No Threat Of Corrupting The Political Process.

Core political speech is protected by the First Amendment regardless whether a corporation is the speaker.

> only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

McConnell, 540 U.S. at 297 (Kennedy, J., dissenting).

Buckley, 424 U.S. at 45, 50, 187; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *FEC v. MCFL*, 479 U.S. 238, 259 (1986). Indeed, *MCFL* upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. Only once, in *Austin*, has this Court upheld a restriction on independent expenditures for core political speech. The specific danger identified in *Austin*, corruption of the political process through the aggregation of wealth generated by business corporations, has no application to speech by nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members.

MCFL held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form. Although the "resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas," nonprofit advocacy groups that take the corporate form "do not pose that danger of corruption" because they are "formed *to disseminate political ideas, not amass capital*." 479 U.S. at 258-59 (emphasis added). Their "resources . . . are not a function of [their] success in the economic marketplace, but [their] popularity in the political marketplace." *Id.*

In contrast, *Austin* upheld a law restricting expenditures on express advocacy by the Chamber of Commerce because 75% of its funding came from for-profit corporations; the Chamber therefore could (and did) serve as a conduit for using "resources amassed in the economic marketplace" "to provide an unfair advantage in the

political marketplace." *MCFL*, 479 U.S. at 257. The Court specifically observed that the Chamber's corporate wealth had "*little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

MCFL and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of corrupting the political marketplace through wealth generated in the economic marketplace.

This analysis of *Austin* and *MCFL* was confirmed in *FEC v. Beaumont*, 539 U.S. 146, 157-59 (2003), which held that a restriction on corporate campaign *contributions* could constitutionally be applied to nonprofit advocacy organizations as well as business corporations. *Beaumont* reaffirmed that the *Austin* rationale for restricting expenditures was to prevent corporations from "'us[ing] resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.'" *Id.* at 154 (quoting *Austin*, 494 U.S. at 658-59). That problem is simply not presented by the NRA or similar nonprofit advocacy groups.

To be sure, *Beaumont* held that concerns about the corporate form of organization, even for a nonprofit advocacy organization funded by individual donations, were sufficient to sustain restrictions on campaign *contributions* by such a corporation. *Id.* at 159-61. In other words, Congress may ban corporate campaign contributions in order to "bar[] corporate earnings from conversion into political 'war chests.'" *Id.* at 154. But, as the Court reaffirmed,

contributions barely count as speech at all: "Going back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161.

In contrast, independent political *expenditures* on campaign speech by nonprofit advocacy groups constitute "the core of political expression." *Id.* at 161-62. Independent political expenditures "'do not pose that danger of corruption,'" *id.* at 158, and therefore the "'potential for unfair deployment of wealth for political purposes' f[alls] short of justifying a ban on expenditures" by such groups. *Id.* The rationales that sufficed to uphold restrictions on contributions in *Beaumont* cannot survive the strict scrutiny applicable to restrictions on expenditures for core political speech.[9] Indeed, that is precisely why the First Amendment foreclosed Congress's attempt to regulate the independent expenditures of a corporate political action committee ("PAC") in *NCPAC*. *See* 470 U.S. at 500-01.

The NRA is the archetype of the issue advocacy groups protected by the First Amendment. It was formed by its members to disseminate a shared political idea – preservation of Second Amendment rights – not to amass capital. The NRA's resources "are not a function of its success in the economic marketplace, but its popularity in

[9] *Beaumont* repeatedly reaffirmed this fundamental distinction between restrictions on contributions and expenditures. 539 U.S. at 151 & n.2, 155-56, 158-59, 161, 162. *See also id.* at 164 (Kennedy, J., concurring in the judgment). In particular, the Court distinguished the deference accorded legislative judgments about corruption "when Congress regulates campaign contributions" from the strict scrutiny applicable to expenditure restrictions. *Id.* at 155-56, 161.

the political marketplace." *MCFL*, 479 U.S. at 259. The NRA and similar grassroots advocacy organizations do not do significant business in the "economic marketplace," nor derive "market profits," nor receive more than a negligible portion of their revenues from corporate contributions. In short, the NRA does not use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin,* 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 259). Title II's restriction on its independent electioneering expenditures is, therefore, unconstitutional.

