Nos. 06-969 and 06-970

In The Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

vs.

WISCONSIN RIGHT TO LIFE, INC., ET AL.,

Appellees.

SENATOR JOHN McCAIN, ET AL.,

Intervenor-Appellants,

vs.

WISCONSIN RIGHT TO LIFE, INC., ET AL.,

Appellees.

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

BRIEF AMICI CURIAE OF RICHARD BRIFFAULT AND RICHARD L. HASEN IN SUPPORT OF APPELLANT AND INTERVENOR-APPELLANTS

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INTEREST OF THE *AMICI CURIAE*

The individual *amici* are law professors who have devoted much of their careers to the study of election law, especially campaign finance law. Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, has written 17 articles on campaign finance law, some of which the Court has cited in its campaign finance cases. *See*, *e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting). Richard L. Hasen, the William H. Hannon Distinguished Professor of Law at Loyola Law School, has written 18 articles (or parts of books) on campaign finance law, is the co-author of an election law casebook, *Election Law – Cases and Materials* (3d ed. 2004) (with Professor Daniel Hays Lowenstein), and the co-editor of the peer-reviewed quarterly publication, *Election Law Journal*. *Amici*'s affiliations are listed for identification purposes only.

With the consent of the parties, whose letters of consent have been filed with the Clerk of the Court, *amici* respectfully submit this brief in support of the Appellant Federal Election Commission and the congressional Intervenor-Appellants.[1] The brief suggests a test for as-applied challenges to section 203 of the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. § 441b(b)(2), that both protects First Amendment rights of speech and association and preserves the integrity of the election process through

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

reasonable limitations on corporate spending affecting federal elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves yet another attack on the 60-year-old requirement that corporations use separate segregated funds (or PACs), rather than treasury funds, to spend money in connection with federal elections. The Court has repeatedly addressed the PAC requirement, and has sustained its constitutionality, most recently three Terms ago in *McConnell v. FEC*, 540 U.S. 93, 203-11 (2003). The Court has done so not because election-related speech is entitled to less constitutional protection than other forms of political speech, but because, in the context of the election of public officials, legislatures and the Court have repeatedly recognized compelling justifications for regulations that might not be present, or as compelling, in other settings.

At the same time, the Court has recognized that the Constitution sometimes requires the creation of as-applied exemptions from otherwise permissible campaign finance regulations. As-applied exemptions are appropriate, the Court has explained, when the burden on speech in a particular application significantly outweighs any effect the regulation may have in promoting electoral integrity and other compelling legislative objectives – especially where a particular application of the law does not raise any of the concerns justifying regulation.

Thus, for example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Brown v. Socialist Workers '74 Campaign*

Comm., 459 U.S. 87 (1982), the Court created and applied an exemption from general – and constitutionally sound – campaign disclosure requirements for minor political parties that can demonstrate that disclosure of contributors' names would have an unusually severe chilling effect on the parties' and contributors' First Amendment activities. To similar effect, in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 260-61 (1986) (*MCFL*), the Court held that the First Amendment requires an exemption for certain nonprofit corporations from a corporate PAC requirement similar to that at issue here, because applying the requirement to such nonprofit corporations would not further the government interests underlying the requirement.

The Court should adopt a similar approach to as-applied exemptions in this case. The regulation in question here is a 2002 enactment, section 203 of the Bipartisan Campaign Reform Act of 2002, which was aimed at ending widespread evasions of the corporate PAC requirement. This case presents the question whether and under what circumstances the Constitution requires *another* exemption to the PAC requirement for corporations, beyond the exemption recognized in *MCFL* and in BCRA itself in section 204. We respectfully submit that any as-applied exemption ought to build on the principles for identifying such exemptions that the Court developed in *Buckley*, *Brown*, and *MCFL*.

The district court below failed to follow the Court's guidance in these cases. It did not even attempt to tailor its proposed as-applied exemption to those advertisements that are unlikely to implicate the compelling government interests underlying section 203. Congress found, and the Court has agreed, that broadcast ads that name federal

candidates in the immediate pre-election period almost invariably have an impact on voters' choices in the election. Yet the district court would exempt many of those ads from regulation. If upheld by the Court, the district court's test would thwart Congress's objectives and return us to the days immediately preceding BCRA, when corporations easily evaded the PAC requirement.

We believe that a more appropriate test would exempt only those communications not implicating the governmental interests underlying the corporate PAC requirement. We propose that a corporation should be entitled to an as-applied exemption from the PAC requirement for electioneering communications *only when it proves that an identifiable type of communication is unlikely to have any appreciable effect on voters' choices in the election.* Following the approach Congress took in BCRA and the Court's analysis in *McConnell*, whether the corporation is entitled to an as-applied exemption for an ad must be based on a consideration of the context as well as the content of a broadcast advertisement.

