No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

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

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED*

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat 81 (2002) ("BCRA"), bans "electioneering communications," defined as television or radio (broadcast, cable, or satellite) corporate speech that, 60 days before a general election or 30 days before a primary election, refers to a clearly identified federal candidate and can be received by 50,000 or more persons in the relevant district or state. 2 U.S.C. § 434(f)(3)(C). *McConnell v. FEC*, 540 U.S. 93 (2003), held that this provision (i) served the same compelling interest in limiting corporate candidate advocacy accepted by the Court in prior cases, and (ii) would not reach enough true issue advocacy to render the definition of electioneering communication invalid on its face. The questions presented on this appeal are:

1. When compelling governmental necessity overrides the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech," and a speech restriction is enacted that is precise and tailored enough to escape facial invalidity, may that restriction be applied to core speech that the government has no compelling need to suppress?

2. Does *McConnell*'s holding that the government had a compelling need to suppress so-called sham issue advocacy that was clearly intended to influence elections and was the functional equivalent of express electoral advocacy authorize the government to suppress for up to 90 days speech that addresses active legislative issues and petitions for redress from incumbent elected officials who happen to be seeking reelection?

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* All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's underlying membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being.

Business corporations are profoundly affected by federal legislation, policy, and executive action on a wide range of

issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, corporations are critically interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public, federal legislators, and other government officials. At the same time, all Americans, including American voters and government officials, have a vital interest in hearing what corporations have to say on the key issues of the day.

Some of the Chamber's members, particularly large corporations, maintain separate segregated funds, commonly called PACs, that permit some direct advocacy for or against candidates. But the vast majority do not. PACs are complex and burdensome to initiate and maintain. As of January 1, 2005, there were only 1,622 PACs sponsored by corporations registered with the FEC. *See* FEC Issues Semi-Annual Federal PAC Count (Jan. 25, 2005), http://www.fec.gov/press/press2005/20050115count.html. Only some of those PACs are sponsored by Chamber members. When an issue arises requiring comment by a corporation that does not maintain a PAC, it often is not practical for a corporation to organize a PAC, solicit contributions, and then speak out in a timely fashion. Moreover, even corporations that have PACs often will already have spent or committed PAC funds to campaigns or other purposes that must receive PAC funding before the need for issue speech is discerned. Thus, corporations have a strong interest in being able to engage in issue advocacy without the burdens and limitations of the PAC structure. And, for most corporations, requiring them to speak through a PAC is the equivalent to banning their timely speech.

Public policy largely is decided by elected officials. When an active legislative issue is before incumbent officials for action, interested persons have a compelling need to address those issues and to receive speech concerning those issues. For such speech to petition effectively for redress, it must

identify the government officials who will make the critical decisions.

A key function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In that role, the Chamber was a party to the *McConnell* litigation challenging the facial constitutionality of the BCRA's restrictions on corporate political speech that are the subject of the instant as applied challenge. The Chamber regularly files briefs *amicus curiae* where the business community's right to political speech is at stake. *See Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Elections Bd. of Wis. v. Wis. Mfrs. and Commerce*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). And the Chamber, which is incorporated, also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the U.S. v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

This appeal affects the ability of the Chamber and its members to exercise their core First Amendment right to speak about active legislative issues when they are being decided and to seek redress from incumbent elected officials who will do the deciding. Thus, the Chamber's special perspective and vital interests justify its submission of this brief *amicus curiae*.

STATEMENT OF THE CASE

This appeal picks up where *McConnell* left off. This Court previously has found that the government has demonstrated a sufficiently compelling need to limit candidate advocacy by corporations. *McConnell*, 540 U.S. at 205 (collecting authority). Relying on its seminal campaign finance decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court crafted a

standard that would serve that interest while avoiding overbreadth by construing the law banning corporate political speech to apply only to speech that contained explicit words expressly advocating the election or defeat of clearly identified candidates. *MCFL*, 479 U.S. at 248-49.

Over time, Congress perceived that *Buckley*'s "express advocacy" standard was too easily circumvented by so-called sham issue ads that avoided "magic words" such as "vote for" or "elect," but functioned as corporate candidate advocacy. Eventually, in the BCRA, Congress enacted a new ban on "electioneering communications"—corporate speech broadcast during months prior to an election that referred to a federal candidate and could be received by a minimum number of possible voters. 2 U.S.C. § 434(f)(3)(C).