C. Title II's Restrictions On Independent Expenditures By Grassroots Advocacy Organizations Drastically Curtail Speech.

"The freedom to associate with others for the dissemination of ideas – not just by singing or speaking in unison, but by pooling financial resources for expressive purposes – is part of the freedom of speech." *McConnell*, 540 U.S. at 255 (Scalia, J., dissenting). *See also NAACP v. Button*, 371 U.S. 415, 428-29 (1963). "To say that [individuals'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *FEC v. NCPAC*, 470 U.S. 480, 495 (1985).

McConnell upheld Section 203 because corporations, including nonprofit advocacy organizations such as the NRA, the ACLU and the Sierra Club, "can still fund electioneering communications with PAC money," and it was therefore "'simply wrong' to view the provision as a

'complete ban' on expression rather than a regulation." 540 U.S. at 204.

First, this distinction gains no ground for the *McConnell* Court's rationale, because Title II is subject to First Amendment strict scrutiny, not to a mere balancing test. "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *United States v. Playboy Entm't Group*, 529 U.S. 803, 826 (2000).

Second, the distinction between ban and burden drawn by the *McConnell* majority provides little comfort to advocacy organizations and marks yet another break with established doctrine. This Court's jurisprudence has long recognized "the practical difficulties corporations face when they are limited to communicating through PACs," 540 U.S. at 330 (Kennedy, J., dissenting), which are regulated in minute detail by federal law. *See MCFL*, 479 U.S. at 253-54. With respect to grassroots advocacy organizations in particular, the PAC rules constitute a stultifying array of accounting, reporting, solicitation and organizational requirements. "These regulations are more than mere minor clerical requirements. Rather they create major disincentives for speech, with the effect falling most heavily on smaller entities," and for any organization that has not yet established a PAC, spontaneous election speech "becomes impossible." *McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting).

> Couple the litany of administrative burdens with the categorical restriction limiting PACs' solicitation activities to "members," and it is apparent

> that PACs are inadequate substitutes for corporations in their ability to engage in unfettered expression.

Id.

Title II's congressional supporters well understood that requiring the NRA to speak through its PAC would reduce the collective voice of its four million members to a whisper – indeed, they openly declared that gagging the NRA during elections was their purpose.[10] At the trial stage of *McConnell,* Judge Henderson found that the congressional stratagem would succeed, due to the inability of NRA members – the vast majority of whom are individuals of modest means – to pay the NRA's membership fee and then contribute beyond that amount to the NRA's PAC. *McConnell v. FEC*, 251 F. Supp. 2d 176, 318 (D.D.C. 2003) Judge Henderson's finding was not contested by either of the other members of the district court panel, nor questioned by any member of this Court.

Experience since *McConnell* has borne out Judge Henderson's forecast: grassroots advocacy associations comprising individuals of ordinary income have been effectively gagged, while multimillionaires – whose Section 527 organizations are not subject to Title II's restrictions – continue to flood the airwaves with their electioneering

[10] *See* 147 CONG. REC. S2847 (Mar. 26, 2001) (Sen. Wellstone) (referencing the NRA and Sierra Club as prototypical organizations whose ads should be restricted); 145 CONG. REC. H3174 (May 14, 1999) (Rep. Schakowsky) ("If my colleagues care about gun control, then campaign finance reform is their issue so that the NRA does not call the shots."); 148 CONG. REC. H424 (Rep. Pickering) (Feb. 13, 2002) (quoting Scott Harshberger, the President of Common Cause, who championed BCRA by saying: " 'A vote for campaign finance reform is a vote against the second amendment gun lobby.' "); *see generally* LH App. 52a.

speech.[11] *Amicus* does not contend that the First Amendment requires government to level the playing field between rich and poor speakers, but neither does it permit government to suppress the collective speech of ordinary citizens while allowing plutocrats to broadcast as they wish. This Court has struck down even *contribution* limits when they were found to "severely inhibit collective political activity by preventing" a group from aggregating and "using contributions by small donors" to support a candidate, "thereby thwarting the aims" of thousands of individuals "from making a meaningful contribution to state politics." *Randall*, 126 S. Ct. at 2497 (Breyer, J., joined by the Chief Justice, and Alito, J.).

