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 Appeal from the United States District Court for the District of Columbia

---

BRIEF AMICI CURIAE OF COMMITTEE FOR ECONOMIC DEVELOPMENT, NORMAN ORNSTEIN, THOMAS MANN, AND ANTHONY CORRADO IN SUPPORT OF APPELLANTS

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are a non-profit independent research and policy organization of approximately 250 business leaders and educators as well as three political scientists who have dedicated much of their careers to studying and analyzing Congress, federal elections, campaign finance, and American politics, and who have written extensively, both individually and jointly, on those subjects.[1]

The Committee for Economic Development (CED) was formed more than 60 years ago to advance policies that promote stable economic growth and enhance the standard of living and range of opportunities enjoyed by all Americans. Owing to the fact that corruption in government or its appearance impacts the economy and erodes confidence both in our democratic institutions and business community, CED has proposed significant reforms to our federal election laws in order to strengthen our system of campaign finance. *See Investing in the People's Business: A Business Proposal for Campaign Finance Reform* (CED 1999) [*Business Proposal for Campaign Reform*]. CED also participated in the litigation that led to the decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), and filed a brief *amici curiae* upon which this Court relied. *See id*. at 125 n.13.

Anthony J. Corrado, Jr. is a Professor of Government at Colby College and Chair of the Board of Trustees of the Campaign Finance Institute. He served as an expert witness in *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case.

Thomas E. Mann is a Senior Fellow in Governance Studies at the Brookings Institution. He served as an expert witness in *McConnell* v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in*

---

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

part & rev'd in part, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion in that case. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id*. at 148; *id*. at 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners who helped craft the McCain-Feingold legislation.

Stemming from their expertise and interest in federal elections and campaign finance reform, Professor Corrado, Dr. Ornstein, and Dr. Mann have filed *amici* briefs in previous cases before this Court involving election law issues.[2]

All of the *amici* have a great interest in ensuring that the recent reforms that they have been part of bringing to fruition and that have strengthened our federal campaign finance system are not undermined through judicial interpretations, and offer their views to aid the Court in its review of the instant case. Their brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

INTRODUCTION

This case is before the Court for the second time. It involves an as-applied challenge to Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. That Act overhauled our federal election laws by amending, *inter alia*, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 *et seq*. *See McConnell*, 540 U.S. at 114. Among BCRA's amendments to FECA is a provision prohibiting corporations and unions from financing, with general treasury funds,

---

[2] *See Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam) (Corrado, Mann & Ornstein); *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell* v. *FEC*, *supra* (Ornstein); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, *supra* (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

"electioneering communication[s]"—*i.e.*, communications referring to a federal office candidate and broadcast within 30 days of a primary or 60 days of a general election in the candidate's jurisdiction. *See* 2 U.S.C. § 441b(b)(2). In *McConnell*, this Court sustained most of BCRA's provisions against constitutional challenge. *See* 540 U.S. at 203-209. There, the Court rejected a First Amendment *facial* challenge to Section 203, holding that the provision was neither fatally overbroad nor fatally underinclusive. *Id.* at 207-208.

Wisconsin Right to Life, Inc. (WRTL) now brings an as-applied challenge to the same provision. WRTL is a non-profit, non-stock ideological advocacy corporation organized under the laws of Wisconsin that the Internal Revenue Service recognizes as tax-exempt under Section 501(c)(4) of the Internal Revenue Code. J.S. App. 2a-3a. It does not qualify for any recognized exemption allowing it to fund electioneering communications from its general treasury account because it is neither a "qualified nonprofit corporation" under 11 C.F.R. § 114.10 nor fits the exception for 501(c)(4) corporations provided by 2 U.S.C. § 441b(c)(2). *Id.* at 3a n.2. It administers a segregated account for campaign-related activity in the form of a political action committee—a PAC. *Id.* at 58a.

United States Senator Russell Feingold of Wisconsin ran for reelection in 2004. His challengers made a campaign issue of his support for "filibusters" of the President's nominees for federal judgeships. *Id.* In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and "announced that the defeat of Senator Feingold was a priority." *Id.* On July 14, 2004, WRTL issued a news release criticizing Senator Feingold's "record on Senate filibusters against judicial nominees." *Id.* WRTL used a variety of non-broadcast communications to criticize Senate filibusters of judicial nominees. *Id.* at 58a-59a.

On July 26, 2004, WRTL began using its general treasury funds—rather than its PAC funds—to air three broadcast ads criticizing the judicial filibuster tactic and specifically naming Senator Feingold. *Id.* at 59a-60a. In one ad, the

listener hears a father interrupting his daughter's wedding ceremony to "share a few tips on how to properly install drywall." *Id.* at 66a-67a. This set up is followed by the narrator opining that "[s]ometimes it's just not fair to delay an important decision" but, in Washington, "a group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote." *Id.* at 67a. The narrator then urges the listener to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster."[3] *Id.* Each ad features a different plot, but all three play on the same needless-delay theme and essentially convey the same message. *Id.* at 69a, 70a.