The Court's task in setting the balance between the proper scope of election regulation of corporations and the protection of corporate speech is a difficult one. Both Congress and the Court struggled with it, and BCRA and *McConnell* have struck a workable and proper balance. Any as-applied exemptions should not subvert that balance.

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ARGUMENT

I.

IN ITS CAMPAIGN FINANCE CASES THE COURT HAS CRAFTED AS-APPLIED EXEMPTIONS ONLY FOR ACTIVITY NOT IMPLICATING COMPELLING GOVERNMENTAL INTERESTS AND WHEN REGULATIONS IMPOSE UNIQUELY SERIOUS BURDENS ON FIRST AMENDMENT RIGHTS

The Court has repeatedly sustained regulations of campaign finance activity where such regulations are supported by compelling governmental interests specific to the election setting. *See*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding disclosure requirements, campaign contribution limits, and other provisions of Federal Election Campaign Act); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (*Austin*) (upholding requirement that corporations engage in election-related advocacy through separate segregated funds); *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding "soft money" and "electioneering communications" provisions of BCRA). The Court has done so not because election-related speech is entitled to less constitutional protection than other forms of political speech. To the contrary, speech and associational activity that supports or opposes candidates is entitled to the greatest constitutional protection. The election of public officials, however, provides compelling justifications for regulation that are not necessarily present in other settings.

For example, the Court has found that maintaining an informed electorate justifies laws requiring disclosure of information concerning contributions to and expenditures by candidates, political parties, and political committees that support or oppose candidates. *Buckley*, 424 U.S. at 66-67. So, too, the Court has repeatedly held that preventing

the corruption or the appearance of corruption of elected officials justifies contribution limitations. *E.g.*, *id*. at 29; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). Again, this is not because large contributions for political activities are not constitutionally protected, but because they raise unique dangers to the integrity of elections.

In upholding reasonable campaign finance regulations, however, the Court has also indicated that the Constitution sometimes requires the creation of as-applied exemptions from these regulations. The Court has carved out discrete as-applied exemptions either when substantial evidence demonstrates that a uniquely serious burden on First Amendment activities significantly outweighs any effect the regulation may have in promoting electoral integrity in a particular set of cases, or when the conduct of particular actors does not raise any of the concerns justifying regulation.

Thus, in *Buckley* and in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court created and applied an exemption from general – and constitutionally sound – campaign disclosure requirements: disclosure cannot be required when a minor political party shows its contributors, if identified, will be subject to "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74; *Brown*, 459 U.S. at 93. In such a case, not only is there a unique First Amendment harm to the exempted parties; in addition, the required disclosure would do little to advance the voter information and anti-corruption goals that such disclosure ordinarily serves. *See Buckley*, 424 U.S. at 70 ("the governmental interest in disclosure is diminished

when the contribution in question is made to a minor party with little chance of winning an election").[2] When the limited regulatory benefit of applying disclosure to minor party candidates is combined with the demonstration that a particular minor party and its members have been subject to harassment, the First Amendment requires an as-applied exemption to the disclosure requirement.

The Court has used a similar mode of analysis in defining an exemption to requirements (such as that at issue here, in BCRA section 203) that corporations spend money on election-related activities only through "separate segregated funds," or PACs: the exemption is closely tailored to the absence in certain cases of the state interests justifying the regulation.

The Court has recognized that such PAC requirements are generally constitutional because they serve two compelling state interests.[3] *First*, such requirements eliminate

[2] The Court in *Buckley* explained that "[a]s minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent." 424 U.S. at 70. Moreover, the concern that large donors may wield undue influence over officeholders is "reduced where contributions to a minor party or an independent candidate are concerned, for it is less likely that the candidate will be victorious." *Id.*; *see also Brown*, 459 U.S. at 96 n.11 ("In the case of minor parties, . . . their limited financial resources serve as a built-in expenditure ceiling which minimizes the likelihood that they will expend substantial amounts of money to finance improper campaign activities. . . . We cannot agree . . . that minor parties are as likely as major parties to make significant expenditures in funding dirty tricks or other improper campaign activities. . . . Moreover, the expenditure by minor parties of even a substantial portion of their limited funds on illegal activities would be unlikely to have a substantial impact.").

