Nos. 06-969 & 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 OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real-estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real-estate professionals and real-property owners in important matters before the legislatures, courts, and executives of the federal and state governments. The issues presented in those matters include fair-lending practices, equal opportunity in housing, real-estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (argued Nov. 29, 2006); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Lincoln*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. Appellants in No. 06-970 have filed a letter with the Clerk granting blanket consent to any party filing an *amicus* brief, and letters reflecting the consent of appellant Federal Election Commission (No. 06-969) and appellee Wisconsin Right to Life, Inc. (Nos. 06-969 & 06-970) to the filing of this brief have been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

Property Co. v. Roche, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

NAR engages in a variety of federal legislative and political activities intended to advance the interests of its members by improving the legal climate in which the members conduct their businesses. Those activities include financing communications to educate NAR members and the general public about legislation and other matters pending in Congress that may impact the real-estate industry. Those communications may specifically identify members of Congress and call on them to support or oppose legislation, and they may encourage viewers to contact the specified members of Congress to take a particular position. For example, NAR has paid for advertisements promoting legislation to preserve the ability of neighborhood real-estate professionals to serve local communities. Those communications, which share features of the three advertisements at issue here, are intended to influence the adoption or defeat of legislation, and are not intended to influence the election or defeat of any candidate for federal office.

Although NAR maintains a PAC (the REALTORS® Political Action Committee), the extensive regulations and fundraising constraints imposed on PACs (*see* 11 C.F.R. pt. 102[3]) make it unduly burdensome for NAR both to use PAC contributions to support federal candidates, as required by the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b(a), (b)(2)(C), and at the same time to pay for its legislative advocacy through its PAC. Further, NAR

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[3] *See also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253-54 (1986) ("*MCFL*") (plurality) (detailing requirements imposed on PACs).

cannot satisfy the requirements for the constitutional exemption to federal regulations of independent expenditures that this Court established in *MCFL* because many of its members pay their membership dues with corporate funds. *See* 479 U.S. at 264 (exempt corporation must not accept contributions from business corporations). Significantly, that is true even though most of NAR's members are local, independent real-estate brokers who do not possess the "immense aggregations of wealth" with which this Court has expressed concern. *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (internal quotation marks omitted).

NAR files this *amicus* brief for two principal reasons. *First*, this case is critically important to NAR's continuing ability to express the views of real-estate professionals and real-property owners on federal legislation. The Federal Election Commission ("FEC") seeks to use the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), and this Court's decision in *McConnell* essentially to shield incumbent legislators from all grass-roots lobbying for the critical three-month period before any national election. The FEC has justified that result using both BCRA's prohibition on "electioneering communications" by corporate bodies (2 U.S.C. § 441b(b)(2)) and a recently expanded application of federal restrictions on so-called "express advocacy."

Second, NAR files this brief to provide the Court with additional context in which to consider appellee's as-applied challenge to BCRA § 203. NAR provides examples of the grass-roots lobbying advertisements that it has sponsored and hopes to continue to sponsor. Those advertisements, which are described in greater detail below, represent quintessential exercises of the rights of speech, petitioning, and association – an association of professionals petitioning members of Congress to support a piece of federal legislation, and urging concerned citizens to do likewise. However the Court resolves appellee's as-applied challenge (and it should be sustained), the Court should recognize – like BCRA's own sponsors have – that

genuine issue ads do exist and the First Amendment protects them.

STATEMENT

The developments in electoral campaigns and their regulation that led to the statutory provision at issue here began in 1974, when Congress passed a law limiting the ability of individuals and groups to communicate their views on candidates for federal office.[4] That law restricted both "the giving and spending of money in political campaigns." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam). This case involves a restriction on spending.

In *Buckley*, this Court held that restrictions on campaign spending burden the exercise of rights of speech and association, triggering "exacting scrutiny" under the First Amendment. *See id.* at 19-20, 22-23, 39, 44-45. In addressing disclosure requirements for independent expenditures, the Court interpreted the vague statutory term "expenditure" (which was defined to include spending "for the purpose of . . . influencing" a federal election) to apply only to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" for federal office. *Id.* at 80 (footnote omitted). The First Amendment compelled that interpretation because the language as drafted threatened unconstitutionally to chill speech on "public issues involving legislative proposals and governmental actions." *Id.* at 42; *see id.* at 42-44, 76-80. The law at issue in *Buckley* also limited spending by groups, but no party challenged that aspect of the statute. *See McConnell v. FEC*, 540 U.S. 93, 122 (2003). The Court's narrowing interpretation of the disclosure provision was later applied to the group expenditure limitations as well. *See id.* at 126; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("*MCFL*"). Before BCRA, therefore, federal law prohibited corporations and unions from making expenditures on

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[4] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

such forms of expression as television advertisements that expressly advocated the election of a candidate or the defeat of her opponent.[5] *See McConnell*, 540 U.S. at 203; *MCFL*, 479 U.S. at 249; 2 U.S.C. § 441b (2000).

