No. 06M58

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

and

SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN,
Intervenor-Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the three-judge district court erred in holding that Section 203 of the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. § 441b, is unconstitutional as applied to the three advertisements that appellee Wisconsin Right to Life, Inc. sought to broadcast in 2004.

PARTIES TO THE PROCEEDINGS

The appellants who are parties to this jurisdictional statement are four Members of Congress who intervened as defendants in the district court in support of the constitutionality of BCRA's "electioneering communications" provision as applied to the advertisements at issue in this case: Senator John McCain of Arizona; Representative Tammy Baldwin of Wisconsin; Representative Christopher Shays of Connecticut; and Representative Martin Meehan of Massachusetts. For ease of reference, these appellants will hereafter be referred to as the "Intervenor-Appellants." The Federal Election Commission was the originally named defendant in the district court.

The appellee, which was plaintiff in the district court, is Wisconsin Right to Life, Inc., a non-profit Wisconsin corporation.

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OPINION BELOW

The opinion of the district court, *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006) (*WRTL*) is reprinted in the appendix to this jurisdictional statement. App. 1a-39a.

JURISDICTION

The three-judge district court entered an opinion and order on December 21, 2006. On December 28, 2006, the court issued an order finding that there was no just reason for delay and thus entering final judgment with respect to the issues decided in its opinion of December 21, 2006. App. 40a. Intervenor-Appellants filed a notice of appeal on December 29, 2006. App. 43a. The jurisdiction of this Court rests on Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 113-114, codified at 2 U.S.C. § 437h note, and 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at pages 64a-79a of the appendix to this jurisdictional statement.

STATEMENT

This case concerns Section 203 of the Bipartisan Campaign Reform Act of 2002, which prohibits corporations from using their general treasury funds to pay for "electioneering communications" that refer to a candidate for federal office and are broadcast within 30 days of a federal primary election or 60 days of a federal general election. Pub. L. No. 107-155, § 203, 116 Stat. 91-92, codified at 2 U.S.C. § 441b(b)(2). This Court sustained BCRA Section 203 against a facial constitutional challenge in *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003). Following that decision, Wisconsin Right to Life, Inc. (WRTL) filed suit in federal district court, alleging that BCRA's restrictions on the financing of "electioneering communications" were unconstitutional as applied to certain broadcast advertisements referencing a federal candidate that WRTL sought to finance with its corporate general treasury funds.

The three-judge district court denied WRTL's request for preliminary injunctive relief and subsequently dismissed the complaint. App. 47a-48a; 49a-57a. WRTL appealed to this Court, which vacated the dismissal and remanded to the district court for consideration of the merits in the first instance. App. 44a-46a. On remand, in spite of a largely undisputed record demonstrating that the advertisements at issue were functionally identical to those that this Court considered in upholding Section 203 in *McConnell* and that alternative means were available to WRTL to disseminate its message, the three-judge district court denied the motions for summary judgment of the FEC and Intervenor-Defendants and granted WRTL's motion for summary judgment as applied to the three advertisements it sought to run in 2004. App. 24a. In so concluding, the district court created and applied a constitutional test that, like the failed

"magic words" test rejected by Congress and by *McConnell*, focused solely on the face of the advertisements. App. 18a. Intervenor-Appellants appeal the district court's judgment.

1. For the last century, federal law has regulated the use of corporate general treasury funds in connection with federal elections. In 1907, in response to a national concern over the corrosive effect of corporate contributions in elections, Congress passed the Tillman Act, which prohibited "any corporation . . . [from] mak[ing] a money contribution in connection with any election to any political office." Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865; *see United States* v. *Automobile Workers*, 352 U.S. 567, 571-572, 575 (1957) (quoting 34 Stat. 864). In 1925, Congress strengthened the Act, extending the prohibition on corporate contributions to cover "anything of value" and making the giving or receiving of corporate contributions a federal crime in the Federal Corrupt Practices Act. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citing Federal Corrupt Practices Act of 1925, §§ 301, 313, 43 Stat. 1070, 1074).