[3] The general constitutionality of a PAC requirement for corporate election-related spending was not litigated below and thus is not at

(Continued on following page)

a type of "distortion caused by corporate spending" in elections. *Austin*, 494 U.S. at 660. The distortion is the result of "state-created advantages" that permit corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Id.* at 659 (quoting *MCFL*, 479 U.S. at 257).[4] "As the Court explained in *MCFL*, the political advantage of corporations is unfair because '[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.'" *Id.*; *see also McConnell*, 540 U.S. at 205 ("We have repeatedly sustained 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.'" (quoting *Austin*,

issue here. *See Randall v. Sorrell*, 126 S.Ct. 2479, 2500-01 (2006) (Alito, J., concurring) (refusing to reconsider campaign finance precedent in *Buckley*, 424 U.S. 1, because issue was not properly before the Court). The only question in this case is whether Wisconsin Right to Life, Inc. (WRTL) is entitled to an as-applied exemption from the requirement for three advertisements it sought to broadcast with general treasury funds near the 2004 elections.

[4] "State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." *MCFL*, 479 U.S. at 258-59.

494 U.S. at 660)); *MCFL*, 479 U.S. at 257-59; *cf. FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982).

Second, the PAC requirement protects dissenting shareholders of corporations who oppose the use of their money to affect political campaigns. *See McConnell*, 540 U.S. at 204 (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)); *Austin*, 494 U.S. at 673-75 (Brennan, J., concurring); *see also id.* at 665-66 (majority opinion); *MCFL*, 479 U.S. at 260; *cf. FEC v. Beaumont*, 539 U.S. at 154-55.[5]

The Court in *MCFL* held that the First Amendment requires an exemption from the longstanding PAC requirement for a certain category of nonprofit corporations whose electoral expenditures do not implicate these two state interests – namely, those that (1) rely solely on donations from ideological supporters rather than from commercial activities; (2) have no shareholders; and (3) do not take money from business corporations. *MCFL*, 479

[5] These two rationales have been the dual justifications for Congress's restrictions on corporate election activity going all the way back to the Tillman Act of 1907. *See United States v. CIO*, 335 U.S. 106, 113 (1948). Since its inception in 1947, the federal PAC requirement has also applied to labor unions. As the Court recognized in *Austin*, there are "crucial differences between unions and corporations," 494 U.S. at 666, such that the government interests that justify the PAC requirements as to corporations do not necessarily apply in the same manner to unions, *see id.* at 665-66 (elaborating those differences). In *McConnell*, the Court held that the PAC requirement was constitutional as applied to unions, albeit without providing any rationale for treating corporations and unions alike. *See* Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 56-57 (2004). Because of the additional constitutional questions that might arise with respect to application of the PAC requirement to unions, the discussion in this brief is limited solely to election-related spending by corporations.

U.S. at 259-65; *see also McConnell*, 540 U.S. at 210-11 (reiterating criteria in greater detail). In crafting these criteria, the Court ensured that the exemption would be carefully tailored in accord with the underlying justifications for the PAC requirement. Requiring such "*MCFL* corporations" to use PACs for political expenditures would burden their First Amendment activities *without* advancing the state interests that support the general regulation as applied to other corporations. With respect to such a corporation, "the concerns underlying the regulation of corporate political activity are simply absent. . . . It is not the case . . . that [the corporation] merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all." *MCFL*, 479 U.S. at 263.

The Court's treatment of as-applied exceptions in such cases should guide its analysis here, as well, where it is faced with a virtually indistinguishable corporate PAC requirement.

II.

THE COURT SHOULD CRAFT ANY AS-APPLIED EXEMPTION WITH REGARD TO THE COMPELLING INTERESTS CONGRESS SOUGHT TO PROTECT IN BCRA SECTION 203

Section 203 of BCRA is the latest amendment to the very well-established, decades-old regulation on *corporate* expenditures that the Court has reviewed in numerous cases. Congress has regulated corporate influence on federal elections for 100 years, since the Tillman Act of 1907, Pub. L. 59-36, 34 Stat. 864. *See Beaumont*, 539 U.S. at 152-53. Since 1907, "there has been continual

congressional attention to corporate political activity." *Id.* at 153. And for fully 60 years, since the Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 304, 61 Stat. 159-160, Congress has required that corporate *expenditures* in connection with federal elections must come from funds raised for that purpose, rather than from corporate treasury funds derived from shareholders. *See generally Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) (construing the 1947 and 1972 versions of the PAC requirement); *see also id.* at 402-14 (canvassing the history of the regulation); *United States v. International Union of United Automobile Workers (UAW)*, 352 U.S. 567, 570-87 (1957); *MCFL*, 479 U.S. at 246-48.

In 1986, the Court construed the PAC requirement to apply only to expenditures for express advocacy (*i.e.*, ads specifically stating that viewers or listeners should vote for or against a particular candidate), so as to avoid a concern that the coverage of the law was too imprecise. *MCFL*, 479 U.S. at 248-49 (referring to *Buckley*'s vagueness concerns in an analogous context); *see Buckley*, 424 U.S. at 40-44. Within ten years, corporations had begun to exploit this limitation by spending significant sums of treasury funds for so-called "issue ads," that is, ads not expressly advocating a vote for or against a candidate, but instead criticizing or supporting a candidate's position on an issue and telling listeners to call the candidate about the issue. *McConnell*, 540 U.S. at 127-28 & nn.20-21; *see also* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEXAS L. REV. 1751, 1755-62 (1999) (setting forth ease by which corporations and others evaded FECA regulation).