In *McConnell*, the Chamber and others contended that BCRA's electioneering communication standard was *facially* unconstitutional because it was not narrowly tailored to the government's claimed interest in limiting candidate advocacy by corporations. By a bare majority, *McConnell* rejected that facial challenge. The majority ruled that, because speech within the electioneering communication definition "will *often* convey [a] message of support or opposition" to a candidate, the standard avoided facial invalidity because it was not substantially overbroad. 540 U.S. at 205-07, 239.[1]

This appeal asks what should occur when the facially valid electioneering communication standard is applied to suppress core speech that does not support or oppose a candidate. *McConnell* flagged this issue, noting that the justification for limiting corporate candidate advocacy left open the status of true issue speech. *Id.* at 206 n.88. Moreover, *McConnell*

[1] *McConnell* erroneously applied a test of "substantial overbreadth," rather than the more rigorous "narrow tailoring" test required by settled precedent. 540 U.S. at 207. *McConnell* also found that the electioneering communication standard provided a precise and objective bright line test. 540 U.S. at 194.

repeatedly noted that a facially valid restriction remains open to "as applied" constitutional challenges. *Id.* at 159, 173, 244.

The as applied issue here arises from ads that appellant Wisconsin Right to Life, Inc. ("WRTL") began broadcasting in Wisconsin in July, 2004. Those ads criticized Senate filibusters of judicial nominees and urged Wisconsin viewers to petition their two Senators, Feingold and Kohl, to oppose such filibusters. The ads said nothing about the record of the two Senators, merely identifying them as the persons representing Wisconsin interests in the filibuster controversy.

Because WRTL was a corporation, its broadcast speech was potentially subject to restriction as electioneering communications. Because Senator Feingold had decided to seek reelection, as incumbent federal legislators frequently do, the ads unavoidably mentioned a candidate, though they did not identify him as such. The filibuster issue was not resolved during July.

In August, 30 days before the Wisconsin primary election, BCRA's electioneering communication blackout period began. At that point, the threat of serious civil and criminal sanctions forced WRTL to suppress its ads, even though the filibuster issue was coming to a head in the Senate where Senator Feingold still held office. Indeed, because the blackout period also included the 60 days before the general election, *WRTL faced a nearly three-month ban on core speech directed not to the election but to an active legislative issue then being decided by incumbent office holders*.[2]

WRTL's situation is not unique. Nothing prevents vital legislative issues from coming to the fore during the three months prior to a general election and, indeed, that often has

[2] WRTL reasonably could believe that the filibuster of judicial nominees threatened the organization's broader policy goals. WRTL explained why its theoretical right to speak through a PAC was not viable.

occurred. In the *McConnell* record, the ACLU listed 29 instances of action by the 106th Congress on bills of interest to the organization during the 60 days prior to the November, 2000, elections. *See McConnell* J.A. at 622-626 (attached at Appendix). In the *McConnell* district court litigation, Judge Leon listed various "important, and controversial, pieces of legislation" that were considered by Congress during the blackout period, concluding that they illustrate "BCRA's potential impact on genuine issue advocacy." *McConnell v. FEC*, 251 F. Supp. 2d 176, 793 n.98 (D.D.C. 2003) ("a resolution authorizing the use of armed force against Iraq . . .; an election reform bill . . .; legislation to establish the Department of Homeland Security . . .; and various appropriations bills"). In addition, the 108th Congress held 157 roll call votes in the 60 days leading up to the November, 2004, elections. *See* United States House of Representatives and United States Senate Roll Call Votes, 108th Congress—2d Session (2004), *at* http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm,http://clerk.house.gov/evs/2004/ROLL_400.asp, and http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited Oct. 28, 2005). Lastly, it is not unusual for legislators to maneuver to set sensitive votes in the election period. *See, e.g.*, Andrew Mollison, *Votes on Guns, Marriage Slated; GOP Leaders in House Push Symbolic Bills*, Atlanta Journal-Const., Sept. 28, 2004, at 3A.