Anticipating that the advertisements would constitute "electioneering communication[s]" under BCRA if aired during the period between August 15, 2004, and November 2, 2004, WRTL sued the Federal Election Commission in federal district court. *Id.* at 59a. It alleged that BCRA's prohibition on financing electioneering communications with general treasury funds is unconstitutional as applied to its advertisements and moved for a preliminary injunction. *Id.*

The District Court denied WRTL's motion, concluding that its "showing" failed to meet the standard for granting such relief, *id.* at 60a, in large measure because this Court's rejection of a facial constitutional challenge to BCRA Section 203 "le[ft] no room for the kind of 'as applied' challenge that WRTL propounds," *id.* at 61a. However, its reading of *McConnell* was "but one reason" it found WRTL's lawsuit without hope of success. *Id.* at 62a. It went on to observe that, in light of their timing and the objectives of WRTL's PAC, the ads "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.*

Following its denial of a preliminary injunction, the District Court dismissed WRTL's lawsuit. *Id.* at 55a-56a. This

[3] While the ads contain no contact information for either Senators Feingold or Kohl, they direct listeners or viewers to a website critical of Senator Feingold's record in office.

Court later reversed that judgment, concluding that, "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 126 S. Ct. 1016, 1018 (2006) (per curiam). It declined, however, to consider the District Court's suggestion that "WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," finding it "ambigu[ous]" whether that observation was intended as an alternative ground for decision. *Id.* Accordingly, the case was remanded for the District Court to "consider the merits of WRTL's as-applied challenge in the first instance." *Id.*

On remand, and after an expedited discovery period, the District Court granted summary judgment in WRTL's favor. J.S. App. at 2a. In assessing whether WRTL's ads constituted express advocacy or its functional equivalent, it eschewed any reliance on the intent or effect of the ads, finding such reliance both "practically" and "theoretically unacceptable" and "dangerous and undesirable when First Amendment freedoms are at stake." *Id*. at 19a-20a. In its view, "the judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker's mind." *Id.* at 22a. The District Court thus limited its inquiry to assessing whether the "language within the four corners of the anti-filibuster ads"

> (1) describe[s] a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the future; (2) refer[s] to the prior voting record or current position of the named candidate on the issue described; (3) exhort[s] the listener to do anything other than contact the candidate about the described issue; (4) promote[s], attack[s], support[s], or oppose[s] the named candidate; and (5) refer[s] to the upcoming election, candidacy, and/or political party of the candidate. [*Id.*]

Under this approach, the District Court found that, "on their face, WRTL's three 2004 anti-filibuster advertisements were not 'intended to influence the voters' decisions.' " *Id.* at 24a. This conclusion obviated any need for the court to "analyze

whether the ads *in fact* would have—or potentially could have—affected Senator Feingold's reelection." *Id.* (emphasis in original).

The District Court further concluded that the government could assert no compelling interest in regulating genuine issue ads such as WRTL's under BCRA. *Id.* at 28a. Unlike express advocacy or its functional equivalent, it explained that genuine issue ads do not bear on a candidate's fitness for office and thus implicate no concern about "political corruption and public cynicism in government." *Id.* at 27a.

Judge Roberts dissented from the grant of summary judgment, concluding that the majority's approach "is inconsistent with *McConnell*, is inconsistent with this panel's own prior rulings, and finds little support in logic." *Id.* at 30a.

SUMMARY OF ARGUMENT

Preventing corporations, unions, and national banks from using general treasury funds to influence federal elections is not a novel congressional goal; it is one that Congress has pursued for more than a century. BCRA is only its most recent effort "to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell*, 540 U.S. at 115 (internal quotation marks & citation omitted).

Section 203 extends a longstanding prohibition against the use of corporate and union treasury funds for ads that expressly advocate the election or defeat of a federal candidate to cover a newly-defined form of communication—*i.e.*, electioneering communications. Based on overwhelming evidence, Congress concluded that this extension was necessary to prevent corporations and unions from circumventing the pre-existing FECA prohibition by funding with general treasury revenues ads that, while falling short of prohibited "express advocacy," were no less calculated to influence federal elections and likely had that effect. Section 203 thus closed a loophole in FECA that corporations and unions exploited in past elections.

This Court upheld BCRA Section 203 against a facial constitutional attack in *McConnell*. Yet, in striking that same statute down as applied to WRTL's ads, the District Court overlooked this Court's core rationale for upholding the provision on its face. In addition to deviating from the approach taken in *McConnell*, the District Court also deviated from the traditional approach to as-applied challenges—which are fact intensive inquiries—on the mistaken belief that a speaker's intent or purpose for communicating a message is beyond the bounds of judicial inquiry. If future as-applied challenges to Section 203 are reviewed in the same contextual vacuum fashioned here by the court below, Congress's effort to capture ads that are the functional equivalent of express advocacy will inevitably be lost as political actors push the limits of the District Court's "four corners" rule—a crabbed rule that harkens a return to the pre-BCRA "magic word" days.

In any event, the ads that WRTL sought to air during BCRA's pre-election blackout period are, at bottom, the very kind of sham issue ads—*i.e.*, ads about *candidates* masquerading as ads about *issues*—that Congress expressly sought with BCRA Section 203 to prohibit. As is obvious from the timing, content, and context of WRTL's ads, they were designed to influence Senator Feingold's bid for reelection and, if permitted to air, would likely have had just that effect.

ARGUMENT

I. BCRA SECTION 203 CLOSED A LOOPHOLE IN THE FEDERAL CAMPAIGN FINANCE REGIME THAT CORPORATIONS AND UNIONS HAD EXPLOITED IN PREVIOUS ELECTIONS.

"Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul." *FEC* v. *Beaumont*, 539 U.S. 146, 153 (2003). BCRA Section 203 and the definition of "electioneering communication" fall into the former category. Although that provision extends the prohibition on the spending of corporate and union

general treasury funds in connection with federal elections to encompass a newly-defined form of communication, since the Court's seminal ruling in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203. Section 203 is no more than a modification of pre-existing law needed to " 'plug [an] existing loophole' " in that longstanding prohibition. *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 582, 585 (1957) (*UAW*) (quoting S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. 38-39 (1947)).