In the years preceding BCRA's enactment, Congress concluded that candidates' supporters were circumventing that spending restriction by paying for ads that were intended to and did function as candidate advertising but eschewed the words of express advocacy (which were generally limited to words like "vote for"). *See McConnell*, 540 U.S. at 126-28. Instead of expressly telling the viewer to vote for or against a particular candidate, the ads would instead take the form of "so-called" or "sham" issue ads – for example, an ad "that condemned [candidate] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27, 132.

In part to address that problem of "candidate advertisements masquerading as issue ads," *id.* at 132 (internal quotation marks omitted), Congress enacted BCRA. As interpreted by this Court, § 203 prohibits corporations from using their general treasury funds to pay for any "electioneering communication." 2 U.S.C. § 441b(b)(2); *see McConnell*, 540 U.S. at 203-04 & n.87. Section 201, in turn, defines an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office. 2 U.S.C. § 434(f)(3).

In *McConnell*, this Court rejected a facial challenge to the constitutionality of those provisions. *See* 540 U.S. at

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[5] *See generally FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 490 (1985) ("On the record before us, these expenditures were 'independent' in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents.").

189-94, 203-09. Several plaintiffs in that case contended, among other things, that § 203 was overbroad because the compelling government interest justifying regulation of express candidate advocacy did not apply "to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206. According to the Court, that contention "fail[ed] *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* (emphasis added). It further stated that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.* This case presents the question *McConnell* left open – namely, whether § 203's prohibition on "electioneering communications" can constitutionally be applied to an ad that is not "the functional equivalent of express advocacy."

SUMMARY OF ARGUMENT

A. Wisconsin Right to Life, Inc. ("WRTL") seeks to sponsor broadcast communications advocating positions on matters pending before Congress and urging citizens to contact their members of Congress about those matters. NAR believes that it should be able to engage in similar legislative advocacy. Legislative advocacy of the type that WRTL and NAR seek to conduct (which is referred to as grass-roots lobbying) implicates the First Amendment's protections for speech, petitioning, and association. BCRA § 203, which prohibits corporate grass-roots lobbying of incumbent candidates for 30 days before a primary and 60 days before a general election, burdens all three of those First Amendment protections. Although this Court has recognized a compelling government interest in limiting corporate spending on electoral advocacy, it has not recognized a similar interest in limiting corporate speech addressing legislative affairs. Because no compelling interest justifies BCRA § 203's burdens on true legislative

advocacy, that provision is unconstitutional as applied here.

B. The FEC and the intervenors contend, however, that the compelling government interest in restricting corporate electoral spending justifies prohibiting grass-roots lobbying during the pre-election period. But communications like those that NAR desires to fund are not the functional equivalent of express candidate advocacy, and their regulation therefore cannot be defended on that ground.

C. In criticizing the district court's conclusion that the First Amendment precludes BCRA § 203's application to WRTL's planned advertisements, the FEC asserts that WRTL, and other similarly situated speakers challenging the application of BCRA § 203 to their speech, cannot prevail on an as-applied challenge to § 203 unless it articulates a legal test to govern future as-applied challenges. But nothing justifies imposing such a requirement on speakers such as WRTL.

D. The FEC and the intervenors also criticize the district court for giving insufficient weight to purported contextual facts – such as separate statements made by WRTL (or other individuals and groups) about the upcoming election. The wide-ranging inquiry that the FEC and the intervenors urge conflicts with the approach that this Court took in *McConnell* and penalizes one speaker for the statements of others.

E. In asserting that BCRA imposes a tolerable burden on First Amendment freedoms, the FEC and the intervenors rely on the fact that BCRA's definition of electioneering communications does not include print or other non-broadcast advertisements. But the availability of those avenues of expression is not as clear as the FEC and the intervenors suggest. The FEC recently has taken an aggressive interpretation of its ability to prohibit corporate funding of non-broadcast advertisements that the FEC contends contain express electoral advocacy by considering amorphous contextual factors – an approach that

significantly threatens to chill legitimate and constitutionally protected speech.[6]

ARGUMENT

BCRA § 203 IS UNCONSTITUTIONAL AS APPLIED TO TRUE LEGISLATIVE ADVERTISING

The district court correctly held that BCRA's prohibition on "electioneering communications" cannot constitutionally be applied to "genuine issue ads" – that is, ads that are neither "express advocacy" nor "its functional equivalent." J.S. App. 17a. As applied here, BCRA burdens the exercise of fundamental First Amendment freedoms, and the compelling government interest in regulating corporate speech on candidate elections does not apply to true legislative advertising.