Congress's response to this widespread evasion of the restrictions on corporate campaign spending was section 203 of BCRA. It applies the PAC requirement to "electioneering communications." Doing so eliminates the vagueness concerns that resulted in the Court's narrowing construction in *MCFL*, and as a practical matter puts corporations in much the same position they were in for several decades after Congress enacted its initial limitation on corporate expenditures in 1947. Under section 203 – and the definition of "electioneering communications" found in BCRA section 201 – the corporate PAC requirement now extends to expenditures for broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office, that are aired within 60 days before a general election or 30 days before a primary election, and that are aired to the candidate's constituency. 2 U.S.C. § 434(f)(3). Congress determined that by reason of their content, medium, timing, and targeting, such ads are "functionally identical in important respects" to express campaign advocacy even though they eschew the "magic words" of express advocacy, such as "Elect John Smith." *McConnell*, 540 U.S. at 126. In *McConnell*, the Court agreed, upholding the extension of the longstanding corporate PAC requirement to electioneering communications as defined by Congress. *Id.* at 203-09.

In so doing, the Court gave great weight to political realities and focused on the electoral significance of the ads' context – not merely to their words:

> [T]he unmistakable lesson from the record on this litigation, as all three judges in the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless . . . Not

> only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And *although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words*, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

Id. at 193-94 (emphasis added); *see also id.* at 206.

The Court in *McConnell* concluded that BCRA's electioneering communication definition was not vague, *id*. at 194, and that the corporate PAC requirement for such electioneering communications is neither unconstitutionally underinclusive, *id.* at 207-08, nor unconstitutionally overbroad, *id.* at 205-07. The Court noted that the vast majority of ads that fall within the statutory definition are "clearly" election-related. *Id.* at 206. Moreover, the Court noted that corporations would not be unduly burdened by the regulation because they could continue to pay for political ads either by avoiding any specific reference to federal candidates, or "in doubtful cases by paying for the ad from a segregated fund," that is, a PAC. *Id*.

We respectfully submit that in determining whether any as-applied exemption to this rule is constitutionally required, the Court ought to build on the principles that it developed in *Buckley*, *Brown*, and *MCFL*.

In crafting as-applied exemptions in those cases, the Court identified discrete circumstances in which the constitutional balance between the burden on First

Amendment rights and the advancement of the state's interests was significantly different from the usual run of cases in which the regulation had already been deemed constitutional. In particular, the Court considered whether there were situations in which (i) the burden on First Amendment rights was greater than in the standard cases covered by the regulation; and (ii) the usual justifications for imposing that burden did not apply, *i.e.*, where the state interests are not implicated.

In this case – unlike in *Brown*, 459 U.S. 87; *see supra* pp. 6-7 – there are no circumstances in which BCRA's PAC requirement imposes *greater* burdens on First Amendment rights than the burdens imposed in the vast majority of concededly constitutional applications. In particular, application of section 203 to "electioneering communications" that are purportedly related to legislative initiatives does not impinge on corporations' protected speech any more than does the application of the PAC requirement to express advocacy itself. As the Court explained in *McConnell*, "the speech involved in so-called issue advocacy" is not "any more core political speech than are words of express advocacy." 540 U.S. at 205.[6]

[6] "After all," the Court explained, " 'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,' " and " '[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.' " *McConnell*, 540 U.S. at 205 (citations omitted). On this particular point, the entire Court in *McConnell* appeared to be in agreement. *See id.* at 328 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Court's decision in *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is not to the contrary. In *Bellotti*, the state had foreclosed all means for corporations to engage in communications on

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Because application of section 203 to speech that is arguably more focused on legislative initiatives than on electoral choices does not raise *greater* First Amendment concerns than the core applications of the law that the Court has already approved, if there are to be any as-applied exemptions from that statute, it would only be under circumstances in which "the interests that justify the regulation of campaign speech might not apply." *Id.* at 206 n.88; *see also MCFL*, 479 U.S. at 263 ("the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL").

As noted above, *supra* pp. 7-9, Congress and the Court have identified at least two such interests – prevention of the "distortion caused by corporate spending" when a corporation uses funds secured by virtue of "state-created advantages," and protection of the prerogatives of dissenting shareholders – that are sufficiently compelling to justify the basic corporate PAC requirement, even as applied to core political speech.