1. This Court is mindful of the "historical prologue" of a challenged provision of federal election law, *Beaumont*, 539 U.S. at 156; *see UAW*, 352 U.S. at 570 ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."), and it has recognized that the prohibition on corporate and union general treasury expenditures in connection with federal elections has long been a cornerstone of federal election law. *See Beaumont*, 539 U.S. at 152-154. That restriction reflects an abiding concern with the ability of corporations and unions to leverage their state-sanctioned privileges and to aggregate large amounts of capital into unfair political advantages. *See Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (*NRWC*); *UAW*, 352 U.S. at 585.

Congress made its initial foray into the arena of campaign finance regulation in 1907. It responded to President Roosevelt's call for a ban on corporate political contributions "not with half measures, but with the Tillman Act," which "banned any corporation whatever from making a money contribution in connection with federal elections." *Beaumont*, 539 U.S. at 153 (internal quotation marks & citation

omitted). In 1925, it extended the Tillman Act's prohibition on corporate contributions to encompass "anything of value" and by criminalizing the giving and receiving of corporate contributions. *See NRWC*, 459 U.S. at 209 (citing Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074). Congress later extended the coverage of this prohibition to include labor unions. *See NRWC*, 459 U.S. at 209 (noting that "union contributions in connection with federal elections were prohibited altogether" by the War Labor Disputes Act of 1943). And, later still, Congress extended the scope of this prohibition to include "expenditures" as well as contributions. *See McConnell*, 540 U.S. at 117.

In its "steady improvement of the national election laws," *id*., Congress enacted FECA in 1972, which "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures." *Id.* at 118. Specifically, FECA Section 441b, which constituted "merely a refinement of th[e] gradual development of the federal election statute," *NRWC*, 459 U.S. at 209, made it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any" federal election. 2 U.S.C. § 441b(a); *see FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (*MCFL*). The term "expenditure" included "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). While barring expenditures of general treasury funds, however, FECA "expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *McConnell*, 540 U.S. at 118; *see MCFL*, 479 U.S. at 241; *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409-410 (1972).

2. FECA Section 441b's prohibition against corporate and union expenditures of "anything of value" in connection with federal elections was later modified by this Court in a way that ultimately prompted Congress to enact BCRA Section 203. In *MCFL*, this Court accepted the argument that FECA

Section 441b "necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates" and held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 248-249. This requirement stemmed from the Court's own prior decision in *Buckley* v. *Valeo*, *supra*, which—in order to avoid vagueness and overbreadth concerns inhering in a different FECA provision—held that "expenditure encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' " *Id.* (quoting *Buckley*, 424 U.S. at 80). As the *MCFL* Court explained, *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." 479 U.S. at 249. *Buckley* identified eight such "more pointed exhortations"—namely, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject," 424 U.S. at 44 n.52—which later became "known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

"As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.' " *McConnell* v. *FEC*, 251 F. Supp. 2d at 525-526 (Kollar-Kotelly, J.) (footnote omitted)). That meant that "corporations and labor unions could use their general treasury funds to pay for an advertisement *which influenced a federal election*, provided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement." *Id.* at 526 (emphasis added).

3. "[E]xperience demonstrates how candidates, donors, and parties test the limits of the current law." *Beaumont*, 539 U.S. at 155 (internal quotation marks & citation omitted). The prohibition contained in FECA Section 441b (qualified by the magic words requirement) proved no exception to this lesson of experience. In the years following *MCFL*, corporations and labor unions tested FECA Section 441b's prohibi-

tion by making expenditures on ads that eschewed reliance on *Buckley*'s "magic words" but were no less effective at influencing federal elections than communications containing "pointed exhortations" of support for or opposition to candidates for federal office. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 526 (Kollar-Kotelly, J.). Such ads "were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *McConnell*, 540 U.S. at 128. As Dr. Mann explained in his report in the *McConnell* litigation, research concerning this period reveals "extensive and elaborate efforts by parties, candidates, unions, corporations and groups to exploit this new issue advocacy loophole to avoid the strictures of federal election law." Report of Thomas E. Mann 20-21 [Mann Report].

4. The late 1990s were a boom time for issue advocacy during which "[c]orporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads." *McConnell*, 540 U.S. at 127. The Annenberg Center for Public Policy, which has studied "issue advocacy" since the early 1990s, concluded that "the numbers of ads, groups, and dollars spent on issue advocacy * * * climbed" markedly from the 1996 to the 2000 election cycle. *McConnell*, 251 F. Supp. 2d at 879 (Leon, J.). It found that the 1995-96 election cycle saw about "$135 million to $150 million * * * spent on multiple broadcasts of about 100 ads." *Id.*

CED has found that "[d]uring the 1996 election cycle, a wide array of party organizations and other groups seized on the issue advocacy distinction and spent tens of millions of dollars on advertisements carefully designed to avoid restrictions of federal law." *Business Proposal for Campaign Reform* 29. CED estimated that "party organizations spent at least $100 million on issue advertising in 1996." *Id.*; *see also id.* (noting that "total amount spent on issue ads during the 1996 election is not known"). These ads "were broadcast in markets across the nation and aired in every key congres-

sional race in the country," and "[a]lmost all the commercials broadcast by these organizations featured specific federal candidates, and most were aired in the final six weeks of the general election campaign." *Id.*

The numbers only grew during the next election cycle: "[T]he Annenberg Public Policy Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million." *McConnell*, 251 F. Supp. 2d at 879 (Leon, J.). During this cycle, "836 issue ads were broadcast in 30 states during the final 60 days before the election, of which an estimated 70 percent were sponsored by major parties." *Business Proposal for Campaign Reform* 29.