Corporations who need to address those issues and urge the public to call for redress by their elected representatives often will find themselves facially barred by the electioneering communication standard. Such situations may not be so common as to justify holding the electioneering communication standard facially invalid—though the Chamber disagrees with this point and litigated it in *McConnell*—they are important to those involved and to our core constitutional values.

WRTL brought an action seeking preliminary relief to allow it to continue its ads. WRTL argued that simple inspection of its ads showed that they did not advocate for or against any candidate but, instead, addressed an active legislative issue and mentioned the incumbent officials who could provide redress. Thus, the need to restrict corporate candidate advocacy that *McConnell* relied on to justify the electioneering communication standard did not apply to the WRTL ads or to similar speech. Because any suppression of core speech is irreparable injury and the First Amendment establishes a strong public interest in free speech, WRTL argued that preliminary relief should be granted.

As required by section 403 of the BCRA, the action was considered by a 3-judge panel of the U.S. District Court for the District of Columbia. That court denied preliminary relief, ruling *inter alia* that:

- Although *McConnell* only "was considering a facial challenge," it precluded all "as applied" challenges by ruling that "we uphold all applications" of the electioneering communication standard, thus barring relief as a matter of law.
- Because WRTL's ads were of a general type that *McConnell* said "often" will communicate an electioneering message (e.g., broadcast by a corporation near an election and referring to a candidate) and WRTL's PAC opposed Senator Feingold, WRTL could not show that its ads did not implicate the government interest in suppressing corporate candidate advocacy.
- WRTL faced little injury because it retained the theoretical right to address the issue of filibusters in other ways, including through its PAC.

- The "public interest [in suppressing the ads] is already established by the Court's holding [in *McConnell*] and by Congress' enactment."

Shortly thereafter, the panel entered a final order of dismissal "for the reasons set forth" in denying preliminary relief.

WRTL appealed to this Court, noting that, although the occasion for its particular ads had passed, this was a situation capable of repetition while avoiding review, that WRTL intended to finance similar speech in the future, and that this Court usefully could begin to mark the contours of as applied challenges to the electioneering communication standard. WRTL further observed that, because BCRA funnels all such as applied challenges to the same district court, the precedents set by that court were particularly important and could not be shaped by the differing views of other courts.

The FEC moved to dismiss the appeal or summarily affirm the judgment, asserting *McConnell* was dispositive. This Court denied the motion and agreed to consider both whether as applied challenges are viable in light of *McConnell* and whether WRTL's ads should have been protected.

SUMMARY OF ARGUMENT

The as applied relief sought here relieves a fundamental tension between *McConnell*'s rationale and its holding. *McConnell* reasoned that the substance of corporate speech, not its form, determined the government's need to regulate. So-called sham issue ads that were "the functional equivalent of express advocacy" in substance clearly advocated for or against candidates. *McConnell*, 540 U.S. at 206. The same compelling interest the Court has found adequate to justify suppressing corporate express advocacy also justified suppression of functionally equivalent speech cast in the form of issue ads.

However, having just held that substance trumped form, *McConnell* then sustained a definition of forbidden speech—

the electioneering communication standard—based on form rather than substance. The test looked to such formal matters as where and when speech was broadcast and whether a candidate was identified, giving no weight to whether the speech functioned as candidate advocacy.

This tension between *McConnell*'s rationale and result had a reason. To assure core speech is not deterred by uncertainty, First Amendment facial analysis requires the government to provide a sufficiently tailored bright line definition of the speech that is regulated. Such a definition may well employ formal elements that are objective, easily identified, and reasonable markers for the speech the government may regulate. The resulting bright line plays a valuable primary role in identifying speech that poses no risk of regulation. Assuming it is sufficiently tailored, it defines a substantial area in which speech is not needlessly chilled by uncertainty and risk. But such a line inevitably will encompass some speech that the government has no compelling need to regulate.