The Smith-Connally Act of 1943 temporarily applied the Corrupt Practices Act to labor unions. *Automobile Workers*, 352 U.S. at 578 (citing 57 Stat. 163, 167). Despite this enactment, "Congress was advised of enormous financial outlays said to have been made by some unions in connection with the national elections of 1944." *Automobile Workers*, 352 U.S. at 579. By 1947, Congress had clearly extended the prohibition to include corporate and union expenditures designed to influence federal elections. *Id.* at 583-584 (discussing passage of the Taft-Hartley Act to, as Senator Taft explained, "plug a loophole which obviously developed, and which, . . . as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations" (quoting 93 Cong. Rec. 6439)).

In 1972, "Congress continued its steady improvement of national election laws by enacting [the Federal Election Campaign Act (FECA)]." *McConnell*, 540 U.S. at 117. In doing so, Congress "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures, but 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." *Id.* at 118.

Despite these longstanding Congressional efforts to prevent corporate and union corruption of federal elections, during the 1990s corporations began to use their general treasury funds to finance so-called "issue" advertisements that, despite their label, were in purpose and effect election advertisements. This period of corporate circumvention followed this Court's decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, where this Court interpreted the former version of 2 U.S.C. § 441b to apply only to expenditures that "expressly advocate" a candidate's election or defeat in order to avoid constitutional vagueness problems. 479 U.S. 238, 249 (1986). A decade earlier, in *Buckley* v. *Valeo*, this Court had introduced the concept of express advocacy when it narrowly construed other FECA provisions to avoid problems of vagueness and overbreadth. 424 U.S. 1, 43-44, 77-80 (1976). The Court had provided examples of words that it considered express advocacy, including "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52. Those examples "eventually gave rise to what [became] known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

Corporations and unions learned quickly that the "magic words" test allowed them to spend money from their corporate coffers to influence federal elections by avoiding words of express advocacy. As this Court later observed in *McConnell*, after just more than a decade of experience under the system, "the unmistakable lesson" was that the express advocacy "requirement is functionally meaningless" because the "absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193.

In order to close the much-exploited loophole in the longstanding prohibition on the use of corporate and union funds to influence federal elections, Congress adopted Section 203 of BCRA, which amended Section 441b of FECA by barring corporations and unions from financing "electioneer-

ing communications" with money from their general treasuries and requiring them to finance all such communications with funds from separate PAC accounts. 2 U.S.C. § 441b(b)(2). Congress defined the term "electioneering communication" as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is, with the exception of communications referring to a candidate for President or Vice President, "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88, codified at 2 U.S.C. § 434(f)(3)(A)(i)(III).[1] Corporations and unions remained free to establish separate segregated funds and to pay for "electioneering communications" from those funds. 2 U.S.C. § 441b(b)(2)(C). Congress created this tailored definition to close the "magic words" loophole while avoiding vagueness concerns that arose in *Buckley* and *Massachusetts Citizens for Life*.

2. In *McConnell*, this Court upheld Section 203 against a facial constitutional challenge. As the Court held, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [BCRA Section 203] as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003) and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Id.* (quoting *Beaumont*, 539 U.S. at 163). Pointing out that its well-established campaign-finance jurisprudence reflects "respect for the legislative

[1] A communication is deemed "targeted to relevant electorate" if it "can be received by 50,000 or more persons" in the district (in the case of House races) or State (in the case of Senate races) the candidate seeks to represent. 2 U.S.C. § 434(f)(3)(c).

judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.* at 205 (citations and internal quotation marks omitted), the Court concluded that the compelling governmental interests that support requiring corporations to finance express advocacy from a PAC apply equally to their financing of "electioneering communications." *Id.* at 206. The Court explained that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.*

In addressing the argument that the definition of "electioneering communications" might encompass some genuine issue advocacy, the Court considered it sufficient that "the vast majority of ads" run during the 30- and 60-day intervals between federal primary and general elections "clearly had such a purpose." 540 U.S. at 206. The Court found it decisive, moreover, that "in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.*

3. Appellee WRTL is a non-profit, non-stock Wisconsin corporation. Because WRTL accepts contributions from corporations and does not qualify for any exemption from Section 441b, *see* Am. Compl. ¶ 23, WRTL may not use its corporate treasury to finance expenditures on behalf of or in opposition to candidates for federal office. WRTL maintains a political action committee, the Wisconsin Right to Life Political Action Committee (WRTL-PAC). WRTL and its PAC have a long history of supporting or opposing candidates in federal elections.