During the "1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements." *Id.* In passing BCRA, the Annenberg Center's tracking of the rise of organizations' reliance on issue advocacy did not escape Congress's attention. *See* 147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001).

5. The meteoric rise in issue ads was not a coincidence but a strategy adopted by organizations intent on influencing federal elections. As Dr. Mann explained in his report, "[p]arties and outside groups used issue advocacy as a cover to finance campaigns for and against federal candidates in targeted races." Mann Report 24. CED has similarly observed that "issue advocacy * * * became the new strategy for election spending, especially for organizations not allowed to make direct contributions in federal campaigns." *Business Proposal for Campaign Reform* 29.

Two judges on the three-judge District Court convened to review the pre-enforcement challenge to BCRA similarly found that organizations used issue ads for the purpose of influencing federal elections. Judge Kollar-Kotelly found "uncontroverted" evidence "that by the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic

words." *McConnell*, 251 F. Supp. 2d at 528 (internal quotation marks, alteration & citation omitted). Judge Leon likewise concluded that the "factual record unequivocally establishes that [issue ads] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." *Id.* at 800.

6. The line that *Buckley* drew between express advocacy and issue advocacy—later imported into FECA Section 441b in *MCFL*—was not only easily and frequently circumvented but largely illusory from the start. *Buckley* foresaw as much:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest. [*Buckley*, 424 U.S. at 42.]

Indeed, this Court in *McConnell* confirmed that the express advocacy test is "functionally meaningless." 540 U.S. at 193, 217. "While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *Id.* at 126.

Experience in fact powerfully demonstrated that the express advocacy test and the focus on "magic words" failed to identify accurately communications designed to influence federal elections. As Dr. Mann explained in his report, "research by political scientists confirmed the suspicion" that there is "little difference in purpose and content between express advocacy and candidate-specific issue advocacy communications financed by parties and groups." Mann Report 24. He explained that the "evidence of the explicit electioneering purpose of candidate-specific issue advocacy near the election was overwhelming" as such ads "run by parties and groups were largely indistinguishable from the campaign ads of the candidates." *Id.* As Dr. Mann found:

> Very few candidate ads used words of express advocacy; virtually all party issue ads mentioned the name of a federal candidate, mostly in attack mode, but few mentioned the name of the party; and almost every issue ad featuring the name of the candidate and running near an election was clearly designed to support or attack a candidate, not to express a view on an issue. [*Id.*]

The result: "Voters were unable to differentiate candidate-specific issue ads * * * sponsored by parties and outside groups from campaign ads run by candidates." *Id.*

That the dichotomy between express advocacy and issue advocacy is a false one was further born out by the *McConnell* litigation. All three of the judges of the District Court agreed that few ads run by candidates, parties or interest groups rely on words of express advocacy. *See* 251 F. Supp. 2d at 303 (Henderson, J.); *id.* at 529 (Kollar-Kotelly, J.); *id.* at 874 (Leon, J.); *see also McConnell*, 540 U.S. at 128 n.18. The record before them confirmed that media professionals actually disfavored such heavy-handed tactics. As one political consultant explained, given "the modern world of 30 second political advertisements," it "is rarely advisable" to use "such clumsy words as 'vote for' or 'vote against.' " *Id.* at 529-530 (Kollar-Kotelly, J.); *see also id.* at 305 (Henderson, J.); *id.* at 874-875 (Leon, J.). Rather, the "most effective" course, as "[a]ll advertising professionals understand," is to "lead[ ] the viewer to his or her own conclusion without forcing it down their throat." *Id.* at 529-530 (Kollar-Kotelly, J.); *id.* at 875 (Leon, J.); *see also McConnell*, 540 U.S. at 193 n.77 (noting that "political professionals and academics confirm that the use of magic words has become an anachronism"). "This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians." *McConnell*, 251 F. Supp. 2d at 530 (Kollar-Kotelly, J.). The express advocacy limitation of course proved no substantial obstacle for this "modern" electioneering approach.

Members of Congress themselves—some of them "seasoned professionals who have been deeply involved in

elective processes and who have viewed them at close range over many years"[4]—confirmed that the "magic words" of express advocacy "do not distinguish pure issue advertisements from candidate-centered issue advertisements." *Id.* at 532 (Kollar-Kotelly, J.). Senator Feingold, for example, opined that "[p]eople didn't need to hear the so-called magic words to know what these ads were really all about." 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001), while Senator McCain explained that "th[is] Court's definition of 'express advocacy'—magic words—has no real bearing in today's world of campaign ads." 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001); *see also* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[E]ven a casual observer would concede that 'magic words' is a dramatically underinclusive test for determining what constitutes a campaign ad."). Many other federal lawmakers expressed similar views on so-called issue advocacy.[5]

---

[4] *Buckley*, 424 U.S. at 261 (White, J., concurring in part & dissenting in part); *see also Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours.").