A. No Compelling Government Interest Justifies BCRA § 203's Burden On First Amendment Rights

This case involves the ability of corporations (both for-profit and not-for-profit) to engage in grass-roots lobbying. Grass-roots lobbying is designed to inform members of the public about important legislative or public-policy issues and to express a particular view about those issues. Such efforts often seek to motivate constituents to contact their elected officials about those issues. It typically takes the form of advertisements advocating a position on a pending issue and recommending that viewers contact their political representatives and urge them to support that position.[7]

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[6] The FEC also contends that this case is moot. This Court postponed to the hearing on the merits further consideration of the question of jurisdiction in these cases. *See* Order (Jan. 19, 2007). NAR agrees with WRTL and the intervenors (*see* Appellants Br. 13 n.8) that this case is not moot because, as the district court explained, it is capable of repetition, yet evading review. *See* J.S. App. 11a-15a. (References to "J.S. App." are to the Appendix to the Jurisdictional Statement filed by the FEC in No. 06-969.)

[7] *See*, *e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 793 (D.D.C.) (Leon, J.) (describing "genuine issue advertisements . . . , the sole

In this case, for example, WRTL sought to sponsor broadcast communications criticizing the Senate's conduct of (or failure to conduct) a constitutional function – advising on and consenting to the President's judicial nominees (*see* U.S. Const. art. II, § 2, cl. 2). *See* J.S. App. 3a-6a & nn.3-5. Those communications would have expressed the collective concern of WRTL's adherents that the failure to confirm judges impaired the judiciary's functioning and would have urged recipients of the communications to contact their Senators and express disapproval of the practice of filibustering to prevent a confirmation vote on judicial nominees. *See id.*

NAR has paid for analogous advertisements promoting its views on behalf of its member real-estate professionals, as well as real-property owners, on pending federal legislation. For example, NAR has sponsored advertisements with the following messages:

> *Congressman Ferguson*
> *please cosponsor*
>
> H.R. 3424 – "The Community Choice in Real Estate Act"
>
> ***A COMMITMENT TO***
> ***OUR COMMUNITY***
>
> America was built by people following a dream, starting small businesses and building communities – by people working together in communities volunteering to enhance our quality of life. They have made America into the great country it is today.
>
> Legislation has been introduced that will preserve our local communities, preserve competition in real estate and give consumers the choices they deserve.

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purpose of which is educating the viewers about an upcoming vote on pending legislation, and encouraging them to inform their elected representative to vote for or against the bill (i.e., legislation-centered advertisements)"), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

H.R. 3424 will keep the local personalized service consumers now receive from their local neighborhood real estate professionals.

Call Congressman Ferguson at 908-686-5576 to ask him to join more than 160 members of Congress and cosponsor this bipartisan legislation to ensure local choice for our communities.

We need the support of strong leaders such as Congressman Ferguson, so that consumers and local communities will win.

* * *

Call
Congressman Gonzalez
210-472-6195

Tell Him to
Do the Right Thing
and Cosponsor

H.R. 3424 –
"The Community Choice in Real Estate Act"

A COMMITMENT TO
OUR COMMUNITY

Right now, large mega banks are attempting to control more and more of our lives. The Big Bank Conglomerates now want to buy up locally owned and operated real estate companies. The result: consumers lose.

Legislation has been introduced that will preserve our local communities, preserve competition in real estate and give consumers the choices they deserve.

H.R. 3424 will keep the local personalized service consumers now receive from their local neighborhood real estate professionals.