This case involves three broadcast advertisements that WRTL proposed to run shortly before the 2004 federal election in Wisconsin with funds from its corporate treasury. In 2004, WRTL and its PAC targeted Senator Russell Feingold for defeat. WRTL-PAC announced in the title to a March 2004 press release its "Top Election Priorities: Re-elect President Bush . . . Send Feingold Packing." Intervening

Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 2. Warning that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections," WRTL-PAC's Chair emphasized that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." *Id.* Three weeks later, WRTL itself issued a similar release subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Feingold Packing!" *Id.*, Ex. 3.[2] The release quoted the legislative director of WRTL as saying:

> One of the most important elections in the history of the right to life movement will take place in November[.] The people who represent us in Washington should, at the very least, have some modicum of respect for human life. Apparently, Feingold, Kohl and Kerry do not. This issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing.

Id.

The Senate filibuster against certain judicial nominees nominated by President Bush—the subject of the WRTL advertisements at issue—was an important campaign issue in the 2004 Wisconsin Senate race. A news report in The Milwaukee Journal Sentinel in November 2003 headlined "3 seeking Feingold seat attack him on judges issue: Republicans see Senate fight as important to voters," noted:

> In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. . . . "I think it will be a huge issue," said GOP Senate candidate Russ Darrow.

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[2] This press release is available on the WRTL website at http://www.wrtl.org/News04/032604.pdf.

Intervening Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 5.

Moreover, WRTL, through its PAC, explicitly connected its campaign opposition to Senator Feingold to the filibuster issue. The March 2004 press release, for example, noted that WRTL's three endorsed candidates for Feingold's Senate seat "all stated they would oppose a filibuster." Intervening Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 2. WRTL continued to advocate Senator Feingold's defeat during the summer of 2004, and in a July 14, 2004 news release, criticized Senator Feingold for his position on the filibuster of judicial nominees. FEC's Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 16.

On July 26, 2004, as the September primary election neared, WRTL began using its corporate treasury funds to finance preparation of the three advertisements at issue here. The lead-in to each advertisement varied, but each criticized a "group of Senators" for filibustering judicial nominees and then requested that the viewer "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." App. 58a-63a. Because WRTL intended to broadcast advertisements on television or radio that referred to a clearly identified candidate for federal office and targeted the electorate of that candidate, WRTL's advertisements would constitute "electioneering communications" if run during the statutorily prescribed period. 2 U.S.C. § 434(f)(3)(A)(i); BCRA § 201. Accordingly, federal law required WRTL to use only its PAC funds to finance these advertisements beginning on August 15, 2004—thirty days before the primary election. 2 U.S.C. § 441b(b)(2); BCRA § 203.

4. WRTL filed suit on July 28, 2004, alleging that the statute could not constitutionally be applied to its advertisements and seeking injunctive relief to prohibit the FEC from enforcing the statute as to those ads. WRTL anticipated that its "ongoing advertisements [would be considered] electioneering communications from August 15, 2004 to November 2, 2004, because they meet the statutory and regulatory definitions." Compl. ¶ 23.

WRTL also sought declaratory and injunctive relief as to any advertisement that constituted "grassroots lobbying," a term WRTL did not define. Compl. 13. WRTL subsequently amended its complaint to add one paragraph. Paragraph 16 of the Amended Complaint alleged that "there is a strong likelihood" that WRTL intends, at some unspecified future date, to run "grass-roots lobbying ads" that "similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Wisconsin." Am. Compl. ¶ 16. WRTL did not identify any particular time, place, issue or candidate that it intended to mention in such advertisements, merely indicating that WRTL is "concerned about a range of issues." *Id.*

The district court denied WRTL's request for a preliminary injunction as to the 2004 advertisements. App. 56a. In holding that WRTL had not established a substantial likelihood of success on the merits, the district court, relying on a footnote in *McConnell*, explained that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds before us." App. 52a (citing *McConnell*, 540 U.S. at 190 n.73)). The district court further reasoned that the specific facts of the case "suggest that [WRTL's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* The district court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will often convey [a] message of support or opposition" regarding candidates. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellant] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appellant] names in its broadcast adver-

> tisements, and the PAC announcing as a priority "sending Feingold packing."