[5] *See, e.g.*, 148 Cong. Rec. H387 (daily ed. Feb. 14, 2002) (statement of Rep. Cardin) ("Currently, these [issue] ads which are clearly aimed at influencing an election can be worded in a way that they are deemed issue advocacy and are not subject to campaign spending limits or disclosure requirements."); 148 Cong. Rec. H410 (daily ed. Feb. 14, 2002) (statement of Rep. Kleczka) ("An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law."); 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001) (statement of Sen. Edwards) ("In fact, [issue advertisements] are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country."); 144 Cong. Rec. H6802 (daily ed. July 30, 1998) (statement of Rep. Shays) ("They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such."); 144 Cong. Rec. S1038-39 (daily ed. Feb. 26, 1998) (statement of Sen. Bryan) ("Independent expenditure ads are one of the very reasons the

7. The widespread practice of using soft money to fund issue ads designed to influence federal elections was further documented in the six-volume report—spanning nearly 10,000 pages—that the Senate Governmental Affairs Committee (Committee), chaired by Senator Fred Thompson and led also by Ranking Member John Glenn, produced following its investigation into campaign finance law abuses during the 1996 presidential campaigns. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) (Thompson Report). This Court has characterized the Committee's findings as "disturbing." *McConnell*, 540 U.S. at 122.

The Committee concluded that issue ads constituted "the second most significant loophole" in the pre-existing campaign finance regime. Thompson Report at 5968 (minority views). The Committee "found such ads highly problematic for two reasons." *McConnell*, 540 U.S. at 131. First, because issue ads "accomplished the same purpose as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide." *Id.* Second, while the ads were "ostensibly independent of the candidates," they were "often actually coordinated with, and controlled by, the campaigns." *Id.* "The ads thus provided a means for evading FECA's

---

campaign system is out of control. We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy."). 143 Cong. Rec. S10125 (daily ed. Sept. 29, 1997) (statement of Sen. Collins) ("[T]he situation I have described [regarding 'issue' ads run by the AFL-CIO] has led to the biggest sham in American politics. Nobody in Maine believed that the AFL[-]CIO's negative ads were for any purpose other than the defeat of a candidate. Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections. The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham.").

candidate contribution limits." *Id.* The Committee's findings bear out these conclusions.

Looking broadly at the problem posed by issue advocacy, the Thompson Report found that both national parties used soft money to fund issue ads intended to influence the 1996 presidential election. The Democratic National Committee (DNC) spent $44 million on issue ads during the 1996 presidential election, while the Republican National Committee (RNC) spent $24 million. *See* Thompson Report at 4482; *id*. at 8294 (minority views). When Harold Ickes, President Clinton's Deputy Chief of Staff, was asked during the Committee hearings whether the average person would comprehend the DNC and RNC's issue ads as encouraging a vote for one of the presidential candidates, he responded that "I would certainly hope so. If not, we ought to fire the ad agencies." *Id*. at 8286 (minority views).

The 1996 presidential candidates themselves tended to share this view toward issue ads funded by soft money. That President Clinton fully appreciated the impact of issue ads on his campaign for a second presidential term is apparent in his telling major contributors to the DNC that their contributions, which funded ads "run * * * through the Democratic party," rather than his campaign, "have made a huge difference." *Id.* at 62. Senator Dole's campaign deployed this strategy as well. The Report concluded that "there can be little doubt that the RNC's issue ads were intended to influence the outcome of a federal election." *Id.* at 4014. One of those advertisements, entitled "The Story," the Thompson Report concluded, "was nothing more than a biography of Bob Dole." *Id.* Senator Dole's campaign manager, Scott Reed, acknowledged that "[w]e went out in April and May and raised $25 million for the party, of which about $17, $18 or $19 million was put into party building ads, which were Bob Dole in nature." *Id.* at 8301 (minority views). In an interview with Ted Koppel of ABC News, Senator Dole explained that, while his campaign could not afford to fund ads lauding his candidacy, the RNC ran "generic" ads on his behalf. *Id.* at 4153-54. Questioned whether "Bob Dole for

President" constitutes "generic spending," Senator Dole explained that such generic ads "never say[ ] that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture!" *Id.* at 4154.

The Thompson Report further detailed the extent to which the national parties coordinated their issue ads with the campaigns of their presidential candidates. As for the DNC, the report concluded that the White House essentially "operated the [DNC] party apparatus as a slush-fund for the President's re-election campaign." *Id.* at 23. The Clinton/Gore campaign and the DNC used the same consultants, pollsters and media producers, *id.* at 34, and even coordinated the day on which their respective ads would run, *id.* at 118. Indeed, Dick Morris, a campaign advisor to President Clinton, stated that the President himself was so involved in the creation of all of the DNC and Clinton/Gore campaign ads that they essentially " 'became * * * the work of the President himself.' " *Id.* at 122. This "unprecedented" level of coordination led to the "oblitera[tion]" of any "distinctions remaining between the White House, the DNC, and [the] Clinton/Gore [campaign]." *Id.* at 107.

Similar findings were made in regard to the RNC and Senator Dole's campaign. The RNC's media campaign was controlled by Senator Dole's "campaign manager, chief fundraiser, media consultant, and pollster." *Id.* at 8297 (minority views). And "the criterion used by the RNC and the Dole campaign for deciding where to run issue ads was whether the ads would help Senator Dole win electoral votes." *Id.* at 8299 (minority views).