The Court and Congress have identified one category of cases in which these two compelling governmental interests are simply not implicated – namely, application of the PAC requirement to so-called "*MCFL*-exempt" nonprofit corporations. *See McConnell*, 540 U.S. at 210-11 ("We presume that the legislators who drafted" BCRA

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certain referendum proposals. Under BCRA section 203, by contrast, corporations may engage in electioneering communications in a number of ways, including through a PAC that they may control. *See MCFL*, 479 U.S. at 259 n.12 ("The [corporate PAC requirement] imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [*Bellotti*].").

section 204, 2 U.S.C. § 441b(c)(6)(A), extending PAC requirement to certain nonprofit corporations "were fully aware that the provision could not validly apply to *MCFL*-type entities.").

The Court has explained in *MCFL* and *McConnell* why the two state interests that ordinarily justify the corporate PAC requirement are inapposite to such nonprofit corporations. First, such groups do not use aggregations of wealth accumulated by virtue of the corporate form to espouse political advocacy with no correlation to the public's support for such ideas. Second, the shareholder-protection interest is not implicated, because "[i]ndividuals who contribute to [such a nonprofit corporation] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *MCFL*, 479 U.S. at 260-61; *see generally McConnell*, 540 U.S. at 210-11.

Wisconsin Right To Life, Inc. (WRTL) presumably satisfies two of the three criteria for an *MCFL* exemption: It "'was formed for the express purpose of promoting political ideas, and cannot engage in business activities,'" and "'it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings.'" *McConnell*, 540 U.S. at 210 (quoting *MCFL*, 479 U.S. at 264). Therefore, WRTL's use of its treasury funds, like that of most nonprofit advocacy corporations, would not implicate the state interests underlying BCRA section 203. WRTL would be free to use its treasury funds for both issue-oriented *and* direct electoral expression, but for the fact that it does not satisfy the final *MCFL* criterion: WRTL does *not* abide by a policy of declining to accept contributions from for-profit corporations. *See* Defendant Federal Election Commission's Supplemental Brief in Support of Motion for

Summary Judgment, *Wis. Right to Life, Inc. v. FEC*, No. 1:04cv01260, at 12 (D.D.C. Sept. 11, 2006), *available at*: http://electionlawblog.org/archives/fec-wrtl-supp%20msj.pdf (WRTL took contributions of up to $300,000 (including individual contributions of $50,000 and $130,000) from for-profit corporations).

This third requirement "'prevents [nonprofit] corporations from serving as conduits for the type of [otherwise prohibited] direct [corporate] spending that creates a threat to the political marketplace.'" *McConnell*, 540 U.S. at 211 (quoting *MCFL*, 479 U.S. at 264). This point is worth emphasis: The *only* reason section 203 applies to WRTL at all – as to any of its advertising – is because WRTL has opted to accept large amounts of money from the for-profit corporations that are the specific target of the section 203 PAC requirement. If WRTL would simply decline corporate funds to pay for political advocacy, then section 203 and FECA more broadly would not prevent it from using its treasury funds for *any* sort of advertising, including express advocacy.[7] Because it has chosen not to take advantage of the *MCFL* exemption, the burden of establishing eligibility for *yet another* type of as-applied exemption rests upon WRTL. *See Buckley*, 424 U.S. at 72-74; *Brown*, 459 U.S. at 93-94.

[7] It is conceivable that some other nonprofit corporation that accepts very little money from for-profit corporations could demonstrate that in such a case the "conduit" concern the Court has recognized is inapposite because of the trivial amount of corporate funds received. If such a showing were made, then the Court would have to consider whether a "de minimis" exception to the final criterion of the *MCFL* exemption would be appropriate, and manageable. But no such proof has been offered here, presumably because WRTL accepts a great deal of money from for-profit corporations.

Instead of identifying a category of *speakers* that do not implicate the state interests underlying section 203 (as in *MCFL*), WRTL argues that there is a category of *broadcast advertising* that falls within the plain terms of the BCRA definition of "electioneering communications" but that somehow does not implicate the interests underlying the PAC requirement. *See* Appellee's Response to Appellants' Jurisdictional Statements, at 4 (the Court in *McConnell* "'assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads'" (quoting *McConnell*, 540 U.S. at 206 n.88)).

In order for WRTL to meet its burden, it must demonstrate that there is a category of so-called corporate "electioneering communications" as defined by Congress as to which corporate aggregations of wealth do not have the sort of "corrosive and distorting" effects on federal elections that justify the PAC requirement in the first instance, and that do not implicate shareholders' interests in not having their funds be used to affect federal elections.

We submit, however, that advertisements taking the form of "electioneering communications" as defined by Congress will invariably implicate such concerns *except in the unusual situation where it is unlikely that such advertisements would have an appreciable effect on voters' choices in the relevant election*.