App. 53a-54a (citations omitted).

The three-judge court also found preliminary injunctive relief unwarranted because "the actual limitation on plaintiff's freedom of expression . . . is not nearly so great as plaintiff argues." App. 54a. The court held that "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs)." *Id.* The court found it important that WRTL also could have communicated its message during the period preceding the election using print media (such as newspaper advertisements or billboards), electronic media (such as email and internet), or telephone calls. App. 54a n.32.

The district court subsequently dismissed WRTL's complaint in an unpublished memorandum and order. App. 47a-48a. The court held, "for the reasons set forth in" the opinion denying WRTL's motion for preliminary relief, that WRTL's as-applied challenge was "foreclosed by [this] Court's decision in *McConnell*." App. 48a.

WRTL appealed to this Court, which vacated the dismissal, ruling that the district court had misread its footnote in *McConnell* and that "[i]n upholding § 203 [of BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges." App. 45a. As to the district court's statement that the "facts of this case suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," this Court concluded that it was "not clear" whether the three-judge court "intended to rest on this ground" in dismissing WRTL's complaint. *Id.* (internal quotation marks omitted). This Court remanded for the district court "to consider the merits of WRTL's as-applied challenge in the first instance." App. 46a.

5. Following the remand, the lower court set a briefing schedule for summary judgment motions and ordered expe-

dited discovery into "the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign (but not into any historical or planned future advocacy by plaintiff), and the burdens BCRA places upon plaintiff's expression, including the limits of PAC fundraising, the effectiveness of using other media, and the option of employing alternative text for the intended advertisements." Scheduling Order of Apr. 17, 2006, at 2.

The FEC and Intervenor-Appellants offered expert testimony that supported the common-sense view that advertisements such as WRTL's would have an electoral effect in the context of the Wisconsin senatorial race. Charles H. Franklin, Professor of Political Science at University of Wisconsin, Madison, opined that, "within the political context of an election campaign, any advertising that addresses topics of current debate is very likely to have electioneering effects, regardless of the purported purpose of the ad." Franklin Expert Report 23. Those effects were enhanced in the context of the 2004 election because WRTL previously had issued public statements criticizing Senator Feingold's position on the filibuster issue and calling for his electoral defeat. *Id.* at 34-35. Douglas Bailey, an experienced political advertising consultant, likewise opined that WRTL's 2004 ads "would undoubtedly influence the election" and added that the judicial filibuster issue played an important role in the Senate campaign in Wisconsin during the summer of 2004. Intervening Defs.' Mem. In Opp. to Pl.'s Mot. for Summary Judgment, Ex. 15.[3]

WRTL relied on an assertion by its executive director that in her opinion—which she admitted was not based on empirical research—the advertisements would not have af-

[3] The importance of the judicial filibuster issue in the 2004 election was also supported by other sources. For example, the Republican Party of Wisconsin emphasized the issue in criticizing Senator Feingold, asking in its online poll "[w]hat is the #1 reason why Russ Feingold should be voted out of office in 2004" and offering "[h]is obstruction of President Bush's judicial nominees" as one of four possible answers. Intervening Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 16.

fected the campaign because "[t]hey did not speak about elections." Lyons Dep. 33:5-33:11. She conceded, however, that defeating Senator Feingold would have been "consistent with WRTL's . . . goals." *Id.* at 31:24-32:1. As to whether WRTL lacked effective alternative means to communicate its message, WRTL offered only the vague assertion that WRTL-PAC had found fundraising too difficult to obtain sufficient funds for the advertisements, despite the fact that only four years earlier WRTL-PAC had raised more than $150,000. Intervening Defs.' Mem. In Opp. to Pl.'s Mot. for Summary Judgment, Ex. 22. WRTL failed to demonstrate that it could not have employed any other alternative method for conveying its message that would not have implicated BCRA, such as avoiding a specific reference to Senator Feingold.[4]