The Thompson Report further concluded that, just as the national parties exploited the issue-advocacy loophole, so, too, did corporations and unions. It found that such organizations spent "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." *Id.* at 3993. These ads—like the ones produced by the parties—were likewise intended to influence federal elections. *See id.* at 3997. They were indeed often coordinated with the campaigns of the

1996 presidential candidates or the national parties with which they were associated. *Id.* The Thompson Report found, for example, that "[e]vidence * * * indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 elections." *Id.*; *see also id.* at 49 ("White House aides and the AFL-CIO carefully reviewed each other's advertisements and coordinated their timing and placement."). Dick Morris additionally testified during the Committee hearings that an August 1995 meeting between representatives of the Clinton/Gore campaign, the DNC and seven labor organizations constituted " 'a full briefing of us by them on their media plans.' " *Id.* at 128.

Groups backing Republican candidates similarly used issue ads in an attempt to influence federal elections. For instance, The Coalition: Americans Working for Real Change, a group formed to counter issue ads aired by the AFL-CIO, produced issue ads nearly identical to those run by the National Republican Congressional Committee (NRCC), a division of the RNC, aired them at the same time as the NRCC's ads and "in districts where the Republican incumbent's seat was vulnerable." *Id.* at 8944 (minority views). Another group, Triad Management Services, "channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' " *Id.* at 4569 (minority views). "By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." *Id.* They became "surrogates" by which the RNC "was able to circumvent federal campaign finance laws." *Id.* at 5979 (minority views). This was so because whereas "a political party [that] broadcasts issue ads * * * is required to pay for them with a combination of hard dollars and soft dollars," when "an outside group runs such ads, there are no such restrictions—even if the funding comes from the RNC." *Id.*

The Thompson Report concluded that repairs to the campaign finance laws must involve restrictions on issue advocacy. "The majority expressed the view that a ban on the raising of soft money by national party committees would effectively address the use of union and corporate general treasury funds in the federal political process only if it required that candidate-specific ads be funded with hard money." *McConnell*, 540 U.S. at 132; *see also* Thompson Report at 4492. The minority similarly recommended "reforms addressing candidate advertisements masquerading as issue ads." Thompson Report at 9394 (minority views); *see also McConnell*, 540 U.S. at 132.

8. "*Buckley*'s express advocacy line [did] not aid[ ] the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 193-194. The legislative process culminating in the passage of BCRA spanned more than six years and generated multiple reform bills introduced in Congress. *See McConnell*, 251 F. Supp. 2d at 434 (noting that "the legislative process took over six years of study and reflection by Congress") (Kollar-Kotelly); *id.* at 434 n.1 (listing campaign finance bills introduced in Congress during six-year period preceding BCRA's passage). This process was influenced by the failings of the pre-BCRA campaign finance regime brought to light by the Thompson Report as well as the reforms that the report proposed.[6] Senator Feingold, for example, opined that, "in the wake of the Thompson investigation, we reluctantly concluded that we need to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002). Senator Glenn similarly noted that the Thompson Report

[6] The House and Senate bills that ultimately became BCRA were not accompanied by the customary explanatory committee reports. Members of Congress frequently relied on the Thompson Report's findings in floor debates on BCRA, however. *See, e.g.*, 147 Cong. Rec. S3138 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("The 1997 Senate investigation collected ample evidence of campaign abuses.").

"showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless" and that the legislation under consideration "goes a long way to address[ing] th[is] abuse." 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998).

9. BCRA Section 203 directly combats the well documented problem of issue ads that avoided express advocacy but nevertheless had the purpose and likely effect of influencing federal elections. That section extended FECA's preexisting prohibition on the use of corporate and union general treasury funds to finance communications influencing federal elections—which *MCFL* previously had limited to communications expressly advocating election or defeat of a particular candidate—to cover any "electioneering communication." 2 U.S.C. § 441b(b)(2). An electioneering communication is defined as (1) any "broadcast, cable or satellite communication" that (2) "refers to a clearly identified candidate for Federal office"; (3) is made within either 60 days preceding a federal general election, or 30 days preceding a federal primary election, for the office the candidate seeks; and (4) is "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i), meaning that the communication must be received by 50,000 or more persons in the "relevant congressional district or state." *McConnell*, 251 F. Supp. 2d at 212 (per curiam). "Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204.

Congress's new term—"electioneering communication"—is carefully calculated to identify (and block) corporate and union general treasury expenditures on broadcast advertisements intended to influence federal elections that escaped detection under *Buckley*'s express advocacy radar. "By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy," as Judge Kollar-Kotelly

explained, Congress "rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job * * * of distinguishing between candidate-centered issue advertising and pure issue advertising." *McConnell*, 251 F. Supp. 2d at 569. She found that

> the uncontroverted record establishes that pure issue advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the advertisement is run in a competitive race. [*Id.* at 567.]

Each criterion of Congress's new term is bottomed on empirical evidence. *First*, the definition of electioneering communication aims only at the media "found by Congress to be problematic." *Id.* at 569. "The records developed in [the BCRA pre-enforcement] litigation and by the Senate Committee adequately explain the reasons for this legislative choice." *McConnell*, 540 U.S. at 207. As Judge Kollar-Kotelly explained, that record "demonstrate[d] that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections." *McConnell*, 251 F. Supp. 2d at 573. The Thompson Report further supported Congress's finding that "corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell*, 540 U.S. at 207. *See* Thompson Report at 4465, 4474-81; *id.* at 7521-25 (minority views).