At the same time, the First Amendment commands categorically "Congress shall make no law . . . abridging the freedom of speech," a command that applies with full force to corporate as well as individual speech. Although compelling necessity may override that command, that rationale sets its own limits. If the government does not actually need to suppress particular speech, the First Amendment commands that the speech be freely allowed.[3]

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[3] This consideration distinguishes ordinary economic and social legislation. In that context, the due process and equal protection clauses demand only minimal rationality. Thus, if formal markers have a reasonable association with substance, the basic constitutional commands are met and the legislation may be enforced categorically, unless it trenches on some other constitutional guarantee. The unique aspect of legislation regulating core speech is that it all transgresses a core constitutional command, so that mere rationality of classification is not a sufficient

There is nothing novel about using as applied challenges to assure that facially valid provisions do not suppress more core First Amendment activity than is strictly necessary. To the contrary, *McConnell* repeatedly observed that provisions sustained against facial attack remained open to as applied challenge. Indeed, since most types of statutes typically are presumed to be valid, the great majority of as applied challenges involve provisions that are presumed facially valid.[4]

Importantly, as applied challenges are no substitute for the narrowly tailored and objective bright lines demanded by First Amendment facial analysis. Such lines are critical. But neither do as applied challenges conflict with a bright line standard. Instead, they are an important backstop, making sure that the unavoidable limits of legislative foresight and precision do not convert into needless suppression of core speech. Indeed, but for the as applied safety valve, the First Amendment might demand a standard of legislative draftsmanship that would be not just high but virtually impossible.[5]

The challenge for this Court is to establish standards for as applied challenges that will permit them to serve a meaningful speech-protecting role. This need not be done all at once. A benefit of as applied analysis is the opportunity it affords to assess specific circumstances in the light of ex-

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justification. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

[4] Statutes that substantially burden core First Amendment speech are presumed invalid. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). But that does not mean that a finding of facial validity immunizes them from as applied attack. To the contrary, because they operate in a field where the First Amendment forbids Congress to legislate, they must be scrutinized with particular care.

[5] The real risk is that the availability of as applied challenges may lead to acceptance of needlessly low drafting standards. The front line protection of First Amendment values is rigorous facial scrutiny that insists on precise and objective standards that are carefully tailored to the necessity for regulation.

perience. But this Court should not rule so narrowly that every proposed ad must be litigated. Instead, this Court repeatedly has employed as applied litigation to identify categories to which a facially valid standard cannot lawfully apply. *See infra* Section III.

The facts presented by WRTL identify one common circumstance to which the electioneering communication standard does not properly apply. From time to time, elected representatives will be dealing with an active legislative issue in the 90 days prior to an election. For example, a list of such active legislative issues that were pending during the blackout period in 2000 is attached.

Affected corporations must be free to address such issues freely and to urge citizens who agree to petition their incumbent elected officials for redress, even if they happen to be seeking reelection (as incumbents often do). Foreclosing such speech for 90 days—an eternity in public debate—is truly Draconian.[6] Yet permitting such true issue speech would not threaten the interest in limiting corporate electoral advocacy relied on by *McConnell*. Accordingly, this Court should hold that:

- The electioneering communication standard is open to as applied challenges; and
- The electioneering communication standard cannot constitutionally be applied to speech that addresses an active legislative issue and refers to a candidate only in his or her role as an elected official.

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[6] The Chamber expects that WRTL and other participants will discuss why organizing and operating a PAC is a serious burden and often is entirely impractical. For corporations that do not have a PAC in place or whose PAC resources have been committed elsewhere, the electioneering communication provision will operate as a ban. In any event, this Court has held that subjecting core speech to substantial burden is a prohibited abridgment that must be justified by compelling necessity. *See MCFL*, 479 U.S. at 263.

ARGUMENT

I. CORE FIRST AMENDMENT GUARANTEES INCLUDE THE RIGHT OF CORPORATIONS TO SPEAK ON PUBLIC ISSUES AND THE RIGHT OF WILLING MEMBERS OF THE PUBLIC TO RECEIVE SUCH SPEECH

This Court has been clear that corporate speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), and is part of "the free flow of information" the First Amendment protects, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Thus, in case after case this Court has held that corporate speech merits the same high level of First Amendment protection afforded to speech by individuals. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to "strict scrutiny" standard of review); *McConnell*, 540 U.S. at 330 (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies. . . .").