The Court's decision in *McConnell* makes clear that whether or not an ad implicates the relevant state interests is a question that necessarily requires careful consideration of the electoral setting – of whether the ad could have the effect of influencing voters' decisions. The Court held that "issue ads" falling within the statutory definition generally

are the "functional equivalent of express advocacy," *i.e.*, that the "justifications that adequately support the regulation of express advocacy" apply as well to "significant quantities of speech encompassed by the definition of electioneering communications." *McConnell*, 540 U.S. at 206.

Of course, Congress's definition of "electioneering communications" does not correspond *exactly* to every advertisement that implicates the interests supporting the corporate PAC requirement. That definition does not, for instance, cover *every* ad that is likely to influence voters' choices in a federal election. See *id.* at 208 (explaining that the definition is not fatally underinclusive even though "it leaves advertising 61 days in advance of an election entirely unregulated"). Just as the definition – like any bright-line rule – is slightly underinclusive relative to Congress's objectives, perhaps it is likewise a bit overinclusive: There might be *some* ads covered by the definition that would be highly unlikely to influence voters' choices.

Appellees' primary argument appears to be that an as-applied exemption should be recognized where a corporation's ostensible purpose in broadcasting the advertisement is to influence legislative debates rather than (or in addition to) federal elections. There is some reason to think such ostensible non-election-related purposes would be pretextual in a significant number of cases. *See McConnell*, 540 U.S. at 206. But more fundamentally, it simply is not the case that "electioneering communications" would not implicate Congress's compelling interests even if the corporation might *also* intend for the broadcasts to have an impact on legislative debates.

Indeed, a corporation's *intent* in broadcasting such ads should be immaterial to the as-applied-exemption question. The state interests underlying the PAC requirement – the effects of corporate wealth on federal elections by virtue of state-conferred prerogatives, and the protection of shareholders against the risk that their money will be used to influence federal elections in ways that they do not approve – are implicated whenever such ads influence voters' choices, regardless of whether the corporation might have (or be able to articulate as a pretext) additional objectives for broadcasting such ads.

Thus, corporate intent should not be the touchstone for an exemption. The burden for a corporation such as WRTL must be to identify an easily distinguishable set of advertisements that fall within the definition of "electioneering communications" but that do not have any appreciable chance of actually influencing voters' federal election choices – because it is only such advertisements that would not implicate the compelling government interests underlying the 60-year-old requirement that corporations should use segregated funds to influence federal elections.

III.

THE DISTRICT COURT'S AS-APPLIED TEST IS NOT TAILORED TO THE COMPELLING INTERESTS CONGRESS SOUGHT TO PROTECT IN BCRA AND WOULD LEAD TO THE RE-EMERGENCE OF "ISSUE ADS" PAID FOR WITH CORPORATE TREASURY FUNDS THAT HAVE AN IMPACT ON FEDERAL ELECTIONS

The district court did not attempt to identify a set of advertisements that are unlikely to implicate the compelling government interests underlying section 203. Rather, it would create an exemption for any advertisement that "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future," refers to the candidate's voting record, "exhorts the listener to . . . contact the candidate about the described issue," but then avoids references to an election or political party, and avoids expressly attacking or supporting a candidate. (Appendix to Jurisdictional Statement of Appellant Federal Election Commission (App. J.S.) 22a.)

This draws a roadmap for easily evading BCRA. Congress found, and the Court agreed in *McConnell*, that broadcast advertisements that name federal candidates in the immediate pre-election period have an impact on the election. Yet, the district court would exempt many of these ads from regulation. It is hard to imagine what campaign issue is not "currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future." (App. J.S. 22a.) Surely, it would be simple for a corporation to develop an election-period ad that takes an emphatic position on an issue, links a candidate

to the issue, criticizes the candidate's position on the issue (albeit not the candidate herself), and calls on voters to contact the candidate – all without referring to an election or party. As *McConnell* explained, "[l]ittle difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe,' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell*, 540 U.S. at 126-27.

The district court's standard would once again enable corporations to use treasury funds to sponsor election-period ads that condemn Jane Doe's record on a particular issue before exhorting voters to "call Jane Doe and tell her what you think." Truly, under the district court's approach, the exemption would eat up the rule, and the very kinds of advertising tactics that BCRA was enacted to prevent would flourish again.

The district court determined that the as-applied exemption has to be decided solely by looking at the face of the ad, without any context. As the court explained, it limited "its consideration to language within the four corners of the anti-filibuster ads." (App. J.S. 22a.) This is flatly inconsistent with Congress's judgment in BCRA, and with the Court's opinion in *McConnell*. The lower court's test for as-applied challenges to section 203 ignores political reality by adopting a "see no evil" approach, devoid of context, for determining whether corporate treasury funds are being spent on election-period advertisements that are likely to have an appreciable effect on voter choices in federal elections.