> Call Congressman Gonzalez and ask him to join more than 140 members of Congress and cosponsor this bipartisan legislation to ensure local choice for our communities.
>
> We need the support of strong leaders such as Congressman Gonzalez, so that consumers and local communities will win.[8]

* * *

Like the WRTL communications at issue in this case, NAR's advertisements "describe[d] an issue that . . . was . . . an ongoing issue of legislative concern" in Congress. J.S. App. 23a. Those advertisements explained to the constituents of Congressmen Ferguson and Gonzalez why they should support pending legislation to protect the independence of local real-estate agents, exhorted them to contact those congressmen, and provided a telephone number to call. And, like WRTL's ads, NAR's legislative ads did "not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office." *Id.*

1. *Grass-roots lobbying is protected by the Speech Clause, the Petition Clause, and the right of association.* Grass-roots lobbying implicates three interrelated protections of the First Amendment, which provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

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[8] These advertisements were published as print advertisements in February 2002, shortly before BCRA's enactment. Because they were not broadcast on radio or television and because they were not run during a pre-election "blackout" period, BCRA would not have prohibited them. *See* 2 U.S.C. § 434(f)(3)(A)(i)(II). Even so, NAR believes that it has the freedom to broadcast during pre-election periods similar advertisements on pending legislative matters that affect its members, and it may wish to exercise that freedom.

First, legislative advocacy is protected speech. As this Court has explained, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), this Court has construed the First Amendment to afford "the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (alteration in original).[9] Spending on political communications receives the same First Amendment protection because restrictions on that spending "restrain[] . . . the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19; *see id.* at 16-20; *Bellotti*, 435 U.S. at 786 n.23 ("It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'") (quoting *Buckley*, 424 U.S. at 16).

This Court's decision in *Bellotti* confirms the conclusion that this case involves protected speech. There, a corporation challenged a state statute forbidding it from

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[9] *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'") (quoting Thomas Emerson, *Toward a General Theory of the First Amendment* 9 (1966)) (alteration in original); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.").

spending money "for the purpose of influencing the vote on referendum proposals." 435 U.S. at 767. The Court explained that the speech at issue was "at the heart of the First Amendment's protection," *id.* at 776, and "indispensable to decisionmaking in a democracy," *id.* at 777.[10] That was "no less true because the speech [came] from a corporation rather then an individual" because the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*[11]

Second, this case involves the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. WRTL opposed Senate filibusters of judicial nominees. To redress its grievance, it sought to sponsor advertisements petitioning Senators to end the filibusters and urging others also to petition those Senators. Similarly, NAR opposes the attempts of large banking conglomerates to obtain the authority to participate in local markets for real-estate services. Accordingly, NAR has petitioned (and exhorted others to petition) members of Congress to enact legislation prohibiting such entities from leveraging the substantial economic advantages they

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[10] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("issue-based" advocacy "is the essence of First Amendment expression" and "[n]o form of speech is entitled to greater constitutional protection").

[11] *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) ("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.") (internal quotation marks omitted); *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980) ("The restriction on bill inserts cannot be upheld on the ground that [the corporation] is not entitled to freedom of speech."); *Bellotti*, 435 U.S. at 778 n.14 (listing 11 cases invalidating laws infringing speech by corporate bodies).

enjoy as federally chartered institutions to engage in real-estate brokerage, to the detriment of local independent real-estate agents who do not enjoy those advantages. This Court has indicated that such "publicity campaign[s] to influence governmental action fall[] clearly into the category of political activity" protected by the Petition Clause. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-41 (1961); *see id.* at 137-38.

Third, this case involves the ability of corporations "effectively [to] amplify[] the voice[s] of their adherents" – which the First Amendment freedom of association protects. *Buckley*, 424 U.S. at 22 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *see Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) (the value of associative communication "is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost"); *see also Buckley*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression."); *NAACP v. Button*, 371 U.S. 415, 428 (1963) (corporation may raise right of association "on its own behalf").

2. *Section 203 burdens the rights to speak, petition, and associate.* As applied to the type of grass-roots lobbying at issue here, BCRA § 203's regulation on electioneering communications burdens all three of those important First Amendment freedoms. Section 203 precluded WRTL from sponsoring its three planned advertisements. *See* J.S. App. 6a-7a & nn.7-8. Likewise, BCRA prohibits NAR from broadcasting advertisements like those reproduced above on either radio or television (the most effective media[12]), in the congressmen's districts, for three out of every 24 months (election time, when the congressmen are most attuned to the telephone calls that the ad urges constitu-

[12] *See Buckley*, 424 U.S. at 19 (broadcast media are "indispensable instruments of effective political speech").

ents to make[13]) – simply because the ads contain names of candidates for federal office.[14] Under an FEC rule, such ads would be prohibited even if they asked viewers only to call "your Congressman." 11 C.F.R. § 100.29(b)(2); *see* 2 U.S.C. § 431(18). Grass-roots lobbying of the type engaged in by WRTL and NAR is impossible, of course, if a legislative advertisement cannot recommend even that a viewer contact "your Congressman."[15]

Prohibiting corporations from using their general treasuries for advocacy of a legislative agenda imposes a content-based burden on freedom of speech. *See Austin*, 494 U.S. at 657-58; *id.* at 669 (Brennan, J., concurring).[16] Similarly, because the statute restricts WRTL's ability to conduct "a publicity campaign to influence governmental action," *Noerr Motor Freight*, 365 U.S. at 140-41, and "effectively [to] amplify[] the voice of [its] adherents," *Buckley*, 424 U.S. at 22, it trenches on the guarantees of the Petition Clause and the right of association.