The First Amendment protects "speech" rather than merely speakers, and the process of meaningful speech also involves listening. Thus, the right of free speech protected by the First Amendment includes the right to receive information from willing speakers, including corporations. *See Bellotti*, 435 U.S. at 783 ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive

it.") (internal citation omitted). In particular, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, *see Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Without such a right, the First Amendment's universally recognized purpose of assuring free discussion of public affairs so that truth will ultimately prevail cannot be achieved. *See id.*; *Kleindienst*, 408 U.S. at 763 (1972) (citing *Red Lion Broad. Co.*, 395 U.S. at 390).[7]

In short, corporate speech on public issues receives the same high degree of First Amendment protection as speech by individuals. Although *McConnell* sustained the corporate prohibition on engaging in electioneering communications, it did so because "the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office" and electioneering communications "are the functional equivalent of express advocacy." 540 U.S. at 205-06. But that rationale implies its own limit—suppression of core speech must be no broader than is strictly necessary.

[7] As this discussion demonstrates, corporate discussion of issues is entitled to the highest level of protection, not the lesser protection sometimes afforded to "commercial speech." But even commercial speech is highly protected. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

II. *McCONNELL*'S RECOGNITION OF A COMPELLING NEED TO LIMIT SHAM ISSUE ADS THAT WERE THE FUNCTIONAL EQUIVALENT OF EXPRESS CANDIDATE ADVOCACY DOES NOT JUSTIFY SUPPRESSING TRUE ISSUE ADVOCACY BY CORPORATIONS

Where the First Amendment's core provision is set aside to serve compelling necessity, that need must be precisely defined to mark out the limits of permissible suppression of speech. *McConnell* simply applied prior rulings accepting a compelling governmental interest in protecting candidate elections from corruption that threatens the link between the popular will and those who govern. 540 U.S. at 206 n.88 ("unusually important interests [in] '[p]reserving the integrity of the electoral process'") (citing and quoting *Bellotti*, 435 U.S. at 788-89). Moreover, this Court has held that corporate advocacy for or against candidates poses such a threat and justifies a departure from the First Amendment's categorical command that Congress "make no law" abridging free speech. *Id.* at 205 (collecting authority).[8]

But the Court has never found a compelling need to regulate corporate issue speech that does not advocate for or against candidates. To the contrary, it repeatedly has protected true corporate issue advocacy. For example, *Bellotti* flatly rejected any notion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784. Emphasizing that First Amendment rights have "particular significance with respect to government," *id.* at

[8] The empirical and theoretical grounds for this conclusion are weak, and the Chamber hopes the Court eventually will revisit the issue. For present purposes, however, the Chamber assumes that a compelling interest justifies excluding most corporations (but not "*MCFL*" or media corporations) from electoral advocacy.

777 n.11, *Bellotti* held that the state had no compelling need to forbid corporate issue advocacy.

Similarly, *Consolidated Edison Co.* found no justification for preventing even a regulated corporate monopoly from addressing "controversial issues of public policy." 447 U.S. at 537. Stressing that the corporate nature of a speaker does not undermine "the inherent worth of the speech in terms of its capacity for informing the public," it forbade the state to interfere with the corporation's use of space in its billing envelopes for issue advocacy. *Id.* at 530 (quoting *Bellotti*, 435 U.S. at 777).[9]

Buckley clearly understood the government's legitimate concern to be limited to restricting candidate advocacy rather than true issue speech. Thus, in crafting a narrowing construction intended to cure vagueness and overbreadth, *Buckley* focused on speech using explicit words that expressly advocated the election or defeat of clearly identified candidates. 424 U.S. at 43-44.

When Congress concluded that the express advocacy standard proved ineffective to restricting corporate candidate advocacy, Congress created and *McConnell* approved the electioneering communication standard. *McConnell* said that corporate issue speech was not so rigidly protected that merely adopting the form of issue speech precluded all regulation. 540 U.S. at 193. Instead, the issue was one of substance: the government was equally entitled to reach so-called sham issue ads that "do not urge the viewer to vote for or against a candidate in so many words [but] *are no less*

[9] The corporate form of certain nonprofit organizations is disregarded for purposes of the restrictions at issue in this case. *See* 11 C.F.R. § 114.10 (exempting *MCFL* corporations from electioneering communication ban). Like the vast majority of corporations, WRTL is not such an organization. This case, like *Bellotti* and *Consolidated Edison Co.*, concerns restrictions on the speech of true corporations.

clearly intended to influence the election." *Id.* (emphasis added).