6. On December 21, 2006, the district court granted WRTL's motion for summary judgment as applied to the three advertisements it sought to run in 2004. In reviewing the justiciability of WRTL's claim relating to the 2004 ads, the court concluded that WRTL's claim was not moot because it fell within the "capable of repetition, yet evading review" exception to that doctrine. App. 12a. The court reasoned that the text of the ads, combined with WRTL's stated intention to run unspecified advertisements during future periods, was sufficient to create a "reasonable expectation" that WRTL will be "subject to the same action again." App. 11a-12a & n.15. To the extent that its conclusion conflicted with another three-judge court's recent review of "essentially the same issue," the court "respectfully disagree[d]." App. 12a n.14 (citing *Christian Civic League of*

[4] Indeed, the advertisements did not include contact information for Senator Feingold, but rather referred the audience to a website (www.befair.org) that contained information criticizing him for his position on the filibuster.

Maine, Inc. v. *FEC*, No. 06cv0614, 2006 WL 2792683 (D.D.C. Sept. 27, 2006) (*CCL*)).[5]

Addressing the merits of WRTL's challenge as to the 2004 advertisements, the three-judge district court found it both "practically and theoretically unacceptable" to consider anything other than the text and images of the advertisements. App. 16a. The court devised a five-factor analysis of the "four corners" of WRTL's 2004 advertisements. Specifically, the lower court "limit[ed] its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate." App. 18a. Based on its application of that test, the court concluded that the advertisements were not the "functional equivalent of express advocacy" because they did not on their face meet any of the five characteristics except the first. App. 20a. Reasoning that this Court held in *McConnell* that the justifications for regulating express advocacy extend only to its "functional equivalent," the Court held that there existed no compelling interest to justify applying BCRA Section 203 to WRTL's 2004 advertisements. App. 21a. The Court did not address WRTL's ability to use alternative means, including the use of WRTL-PAC, to disseminate its message.

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[5] *CCL* involved a challenge to Section 203 of BCRA as applied to one specific advertisement and, as here, as to future "grassroots lobbying" advertisements. The court rejected both claims as non-justiciable, but on facts very different from those present here. 2006 WL 2792683. For example, with regard to whether the dispute was "capable of repetition, yet evading review," CCL had not, unlike WRTL, sought to run additional ads after the commencement of its lawsuit. *See* App. 12a n.15. The district court's ruling in *CCL* was recently appealed to this Court.

The district court also considered WRTL's claim as to "materially similar grass-roots lobbying ads falling within the electioneering communications prohibition periods" that WRTL intended to run in the future. With respect to that claim, the lower court concluded that "such an intention is too speculative and thus not sufficiently concrete to state a cognizable claim under Article III." App. 13a. Accordingly, the court "reject[ed] WRTL's generalized lobbying claim as unripe" noting that it agreed with the conclusion of another three-judge panel that "recently reached the same conclusion in a similar case." *Id.* (citing *CCL*, 2006 WL 2792683, at *2-5). WRTL has not appealed to this Court the three-judge court's order insofar as it rejected WRTL's claim relating to unspecified future "grassroots lobbying" advertisements.

Judge Roberts dissented, stating that the majority's "plain facial analysis of the text in WRTL's 2004 advertisements—ignoring the context in which the text was developed"—was "inconsistent with *McConnell*, . . . inconsistent with this panel's own prior rulings, and finds little support in logic." App. 25a. Examining the context of the advertisements at issue, Judge Roberts found that "WRTL's role in the political environment that wrought the ad campaign in the first place could be probative of the intent of the ads" and cited a long list of facts suggesting an electoral purpose. App. 34a; *see also* App. 34a-36a.[6]

THE QUESTION PRESENTED IS SUBSTANTIAL

Congress enacted BCRA "to correct the flaws it found" in a broken system of campaign finance laws. *McConnell*, 540 U.S. at 194. Prior to the passage of that landmark legislation, corporations, unions, and other groups freely circumvented FECA's source limitations and disclosure requirements by running millions of dollars' worth of candidate-

[6] Judge Roberts concluded, however, that there was "[a] genuine issue of material fact . . . as to whether WRTL's advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads." App. 39a. Accordingly, he would not have resolved the case on summary judgment.

specific "issue ads." Although the "vast majority" of such advertisements had a clear electioneering purpose, *id.* at 206, these advertisements were deemed to fall outside FECA so long as they omitted "magic words" such as "vote for" or "vote against." Section 203 of BCRA was enacted to close this loophole, and this Court, in upholding that provision against a facial challenge in *McConnell*, concluded that a number of compelling interests justified the effect of the Act on First Amendment rights, including preserving the integrity of the electoral process, preventing corruption, sustaining active, alert citizens, and preserving confidence in government. *Id.* at 205 & n.88. The Court also stressed that BCRA left open various alternative means for corporations to express their views. *Id.* at 206.