The compelling government interests that justify regulation of corporate spending are not concerned with

the content of ads *per se* but with the potential impact of the corporate treasury funds on elections and on the rights of shareholders not to have their funds diverted to election campaigns. The content of the ad is, of course, a critical factor in determining whether an ad raises the concerns that justify regulation. That is why section 203 provides that a reference to a "clearly identified candidate for Federal office" is a prerequisite for regulation of the ad as an "electioneering communication." But as Congress and the Court have recognized, content cannot be the only factor. As BCRA and *McConnell* together make clear, context – including the timing of the ad and the medium of communication – matters, too.

If the lower court's as-applied test is allowed to stand, the corporate "issue ads" that Congress intended to subject to the PAC requirement in BCRA would likely return in full force, thereby leading once again to an irrational regime that might treat ads with virtually identical electoral impact differently, depending upon the presence or absence of magic words (in this case, any word that directly "promotes, attacks, supports, or opposes" a named candidate (J.S. App. 22a)).

Moreover, although WRTL in this litigation requests an as-applied exemption only as to BCRA section 203's PAC requirement, if the lower court opinion is allowed to stand, corporations and others would be able to ask for as-applied exemptions to BCRA section *201*, which uses the same "electioneering communications" test to trigger a *disclosure* requirement for election-related communications over a certain spending threshold. *See* 2 U.S.C. § 434(f). A broad as-applied exemption thus could lead to a situation in which the "sponsors of [issue] ads [will once again use] misleading names to conceal their identity."

McConnell, 540 U.S. at 128. This is a result that would thwart Congress's strong interest in mandating *effective* campaign finance disclosure, an interest eight of the Court's Justices upheld in *McConnell*. *Id.* at 196 (upholding section 201); *id*. at 321 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring and dissenting) (voting with majority to uphold the disclosure rules of section 201 except as to its "advanced disclosure" requirement).

IV.

THE COURT SHOULD HOLD THAT CORPORATIONS SEEKING AN AS-APPLIED EXEMPTION FROM THE PAC REQUIREMENT FOR "ELECTIONEERING COMMUNICATIONS" MUST DEMONSTRATE THAT A PARTICULAR BROADCAST ADVERTISEMENT IS UNLIKELY TO HAVE ANY APPRECIABLE EFFECT ON VOTERS' CHOICES IN A FEDERAL ELECTION

The as-applied exemption the Court should craft is one tailored to the substantial governmental interests that, according to the Court, justify the regulation of corporate election-related activity. We propose the following test: a corporation should be entitled to an as-applied exemption to the PAC requirement for electioneering communications *only when it proves that the communication is unlikely to have any appreciable effect on voters' choices in the federal election.*

For example, suppose a corporation wishes to use its general treasury funds to broadcast a television advertisement during the pre-election period concerning a pending

legislative issue that mentions an incumbent member of Congress who is running unopposed for reelection.[8] In such circumstances, an as-applied exemption might be warranted because in an uncontested election the advertising can have no appreciable effect on voters' choices.[9]

To give another example, imagine a corporation that sells baseball cards. It pays for a television advertisement of its products that is broadcast close to an election and

[8] The Center for Responsive Politics reports that in 2006, candidates ran completely unopposed in 36 House races. Center for Responsive Politics, *2006 Election Analysis: Incumbents Linked to Corruption Lose, But Money Still Wins* (updated Nov. 9, 2006), http://www.opensecrets.org/pressreleases/2006/PostElection.11.8.asp.

[9] The issue is more complex when a corporation wishes to run a television advertisement in an uncontested *primary* election mentioning a candidate who will run in a contested *general* election. Such advertising may affect the general election. *See Christian Civic League of Me., Inc. v FEC*, 433 F.Supp.2d 81, 89 (D.D.C. 2006) (suggesting that electioneering communication mentioning Senator Olympia Snowe broadcast shortly before the 2006 Maine Republican primary for U.S. Senate "might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection"). Nevertheless, Congress has treated the primary and general elections as separate elections under BCRA, and therefore we would not rule out the possibility of an as-applied exemption for uncontested primary elections, depending upon the nature of the proof a corporation is able to adduce, notwithstanding a slight possibility that the pre-primary ads might affect general elections.

The question is not academic in the context of this very case. Senator Feingold ran unopposed in 2004 in the Wisconsin Democratic primary for U.S. Senate. *See* Wisconsin State Elections Board, Results of Fall Primary Election – 9/14/2004, at p. 2, http://165.189.88.185/docview.asp?docid=1382&locid=47. However, only part of the total electioneering communications period at issue in this case was due to the primary; on September 2, or two weeks before the primary, the 60-day general election period began.

includes the name or likeness of a former baseball star who also happens to be an incumbent Senator running for re-election. The corporation should be entitled to an as-applied exemption because such an advertisement, so entirely unconnected to anything relevant to the candidate or his performance in office, is unlikely to have an appreciable effect on the voters' decisionmaking.