3. *No compelling government interest justifies § 203's burden on legislative advocacy.* Because BCRA § 203

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[13] *See McConnell*, 251 F. Supp. 2d at 793-94 (Leon, J.) (discussing record evidence that "the periods immediately preceding elections are the most effective times to run issue advertisements discussing pending legislation because the public's interest in policy is at its peak").

[14] *See McConnell*, 540 U.S. at 334-35 (Kennedy, J., concurring in the judgment in part and dissenting in part) (explaining some of the reasons why grass-roots advocacy must mention the names of members of Congress to be effective).

[15] *See McConnell*, 251 F. Supp. 2d at 794 (Leon, J.) (citing record evidence making this point).

[16] *See also MCFL*, 479 U.S. at 263 ("While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification."); *id.* at 255 (plurality) ("[T]hat the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."); *id.* at 265-66 (O'Connor, J., concurring in part and concurring in the judgment); *cf. McIntyre*, 514 U.S. at 345 (statute requiring campaign literature to identify the author is "a direct regulation of the content of speech").

burdens fundamental First Amendment freedoms, the district court rightly employed "exacting scrutiny" in testing § 203's application to WRTL's ads. *Buckley*, 424 U.S. at 16, 44-45; *see McConnell*, 540 U.S. at 205; *Austin*, 494 U.S. at 669 (Brennan, J., concurring) (such restrictions "must be analyzed with great solicitude and care"); J.S. App. 25a. Statutory burdens on First Amendment rights "must be justified by a compelling state interest," *MCFL*, 479 U.S. at 256, and "narrowly tailored to serve" that interest, *McIntyre*, 514 U.S. at 347. This Court has identified a compelling government interest in restricting corporate expenditures on electoral campaigns to prevent "corruption or the appearance of corruption." *Austin*, 494 U.S. at 658; *see McConnell*, 540 U.S. at 205, 206 n.88; *FEC v. Beaumont*, 539 U.S. 146, 154 (2003); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *Bellotti*, 435 U.S. at 788-89.[17]

But this Court's cases also have recognized that the "unusually important interests underl[ying] the regulation of corporations' *campaign-related* speech" do not apply to legislative advocacy. *McConnell*, 540 U.S. at 206 n.88 (emphasis added). *Bellotti* unequivocally establishes the point. There, the Court held that "[t]he risk of corruption perceived in cases involving candidate elections *simply is not present in a popular vote on a public issue*." 435 U.S. at 790 (citations omitted; emphasis added).[18] The

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[17] In the electoral context, the Court also has recognized a government interest in restricting corporate and union giving and spending on political campaigns to "protect[] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Beaumont*, 539 U.S. at 154 (internal quotation marks omitted). That interest does not apply to organizations, such as WRTL and NAR, whose mission involves advocating legislative changes that would benefit the organization and its members. *See MCFL*, 479 U.S. at 260-61.

[18] *See Austin*, 494 U.S. at 677 (Brennan, J., concurring) (recognizing that, while the government can regulate corporate speech on candidate elections, "a State cannot prohibit corporations from making many other types of political expenditures"); *id.* at 678 (Stevens, J., concur-

speech at issue there – corporate-sponsored advertisements meant to influence a vote on a referendum proposal – cannot meaningfully be distinguished from the legislative advocacy at issue here.

In upholding § 203 against a facial challenge in *McConnell*, this Court identified no compelling government interest justifying the application of BCRA § 203 to true legislative advocacy – advertisements that are not "the functional equivalent of express advocacy." 540 U.S. at 206. Indeed, the Congress that considered BCRA,[19] and the President who signed it,[20] showed by their statements that they perceived no compelling government interest in regulating true legislative advertisements. Congress empowered the FEC to exempt genuine issue ads, *see* 2

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ring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other."); *see also National Right to Work Comm.*, 459 U.S. at 210 n.7 (interpreting *Bellotti* as recognizing that, "in elections of candidates to public office, *unlike in referenda on issues of general public interest*, there may well be a threat of real or apparent corruption") (emphasis added); *Consolidated Edison*, 447 U.S. at 535 (invalidating a regulation that "limited the means by which [a corporation could] participate in the public debate on . . . controversial issues of national interest and importance").