The three-judge court in this case acknowledged *McConnell*'s holding that the justifications for regulating express advocacy apply equally to the regulation of "issue" advertisements, the majority of which are "'intended to influence the voters' decision and have that effect.'" App. 21a (quoting *McConnell*, 540 U.S. at 206); *cf.* App. 30a-31a (Roberts, J., dissenting).[7] But when the majority of the court concluded that it should consider only the text of WRTL's advertisements, it turned back the clock to the era when "magic words" prevailed. Startlingly, the majority of the three-judge court concluded that it was compelled, as a matter of law, to ignore the largely undisputed evidentiary record before it and invent a constitutional test that focuses solely on the face of the ads—a variant of the failed "magic

[7] The court also properly said it was limiting the scope of this as-applied challenge to the three specific advertisements WRTL sought to run in 2004, and that it was declining on ripeness grounds WRTL's invitation to create a broad grass-roots lobbying exception—rulings that WRTL has not appealed. Despite the majority's modest statement of the scope of its ruling, however, its holding effectively creates a massive loophole in the "electioneering communications" provisions for issue advertisements that do not, on their face, contain language expressly promoting, attacking, supporting, or opposing candidates.

words" test rejected by Congress and by this Court in *McConnell*.[8]

Because the district court's decision is seriously flawed and contrary to *McConnell*, and because it threatens to undermine Section 203 of BCRA by reopening the door to widespread circumvention of the longstanding prohibition on the use of corporate and union general treasury funds to influence federal elections, Intervenor-Appellants respectfully request that this Court note probable jurisdiction and set this appeal for briefing and argument.

a. In *McConnell*, this Court considered and upheld Congress's regulation of precisely the type of advertisements that are at issue here. The Court was presented with a massive record,[9] which included not only the text of advertisements purported to be genuine issue advertisements (many of which were facially indistinguishable from the advertisements WRTL sought to run in this case), but also evidence as to the timing, purpose, and effect of such advertisements. 540 U.S. at 127-128, 193, 206. Based on that extensive record, this Court observed that the distinction between so-called "issue" advertisements and express advocacy, while "neat in theory," was "functionally meaningless." *Id.* at 126, 193. "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 al-

[8] Indeed, even considering solely the text of the advertisements, they are best understood as attacking Senator Feingold. The advertisements assert that "[a] group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or no' vote." App. 58a-63a. They then say that this is "politics at work," that it is "causing gridlock," and they urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* Given that the advertisements attack the actions of a "group of Senators" and then immediately mention two senators, the clear inference is that Senator Feingold and Kohl are among that "group." That fact is further reason to conclude that the district court's test is both unworkable and at odds with the practical experience that informed Congress's judgment in enacting Section 203 of BCRA.

[9] *See McConnell* v. *FEC*, 251 F. Supp. 2d 176, 813 (D.D.C. 2003) (Leon, J.) (describing the record as "elephantine").

though the resulting advertisements did 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." *Id.* at 193. It was with that understanding that this Court concluded Congress has a compelling interest in regulating "issue" advertisements that, even if they do not expressly advocate the election or defeat of a candidate, serve as the functional equivalent of express advocacy. *Id.* at 206.