Similarly, suppose a candidate has the same name as an automobile dealership within the district she seeks to represent in Congress – a business that she founded and is now operated by her daughter, who has the same name. The dealership could be allowed to run ads for its business in the pre-election period featuring the name common to the candidate, the dealership, and the current head of the business.[10]

Although this test would require application of some judgment (less in the case of the unopposed candidate, a little more in the baseball card and car dealership cases), the number of difficult cases would be few. The baseball card or car dealership ad will not have an appreciable effect on voters' choices because it is highly unlikely that voters would use an ad so far removed from anything relevant to the candidate or his or her performance in assessing the candidate. In contrast, WRTL's 2004 advertisements should easily fail to qualify for an as-applied exemption

[10] The FEC agreed in a 2004 determination. 2004-31 Op. FEC (2004) (Russ Darrow Group, Inc.), *available at* http://www.fec.gov/aos/2004/ao2004-31final.pdf. Although the FEC declined to create an exemption for all situations in which a candidate and a business shared a name – because such ads could often be used to promote the candidate – it found that in the particular circumstances of the dealership case an exemption was appropriate. *Id*.

(except arguably during part of the primary period, when Senator Feingold was running unopposed; *see supra* p. 25 n.9). A broadcast ad that refers to both a candidate and a campaign issue in the pre-election period is singularly unsuitable for an as-applied exemption, because such ads would almost certainly affect voters' choices about the named candidates. The WRTL ads are closely enough related to a candidate's performance and issues in the election that it is quite plausible the advertisements could affect voters' choices, as the dissent in the lower court below demonstrated, applying an appropriate contextual analysis. (App. J.S. 40a-47a.)[11]

The Court in *McConnell* recognized that political actors can understand context and make such common-sense judgments. In the few close cases that may arise, corporations may seek an advisory opinion from the FEC, *cf*. *McConnell*, 540 U.S. at 170 n.64, or "during those timeframes [ ] simply avoid[ ] any specific reference to federal candidates, or in doubtful cases [ ] pay[ ] for the ad from a segregated fund." *Id*. at 206.

[11] It is noteworthy that the radio scripts for each of WRTL's ads included the following disclaimer: "Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee." (App. J.S. 3a-5a & nn.3-5.) The disclaimer plainly indicates WRTL's recognition that the ads would be perceived by the voters who heard them as electoral ads, thus confirming that even their sponsor understood they would have an electoral effect. Indeed, by specifically using the terms "candidate" and "candidate's committee," the ads employ the language of electoral ads, which reinforces their foreseeable electoral effect. Even under the district court's inadequate, content-only test, the ads' references to "candidate or candidate's committee" ought to render them electoral communications ineligible for any as-applied exemption.

To be sure, there would not be many cases in which corporations would qualify for as-applied exemptions. But corporations would continue to have significant protections for their First Amendment activities. *MCFL*-exempt corporations are not subject to the PAC requirement at all. They can spend their general treasury funds on such ads. (Recall that WRTL itself could qualify for such a sweeping exemption if it simply declines donations from other corporations.) Even for-profit corporations and corporations such as WRTL that do not qualify for the *MCFL* exemption continue to have many ways to engage in political activity, including:

- Spending on express advocacy and electioneering communications through a separate PAC (as WRTL has created (*see* App. J.S. 41a-42a));
- Internet, mail, and print advertising that avoids express advocacy;
- Broadcast advertisements, including ads that refer to federal candidates, that are aired outside the statutory pre-election period and that avoid express advocacy;

and

- Television or radio advertising broadcast close to the election that "simply avoid[s] any specific reference to federal candidates" (*McConnell*, 540 U.S. at 206).

CONCLUSION

Both Congress and the Court have long struggled to set the balance between the proper scope of election regulation and the protection of political speech. BCRA and *McConnell*

have struck a fair balance. Any as-applied exemptions to BCRA should not be allowed to subvert that balance.

The district court erred in its most recent opinion by applying a poorly tailored and constitutionally tone-deaf test for separating electioneering communications likely to influence voters' choices in federal elections from those unlikely to have such an effect. It would permit corporate use of treasury funds for speech that falls within the core of the constitutional justifications for BCRA's regulation. And it would exempt many electioneering communications from the reach of a statute Congress only recently adopted and the Court just recently sustained. Its judgment should be reversed. Any as-applied exemption the Court adopts should exempt only those electioneering communications that are not likely to have an appreciable effect on voters' choices in a federal election.

For the foregoing reasons, we urge the Court to reverse the judgment of the district court.

Respectfully submitted,

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