[19] *See* 147 Cong. Rec. S2845-46 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) (repeatedly referencing "sham issue ads" and stating that "I am not talking about ads . . . that are legitimately trying to influence policy debates . . . I am not talking about legitimate policy ads"); *id.* at S2812-13 (daily ed. Mar. 23, 2001) (statement of Sen. Jeffords) (BCRA's prohibition on electioneering communications not intended to "affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes" or "to urge their members and the public through grassroots communications to contact their lawmakers on upcoming issues or votes"; "[a]ny organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers").

[20] *See* Statement by President George W. Bush Upon Signing H.R. 2356, 38 Weekly Comp. Pres. Doc. 517 (Mar. 27, 2002) ("I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election."), *reprinted in* 2002 U.S.C.C.A.N. 125.

U.S.C. § 434(f)(3)(B)(iv), but the FEC has refused to so,[21] even though several of the intervenors in this case recommended an exemption that would have shielded some legislative advocacy from regulation.[22] Because no compelling state interest justifies the application of BCRA to WRTL's advertisements, the district court correctly held that the statute is unconstitutional as applied to them. *See MCFL*, 479 U.S. at 263; *Bellotti*, 435 U.S. at 795.

B. NAR's Advertisements Are Not The Functional Equivalent Of Express Advocacy

Neither the FEC nor the intervenors contend that BCRA § 203's application to WRTL's advertisements is not subject to strict scrutiny. Rather, they argue that Congress's interest in regulating electoral advocacy justifies prohibiting WRTL's planned advertisements. Regardless of how the Court rules on WRLT's advertisements, NAR's advertisements reproduced above present tangible examples of genuine legislative communications under any reasonable test.

Notably, with one insignificant exception, NAR's communications meet the stringent test articulated by several of the intervenors in their comments to the FEC on its proposed exemption for grass-roots lobbying. Those intervenors have suggested that a communication would be

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[21] *See Electioneering Communications*, 67 Fed. Reg. 65,190, 65,201-02 (Oct. 23, 2002) (rejecting proposed exemptions for true legislative communications because, "[a]lthough some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner").

[22] *See* Letter from Senator John McCain *et al.* to Mai Dinh, FEC, at 10-11 (Aug. 23, 2002) ("McCain Letter") (proposing an exemption "allow[ing] individuals and entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows"), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

"plainly and unquestionably . . . wholly unrelated to an election" if it satisfied the following criteria: (i) the ad concerns only a legislative or executive branch matter; (ii) the ad's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; (iii) the ad refers to the candidate only by the use of a phrase like "your congressman" or "your senator" and does not include the name or likeness of the candidate; (iv) the ad does not reference a political party; (v) the ad does not reference the candidate's record or position on any issue, the candidate's qualifications or fitness for office, or the candidate's election or candidacy. McCain Letter at 10 (internal quotation marks omitted).

Applying the McCain test, NAR's communications concerned only a legislative matter – a pending bill to prevent national banking conglomerates from entering and dominating the real-estate business, to the exclusion of small, independent real-estate brokers. The only references to the two congressmen were statements asking them to support that bill and urging viewers to contact them and tell them to support the bill. The advertisements did not reference a political party, the congressmen's records or positions on any issue, the congressmen's qualifications or fitness for office, or their election or candidacy. But for the fact that NAR's ads mention the congressmen by name, they would meet every criterion of the McCain test. But that fact alone cannot transform the communications into the functional equivalent of express advocacy. To be sure, whether the ad uses the candidate's name may be relevant to whether it has an electoral nature, but basic common sense dictates that use of a name in an advertisement cannot be dispositive.

C. Legislative Advocates Do Not Bear The Burden Of Establishing A Legal Test

The FEC also asserts that WRTL cannot succeed on its as-applied challenge unless it articulates a legal test that

identifies advertisements that are different in kind from electoral advocacy and that is neither unduly complex nor susceptible of evasion. FEC Br. 27. The FEC further asserts that the class of issue advertisements to which BCRA § 203 cannot constitutionally be applied should be defined without reference to the text or content of the advertisements. *Id.* at 43. Intervenors, for their part, apparently recognize no circumstances under which BCRA § 203 cannot constitutionally be applied to legislative advocacy. *See* Appellants Br. 40 n.27 (acknowledging possible exceptions only for commercial advertisements that incidentally mention the name of a candidate).