Second, the definition of electioneering communication encompasses only messages that refer to clearly identified candidates for federal elected office. During the pre-enforcement challenge, "[f]ederal officeholders and candidates * * * testif[ied] that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the

election." *McConnell*, 251 F. Supp. 2d at 534 (Kollar-Kotelly). These politicians' intuitions were confirmed by political consultants' "uncontroverted testimony that when designing pure issue advertisements, it was never necessary to reference specific candidates for federal office in order to create effective ads." *Id.* at 628 (internal quotation marks & ellipsis omitted). As Judge Kollar-Kotelly explained, moreover, the rather obvious "flip side of this coin * * * is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election." *Id.*

Third, the 30- and 60-day pre-election blackout periods applicable to electioneering communications also strongly correlate to the periods during which ads aimed at influencing federal elections are most likely to air—the time period, not surprisingly, immediately preceding an election. Judge Kollar-Kotelly concluded that "[t]he uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election." *Id.* at 564-565; *see also id.* at 630. Her opinion includes a graph showing that the number of issue ads rises as an election day nears and dramatically spikes in the weeks immediately preceding an election. *Id.* at 564. As one media consultant testified: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections." *Id.* at 561. This consultant confirmed the common-sense proposition that, "[f]rom a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." *Id.* And, in *McConnell*, this Court similarly concluded that, although "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [30 and 60 day] preelection time spans but had no electioneering purpose is a matter of dispute * * * the *vast majority* of such ads clearly had such a purpose." 540 U.S. at 206 (emphasis added) (citations omitted).

Fourth, the definition of electioneering communication is keyed to messages that are targeted to the electorate relevant to the candidate to which the message refers. This component of the definition accounts for the fact that messages that "target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." *McConnell*, 251 F. Supp. 2d at 633 (Kollar-Kotelly). Officeholders and candidates confirmed that issue ads delivered to a candidate's electorate were intended to influence the election. *Id.* at 534.

Acknowledging that "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference," *McConnell*, 540 U.S. at 117 (internal quotation marks & citations omitted), this Court upheld Congress's corrective measure embodied in BCRA Section 203, and BCRA's primary definition of "electioneering communication" on which it relies, against a facial constitutional attack in *McConnell*, *see id.* at 189-194, 203-209.

The deference that this Court in *McConnell* showed Congress is especially appropriate "in [this] area where it enjoys particular expertise." *Id*. at 185 n.72. In this case, the Court owes "no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted).

II. THE LOWER COURT'S REVIEW DEPARTS FROM THIS COURT'S PRECEDENTS AND THREATENS TO RE-OPEN THE LOOPHOLE CLOSED BY BCRA SECTION 203.

The District Court traveled a misguided course in holding Section 203 unconstitutional as applied to WRTL's anti-filibuster ads—a course charted on a misapprehension of its role and in reaction to groundless fears, and one that, in the end, led it far astray from *McConnell*'s well-lighted path.

1. The District Court fundamentally misunderstood the task at hand. Even after the parties conducted discovery (ordered by the court) and proposed findings of fact, *see* J.S. App. at 9a-10a, it considered only the "language within the four corners of the anti-filibuster ads," *id.* at 22a, to find the statute unconstitutional on the belief that "[d]etermining [the] intent and the likely effect" of the advertisements is "too conjectural and wholly impractical," *id.* at 18a. But an as-applied constitutional challenge calls for a far more searching—and fact-intensive—review. *See United States* v. *Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972) (as-applied challenge involves determining whether "the section, by its own terms, infringed constitutional freedoms in the circumstances of the particular case"); *see also Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (stating "general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court"). That mode of review "requires an analysis of the *facts of a particular case* to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (emphasis added); *see also Faustin* v. *City & County of Denver*, 423 F.3d 1192, 1196 (10th Cir. 2005) ("[A]n as-applied challenge tests the application of th[e] restriction to the facts of a plaintiff's concrete case."); *Sanjour* v. *EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (en banc) (noting as-applied challenge "ask[s] only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case"). The District Court's contrary approach rendered as-applied review a less precise tool for assessing the constitutionality of an Act of Congress in a particular case by "formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

2. Moreover, the District Court adopted its "four corners" review on a premise that this Court's jurisprudence rejects. It

believed that it had to restrict its review to the face of WRTL's ads because "the judiciary * * * should not be in the business of trying to read any speaker's mind" and likewise should not "be charged with conjuring the subjective intent of the speaker." J.S. App. at 21a-22a. But "[t]he law does not refrain from searching for the intent of the actor in a multitude of circumstances." *Bush* v. *Gore*, 531 U.S. 98, 106 (2000); *see also City of Indianapolis* v. *Edmond*, 531 U.S. 32, 46-47 (2000) ("While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence * * *.").

As this Court has explained, "[i]t is common in the law to examine the content of a communication *to determine the speaker's purpose*." *Hill* v. *Colorado*, 530 U.S. 703, 721 (2000) (emphasis added); *see, e.g.*, *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

The Court has long considered a speaker's intent, for example, when assessing whether symbolic conduct receives First Amendment protection. *See*, *e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (determining "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play" requires consideration of "an intent to convey a particularized message") (internal quotation marks & alteration omitted); *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974). And, in other circumstances, this Court requires consideration of a speaker's intent before his speech may trigger legal liability, *see*, *e.g.*, *Time, Inc.* v. *Hill*, 385 U.S. 374, 387-388 (1967) ("We hold that the constitutional protections for speech and press preclude the application of the New York [right to privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."); *New York Times* v. *Sullivan*, 376 U.S. 254, 279-280

(1964) (holding that a public official may not recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' "), or provide grounds for termination from public employment, *see, e.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563, 574 (1968) ("[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

3. Even more troubling than the District Court's adoption of a "four corners" test based on misplaced concerns is that, in doing so, it ignored *McConnell*'s clear contrary instruction to consider the intent and effect of political ads. There, the Court rejected the plaintiffs' argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications" because they "apply equally to ads aired during th[e blackout] periods if the ads are *intended* to influence the voters' decisions and have that *effect*." *McConnell*, 540 U.S. at 206 (emphases added). Such ads, it concluded, are the "functional equivalent of express advocacy." *Id.* And, while the Court declined to identify the precise percentage of issue ads that had an electioneering purpose, it concluded that "[t]he vast majority of ads clearly had such a *purpose*." *Id.* (emphasis added).