As Justice Kennedy pointed out, "political committees are regulated in minute detail because their primary purpose is to influence federal elections," whereas the "'ACLU and thousands of other organizations like it . . . are not created for this purpose and therefore should not be required to operate as if they were.'" *McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting). The *McConnell* Court "articulate[d] no compelling justification for imposing this scheme of compulsory ventriloquism." *Id.* at 333.

Although some would justify limits on independent expenditures as necessary "to democratize the influence that money itself may bring to bear upon the electoral process," *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., concurring), Title II stands that reasoning on its head. By

[11] For an example of the vigorous spending and healthy state of fund-raising by advocacy corporations that qualify under 26 U.S.C. § 527, *see* http://www.fec.gov/finance/disclosure/norindsea.shtml (reporting individual contributions to MoveOn.org by George Soros in the amounts of $1,044,285, $955,715 and $500,000).

requiring a grassroots advocacy group's political speech to be channeled through a PAC, BCRA ensures that the voices of members of modest means will be silenced, closing the marketplace of political expression to all but the wealthy. Title II thus works a bitter inversion of the *Austin* Court's rationale. *Austin* upheld a limit on corporate campaign expenditures as justified to prevent wealth generated in the economic marketplace from unfairly *amplifying* the corporation's voice beyond the "public's support for the corporation's political ideas." 494 U.S. at 660. The NRA's wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury "accurately reflects members' support for the organization's political views." *Id*. at 666. By requiring the NRA's political speech to be channeled through its PAC, Title II *muffles* the NRA's voice in the political marketplace to a volume far below its "contributors' support for the corporations' political views." *Id*. at 660-61. Thus, far from ensuring that "resources amassed in the economic marketplace [are not] used to provide an unfair advantage in the political marketplace," *MCFL*, 479 U.S. at 257, Title II ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came.

Nor can Title II possibly achieve the congressional goal that the *McConnell* Court attributed to it. The Court proclaimed that electioneering communications are regulated by Title II because they beget the grievous public harm of official corruption, 540 U.S. at 206 n.88, while paradoxically positing that Title II actually bans no electioneering communications at all because corporations remain free to speak through their PACs. *Id.* at 204. But

requiring the electoral speech of corporations to be funneled through their PACs cannot possibly solve the "corruption" problem that *McConnell* identifies as the animating purpose of Section 203. As a measure designed to prevent official corruption, of either the *quid pro quo* or the *Austin*-"gratitude" variety, Title II makes no more sense than a bribery statute requiring corporations to pay for their bribes using funds from PACs. *See McConnell*, 540 U.S. at 275 n.8 (Thomas, J., dissenting). Congress surely did not intend Title II to result in nothing more than an act of institutional ventriloquism, with organizations like the NRA simply uttering from the mouths of their PACs the very same "electioneering communications" that allegedly threatened to corrupt federal office holders. Moreover, *McConnell* fails to explain why a candidate would be any less grateful for, and thus any less corrupted by, an issue ad aired with PAC money than an identical ad aired with a non-profit advocacy group's general funds.

Thus Title II cannot genuinely be justified on an anticorruption rationale, and overruling *McConnell* would not "depart from the fabric of the law; [it would] restore it." *Adarand*, 515 U.S. at 234.

D. The Wellstone Amendment's Suppression Of Political Speech Funded Exclusively With Individual Contributions Cannot Survive Strict Scrutiny Because It Is Not The Least Restrictive Means Of Achieving The Congressional Purpose.