NAR submits that the FEC's legal-test requirement has no basis in this Court's cases and should be rejected. Entities like WRTL (and possibly, in the future, NAR) should not be required to establish an iron-clad legal test to govern future cases as a condition for obtaining relief from an unconstitutional statute. If no compelling government interest supports the application of BCRA § 203 to particular speech, then the statute is unconstitutional as applied to that speech.

Contrary to the FEC's contention, this Court's decision in *MCFL* does not support the FEC's legal-test requirement. There, the Court held that the prohibition on corporate expenditures on express candidate advocacy was unconstitutional as applied to a nonprofit advocacy corporation (MCFL) that did not accept donations from business enterprises. *See MCFL*, 479 U.S. at 263-64. This Court concluded that corporations like MCFL could engage in electoral advocacy without creating the problems at which the prohibition on corporate electoral advocacy was targeted. While (presumably to provide guidance for future cases) the Court detailed the three features of MCFL that it found dispositive, it did not impose on MCFL the burden of establishing an airtight and administrable legal test to prevail on its as-applied challenge. *See id.* Indeed, this Court rejected the contention that "the desire for a bright-line rule," which would be easily

administrable, "justif[ied] any infringement on First Amendment freedom." *Id.* at 263.

Furthermore, *MCFL* is different from this case because MCFL there sought an exemption to engage in *express candidate advocacy*. In that context, it made sense for the Court to articulate how MCFL differed in "kind" from the ordinary business corporation, which Congress had a compelling interest in barring from spending on electoral campaigns. *Id.* Here, by contrast, the compelling government interest in restricting corporate electoral spending does not apply to WRTL's planned communications because NAR (and, indeed, the district court) does not view WRTL as attempting to engage in electoral advocacy. Here, too, there is a difference in "kind," but the difference is that genuine legislative advocacy is different in its essential message from electoral advocacy. Contrary to the FEC's contention, however, whether a particular communication is electoral advocacy can be determined only by examining the text of the communication at issue.

Finally, the *MCFL* Court recognized that as-applied challenges can succeed even when "the class of organizations affected by [the Court's] holding [may] be small." *Id.* at 264. Similarly, the FEC cannot diminish the significance of the First Amendment rights at stake in this case by asserting that the class of true legislative ads captured by the definition of electioneering communication is small. As the Court in *MCFL* concluded:

> Freedom of speech plays a fundamental role in a democracy . . . . Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction.

Id. at 264-65.

D. The Court Should Limit Any Examination Of Context

Under the circumstances, even if the McCain test were to state properly the law, one would expect that NAR should feel somewhat confident that it could prevail in an as-applied challenge, considering that its advertisements concern only a pending legislative matter and contain nothing suggesting an electoral intent or effect. But in reality NAR and others like it can take little comfort because the FEC and the intervenors here assert that the FEC can mine the ads' "context" to discover some purported indicia of electioneering intent or effect. As the district court explained, that approach disserves First Amendment values and is impractical. *See* J.S. App. 19a-22a.

Furthermore, a search for contextual evidence of electioneering intent or effect ignores the approach that this Court took in *McConnell*. There, the Court found it unnecessary to look to context in giving examples of sham issue ads that were the functional equivalent of express advocacy. *See* 540 U.S. at 126-27, 193 n.78. And a focus on the text of the advertisement itself comports with the test put forth by several intervenors in their submission to the FEC. *See* McCain Letter at 10.

Particularly pernicious is the FEC's and the intervenors' focus on statements that WRTL (or its PAC) made in other contexts. *See* FEC Br. 47-48; Appellants Br. 23-24. Indeed, the intervenors would go even further, considering communications made by individuals and groups *other than* WRTL or its PAC. *See* Appellants Br. 25-27. The consequence of that focus is to strip an entity that has made negative statements about an incumbent in the past (or that is considered to be associated with those who have) of its First Amendment right to engage in pre-election grass-roots lobbying of that incumbent on any legislative issue. While it is easy to understand why an incumbent legislator interested in preserving power would

favor such a rule, that does not make it comport with the First Amendment.

E. Print Media May Not Be An Available Alternative

Both the FEC and the intervenors assert that BCRA § 203 does not impose a particularly severe burden on First Amendment activities in part because affected parties like NAR have the option of communicating through non-broadcast media. *See* FEC Br. 36; Appellants Br. 31 n.20. But they fail to mention that the FEC recently has employed an expansive interpretation of the prohibition on expenditures for express advocacy – a prohibition that applies to all media. Specifically, the FEC has promulgated a broad regulatory definition of express advocacy, and it has signaled a willingness to apply that definition, using a wide-ranging contextual analysis, to prohibit communications that neither contain actual express advocacy nor meet the definition of electioneering communication.