McConnell's conclusion that issue ads are tantamount to express advocacy—and permissibly regulated—"if the ads are *intended* to influence the voters' decisions and have that *effect*" makes clear that review of an as-applied challenge to Section 203 requires assessing whether the ads in question are *intended* to influence voters and have that *effect* in view of their context as well as content. By reviewing only whether the "language within the four corners" of the ads met a set of linguistic criteria different from Section 203's objective criteria the District Court ignored the "unmistakable lesson" of *McConnell*: The "presence or absence of magic words cannot meaningfully distinguish electioneering

speech from a true issue ad."[7] The District Court announced a new set of "magic words" instead. *Id.* at 193.

4. If the District Court's approach to as-applied challenges to Section 203 stands, it threatens to re-open the express advocacy loophole that unions and corporations exploited until Congress closed it with that provision. As this Court knows, "[i]f the history of campaign finance regulation * * * proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities." *McConnell*, 540 U.S. at 173.

Congress put an end to the ability of corporations and labor unions to use their treasury funds to influence federal elections by replacing the "functionally meaningless" express advocacy test with objective, empirically-based factors that identify ads intended to influence elections. *Id.* at 193. Yet, if BCRA Section 203 cannot constitutionally apply to ads that meet Congress's objective standards, but do not, on their face, meet the District Court's different criteria, then actors in the political arena will no doubt "test the limits" of the new "four corners" rule with ads designed to influence federal elections. *Beaumont*, 539 U.S. at 155.

To prevent a new wave of ads designed to circumvent the campaign finance laws, and halt a return to the days of high formalism and magic words, the review of as-applied challenges to BCRA Section 203 should focus not just on the "language within the four corners" of the ads but also, as *McConnell* requires, on the intent and effect of the ads.

---

[7] In fact, the District Court actually invoked *Buckley*'s rationale for adopting the magic words requirement to support its limited review, despite *McConnell*'s clear holding that *Buckley*'s "express advocacy restriction was an endpoint of statutory construction, not a first principle of constitutional law." 540 U.S. at 190.

III. WRTL'S ADS ARE THE VERY TYPE OF COMMUNICATIONS BCRA SECTION 203 IS DESIGNED TO PROHIBIT.

Before the District Court restricted itself to the "language within the four corners" of WRTL's ads, it found that the ads "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." J.S. App. at 62a. That conclusion—formed long before it reviewed the merits of WRTL's challenge—remains correct.

1. The context, timing, and content of WRTL's ads reveal that they are designed to "convey [a] message" opposing a candidate for federal office—namely, Senator Feingold. *McConnell*, 540 U.S. at 239. As for context, WRTL's "role in the political environment" first points to the ads' purpose. J.S. App. at 41a (Roberts, J., dissenting). WRTL spent more than $60,000 in independent expenditures to oppose Senator Feingold's reelection, and issued a news release critical of his record on the judicial filibuster issue. *Id.* at 41a-42a. WRTL's PAC also announced that Senator Feingold's defeat was a priority and, toward that end, endorsed three candidates running against him. *Id.*

2. The timing of the ads—which both Congress and this Court recognized is a key determinant for identifying ads intended to influence an election—also signals that WRTL's ads were intended to influence Senator Feingold's reelection effort and, if aired, would have had that effect. Despite using other, non-broadcast media to convey its anti-judicial-filibuster message, WRTL only turned to the broadcast media (and its ads playing on the needless-delay theme) in the run up to the BCRA pre-election blackout period before the election. *See id.* at 5a, 9a. Moreover, the notion that these ads were intended to influence cloture votes on judicial filibusters—rather than Senator Feingold's run for office—is gainsaid by the fact the ads only began to air *after* the cloture votes had taken place and when Congress was out of session on a six-week recess. *Id.* at 43a (Roberts, J., dissenting). WRTL did not even run its ads after the 2004 election "in

either 2004 or in 2005 during the height of the [judicial filibuster] controversy." *Id.* (citation omitted).

3. The content of the ads themselves further indicates that they were intended to impact Senator Feingold's re-election. All of the ads that WRTL sought to air during BCRA's blackout period connect Senator Feingold to a "group of U.S. Senators * * * blocking qualified [judicial] nominees from a simple 'yes' or 'no' vote" by encouraging the listener (or, in the case of the "Waiting" advertisement, viewer) to contact Senator Feingold and tell him "to oppose the filibuster." *Id.* at 70a; *see also id.* at 67a, 69a. Indeed, while the ads offer the listener or viewer no way to contact Senator Feingold, they direct the listener or viewer to a website that "explicitly attacked Feingold's record and encouraged website readers to defeat him." *Id*. at 42a.

In sum, "[t]he notion that th[ese] advertisement[s] w[ere] designed purely to discuss the issue of [judicial filibusters] strains credulity." *McConnell*, 540 U.S. at 194 n.78.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

FEBRUARY 2007 *Counsel for Amici Curiae*