The analysis by the majority of the three-judge court in this case turns the *McConnell* reasoning on its head. The majority would introduce a standard that would, like the failed magic words test, require an advertisement's purpose to be divined solely from its text and without regard to the relevant context. It would permit just the type of evasion that Congress intended to foreclose and would allow corporations to circumvent the law by eschewing forbidden "magic words" while still conveying a clear campaign message in light of the prevailing context. It was precisely because such an approach was unworkable—and because the "vast majority" of facially benign "issue ads" were "intended to influence the voters and have that effect"—that this Court upheld the facial validity of Section 203.[10]

The majority's approach is particularly troublesome given the necessarily fact-intensive nature of an as-applied challenge. As Judge Roberts indicates in his dissent, given the very nature of "issue ads," this Court was compelled to look beyond the text of the advertisements in *McConnell*, even in the context of a *facial* challenge. App. 34a. Yet the majority of the three-judge district court refused to take the

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[10] In rejecting WRTL's claim regarding "materially similar grass-roots lobbying ads" as unripe, the majority purported to decline WRTL's invitation "to carve out" a broad "grass-roots lobbying" exception. App. 12a-13a. But that is precisely the effect of the court's ruling. By limiting its review of WRTL's 2002 advertisements to their text, the majority would introduce the equivalent of the "magic words" test that applied prior to *McConnell*, which would enable any for-profit (and non-profit) corporation and labor union to run ads like WRTL's 2004 advertisements and render Congress's amendments to Section 441b meaningless.

same approach in the context of an *as-applied* challenge, which by its very nature "requires an analysis of the facts of a particular case." *Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). In so doing, the court turned a blind eye to the most obvious and relevant uncontroverted facts.

The facts presented to the three-judge court demonstrated convincingly that WRTL's advertisements were no different than those considered in *McConnell* and, in fact, represented precisely the type of advertisement that Congress had in mind when it enacted BCRA. The majority declined to consider, for example: WRTL's historic and then-current opposition to Senator Feingold and its announcement that one of its "top priorities" in 2004" was to defeat his bid for reelection; WRTL's linkage, through its PAC, of its opposition to Senator Feingold to the filibuster issue; WRTL's timing of its broadcast advertisements to coincide with the Senate's 2004 summer recess (after four judicial filibuster votes had already occurred but just prior to the primary and general elections); WRTL's decision to mention Senator Feingold by name at a time when the judicial filibuster issue had become a central focus in the Wisconsin Senate race and was being used to attack Senator Feingold; and the ample availability of alternative means for WRTL to disseminate its message.[11]

b. The five-factor, text-based test that the majority developed to review WRTL's advertisements only serves to illustrate further that its approach is contrary to both *McConnell* and common sense. The majority concluded that WRTL's advertisements were not intended to influence voters' decisions because, on their face, the advertisements: (1) although describing an issue of "legislative scrutiny" in the

[11] The court suggested that such facts were relevant at an earlier stage. App. 52a (denying WRTL's motion for a preliminary injunction in part because "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating").

Senate (judicial filibusters); (2) did not expressly refer to Senator Feingold's prior voting record or current position on judicial filibusters; (3) mentioned Senator Feingold only in the closing "call-to-action" line, along with Senator Kohl; (4) did not (expressly) promote, attack, support, or oppose either Senator or comment on their past statements or records; and (5) did not mention an election, a candidacy, a political party, or comment on a candidate's character or fitness for office. App. 18a.

As the Supreme Court recognized in *McConnell*, Congress's compelling interest in regulating use of corporate and union general treasury funds to influence federal elections extends to those advertisements that are the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. Functional equivalence, of course, requires analysis of how advertisements actually *function* in the real world, an inquiry that the court below declined to undertake. Congress's interest in regulating the flow of corporate and union dollars to efforts to influence federal elections is no less compelling in cases where the nature of the advertisement is correctly understood in light of the overall context in which the ad ran than in cases in which reference to the text of the ad alone is sufficient. The advertisements at issue in this case, even if read as not attacking Senator Feingold on their face, when understood in context, are precisely the types of advertisements that Congress addressed in Section 203 of BCRA and that this Court considered in *McConnell*.

By holding BCRA Section 203 unconstitutional as applied to the advertisements at issue here, the three-judge district court's ruling stands as an obstacle to the full achievement of the purposes of a critically important federal law. The ruling threatens to create a large class of advertisements that are exempt from the law even though they fall within its terms, and it does so based on reasoning that is, at best, in significant tension with a recent and fully considered decision of this Court. This Court has long recognized that lower court decisions that strike down the application of federal statutes to broad swaths of conduct within their scope merit plenary review, particularly when, as here,

their reasoning is questionable. *See, e.g.*, *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 425 (1993). This case is no exception to that principle.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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