Last year, the FEC found probable cause to believe that the Sierra Club had violated 2 U.S.C. § 441b(a), which (as interpreted by this Court in *MCFL*, 479 U.S. at 249) prohibits corporations from making independent expenditures for express candidate advocacy.[23] It based that conclusion in part on the following definition of express advocacy contained in an FEC regulation:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

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[23] *See* Letter from Lawrence H. Norton, General Counsel, FEC, to B. Holly Schadler, Esq., and Michael B. Trister, Esq. (July 21, 2006), *available at* http://eqs.nictusa.com/eqsdocs/00005810.pdf.

> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

In contending that the communication at issue there, a voter guide, constituted express advocacy under that regulation, the FEC General Counsel's Office gleaned that the "electoral portion" was "suggestive" based on an examination of some of the same "contextual" facts that it relies on here – namely, that the guide was issued in the pre-election period; that it mentioned clearly identified candidates for federal office; and "the Sierra Club's well-known stance promoting environmental regulation." First General Counsel's Report at 11 (Aug. 10, 2005) ("FEC Report"), *available at* http://eqs.sdrdc.com/eqsdocs/00005805.pdf. Thus, the FEC showed a willingness to preclude pre-election speech containing candidates' names even when that speech does not fall within the definition of electioneering communication.

Even worse, the Office cited *McConnell* as support for its expansive interpretation of the express-advocacy requirement. *See id.* at 16. The Office observed that *McConnell* had held that the express-advocacy standard was not a constitutional requirement and had sustained the "promote, support, attack, or oppose" standard against a vagueness challenge. *See id.* at 14-16. But this Court imposed the express-advocacy requirement because the statute as written was unduly vague. *See MCFL*, 479 U.S. at 249; *Buckley*, 424 U.S. at 42-44, 76-80. Nothing in *McConnell*'s holding that the express-advocacy standard does not articulate a constitutional line authorized the FEC to substitute a vague regulatory definition for this Court's narrowing construction of a vague statute. Moreover, the FEC's regulatory standard is a far cry from the relatively straightforward "promote, support, attack, or oppose" test sustained by this Court. The regulation applies when, considering whatever contextual factors the

FEC deems relevant, "*[t]he electoral portion of the communication*" (whatever that portion might be) "is unmistakable, unambiguous, and *suggestive* of only one meaning; and . . . [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages *some other kind of action*" (whatever that action might be). 11 C.F.R. § 100.22(b) (emphases added).

The FEC General Counsel's Office also noted that *McConnell* had upheld the definition of electioneering communication against an overbreadth challenge and had "acknowledged that the definition of electioneering communication would cover some ads which have no electioneering purpose." FEC Report at 16. The Office thus signaled it believed itself to be empowered to regulate speech that is not express advocacy, and that may not even have an "electioneering purpose."

The Sierra Club case, which was the FEC's first use of § 100.22(b) since *McConnell*,[24] leaves speakers with little reason to credit the FEC's and the intervenors' assertions that, regardless of the outcome of this case, they will continue to be able to conduct legislative advocacy in the preelection period through print media. Indeed, to the extent the FEC is able to apply § 100.22(b) in this sweepingly broad fashion to corporate-sponsored ads that are not "electioneering communications" under BCRA § 203, there is little reason to think that the FEC will not similarly do so with respect to ads like those of WRTL at issue here, and thereby functionally eviscerate the constitutional protection to which true legislative advocacy is entitled.[25]

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[24] *See* Third General Counsel's Report at 3 (Nov. 3, 2006), *available at* http://eqs.sdrdc.com/eqsdocs/00005811.pdf. The case was settled after the FEC's finding of probable cause. *See* Letter from Susan L. Lebeaux, Assistant General Counsel, FEC, to B. Holly Schadler, Esq., and Michael B. Trister, Esq. (Nov. 15, 2006), *available at* http://eqs.nictusa.com/eqsdocs/00005815.pdf.

[25] The particular communication at issue in the Sierra Club case may have been fairly characterized as express advocacy based on an

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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examination of the ad's text only. *See* FEC Report at 9-10. Nevertheless, the FEC's suggestion that *McConnell* authorizes it to use a vague regulatory standard to prohibit communications that may "have no electioneering purpose," *id.* at 16, is troubling and likely to chill constitutionally protected speech.