Even if one credits at face value *McConnell*'s premise that the specter of *Austin*-type corruption extends to the independent electioneering expenditures of nonprofit advocacy groups, the case should nevertheless be overruled

insofar as it upholds Sections 203 and 204 of BCRA. Under strict scrutiny, resort to a less restrictive alternative is mandated if one is available. *See Playboy Entertainment*, 529 U.S. at 809-810; *Shrink Missouri*, 528 U.S. at 388 n.3; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). And "the burden is on the Government to prove that the proposed alternatives would not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). There are less restrictive means to ensure that the political voices of advocacy groups like the NRA are not unfairly amplified by corporate wealth generated in the economic marketplace.

Indeed, Congress enacted a less restrictive alternative in Title II itself: the original "Snowe-Jeffords" version of Title II would have exempted electioneering communications by 501(c)(4) advocacy groups like the NRA, so long as they were "paid for exclusively by funds provided directly by individuals." BCRA § 203(b) (adding to U.S.C. § 441b(c)(2)). The so-called "Wellstone Amendment," however, negated the Snowe-Jeffords Provision, *see* § 204 (adding 2 U.S.C. § 441b(c)(6)), for the specific purpose of extending Title II to nonprofit issue advocacy organizations.

The Incumbent Intervenors and BCRA's other sponsors *opposed* the Wellstone Amendment, not because they valued the political speech of the grassroots advocacy groups that the Amendment would stifle, but because they believed that the Amendment was unconstitutional and would likely be struck down by this Court.[12] BCRA's

[12] All four of the Senator-Intervenors voted *against* the Wellstone Amendment, *see* LH App. 41b-42b, and Senator Feingold expressly did so on constitutional grounds. *See* LH App. 58a, 63a.; 147 CONG. REC.

(Continued on following page)

opponents overwhelmingly supported the amendment, presumably for this very reason. BCRA's sponsors therefore insisted both that a severability clause be enacted and that the original Snowe-Jeffords language remain in the bill, so that invalidation of the Wellstone Amendment would not threaten Title II as a whole. And when Section 204 was challenged in *McConnell*, the Government refused to defend its curtailment of electioneering communications by 501(c)(4) organizations and instead merely sought to avoid consideration of it. *See* Brief of the FEC in No. 02-1674, at 112-13.

Ironically, the *McConnell* Court upheld the Wellstone Amendment by reading into it an exception for *MCFL*-type corporations, despite the fact that, as the Court itself conceded, Section 204 "does not, on its face, exempt *MCFL* organizations from its prohibition," and despite Congress's evident intent to override *MCFL* by broadening BCRA to include issue-advocacy groups. 540 U.S. at 210-11. *See also id.* at 338-39 (Kennedy, J., dissenting) ("There is no ambiguity regarding what § 204 is intended to accomplish. . . . [T]he Wellstone Amendment could be understood only as a frontal challenge to *MCFL*").

The *McConnell* decision thus marks the first time in our Nation's history that the Court has sanctioned a content-based restriction on core political speech funded by an association of like-minded individuals – and the Court did so *gratuitously*, because the less restrictive alternative of Section 203(b) was readily at hand.

S3073 (Mar. 29, 2001) (statement of Sen. Feingold); 147 CONG. REC. S2833 (Mar. 23, 2001) (statement of Sen. Edwards).

Prior to *McConnell*, this Court's teaching was that Congress may require that a corporation's expenditures bear a meaningful "correlation" to, *Austin*, 494 U.S. at 660, or constitute a "rough barometer" of, public support for that corporation's political views. *MCFL*, 479 U.S. at 258. The original Snowe-Jeffords approach, preserved in Section 203(b), accomplished that by confining the electioneering expenditures of nonprofit advocacy organizations to the amount of contributions they received from individual donors. In contrast, the Wellstone Amendment, by preventing such organizations from engaging in any "electioneering communications" for fear that a single corporate dollar might otherwise lend indirect assistance, suppresses far more speech than necessary to achieve the goals vindicated in *Austin* and *MCFL*. With the less restrictive alternative of the Snowe-Jeffords provision at hand, Section 204 cannot survive strict scrutiny.

CONCLUSION

This Court should reconsider *McConnell* and invalidate either Title II's prohibition of electioneering communications or, alternatively, the Wellstone Amendment.

Respectfully submitted,

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