Thus, *McConnell* held that the new electioneering communication standard served the same compelling interest in restricting corporate candidate advocacy that had justified applying *Buckley*'s express advocacy standard to corporate speech. In response to arguments 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," *McConnell* responded:

> This argument fails *to the extent that the issue ads* broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voter's decisions and have that effect.

Id. at 206 (emphasis added). In short, the need to regulate depended on whether the ads, in fact, functioned as express advocacy, not on their form.

Ironically, having held that the government's need to suppress speech was determined by its substance—functioning as candidate advocacy—*McConnell* sustained an electioneering communication standard that, like the express advocacy standard, turned on issues of form. *Id.* Although *McConnell* concluded that the formal incidents specified by the electioneering communication standard often are markers for candidate advocacy, the Court recognized this need not always be so. *Id.* at 206-07.

McConnell acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads.*" *Id.* at 206 n.88 (emphasis

added).[10] In fact, the record in *McConnell* included evidence of such genuine issue speech by corporations. *See, e.g.*, *McConnell* J.A. at 328 (the Chamber supported ads "that urged Senator Daschle to schedule a Senate vote on Eugene Scalia's nomination as Solicitor of Labor"), 286 (the National Association of Manufactures ran ads supporting the President's tax proposal and "referred to the proposal as being that of the President"). Nonetheless, the Court held the electioneering communication standard to be sufficiently tailored because "the vast majority" of ads within its language were the "functional equivalent" of express advocacy and "clearly had [the same] purpose." *Id.* at 206; *see also Colo. Right to Life Comm., Inc. v. Davidson*, No. 03-CV-1454, 2005 WL 2450157, at *13 (D. Colo. Sept. 30, 2005) ("if the government wishes to justify a regulation of corporate political activity under [*McConnell*], it must demonstrate that the regulated activity is 'the functional equivalent of express advocacy.'")

In sum, the electioneering communication standard was held facially valid because it met the government's compelling need to restrict corporate speech that was the functional equivalent of express candidate advocacy. *McConnell* did not find any compelling need to suppress genuine corporate issue speech. It merely predicted that such genuine issue ads would not be affected frequently enough to justify holding the standard facially invalid. *McConnell* clearly left the door open to restrict application of the electioneering communication standard to speech that does not function as express candidate advocacy.

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[10] Context makes clear that *McConnell* uses "genuine issue ads" to distinguish speech that is the "functional equivalent" of express advocacy. To illustrate the "so-called issue advocacy" targeted by the electioneering communication standard, *McConnell* quoted an ad that accused a candidate of beating his wife and failing to support his children. 540 U.S. at 193 n.78.

III. THE "ELECTIONEERING COMMUNICATION" PROVISIONS OF BCRA CANNOT CONSTITUTIONALLY BE APPLIED TO SUPPRESS CORPORATE ADS THAT ADDRESS ACTIVE LEGISLATIVE ISSUES AND SEEK REDRESS FROM INCUMBENT REPRESENTATIVES

Although as applied challenges typically are supported by one or more concrete examples, the Court often describes a category of speech that is protected from the primary standard. For example, *Edenfield v. Fane*, 507 U.S. 761 (1993), entertained a challenge to promotional activities by Certified Public Accountants. The Court accepted that there could be a need to protect individuals from such activities. But because businesses tend to be more sophisticated and less vulnerable, the Court held that "as applied to CPA solicitation in the business context," the statute violated the First Amendment. 507 U.S. at 763; *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993) (*Fane* sustained an "as applied challenge to a broad category of commercial solicitation"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (holding an obscenity statute invalid as applied to some definitions of "lust" but not others). Similarly, *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604, 620-22 (1996), held that general spending restrictions could not be applied to "independent expenditures" by political committees. And *United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995), held that a restriction on honoraria violated the First Amendment as applied to federal employees in lower pay grades. There, although Justice O'Connor's partial dissent preferred to describe a different category of protected speech, she accepted the basic approach, saying:

> There is a commonsense appeal to the Government's argument that, having deemed a particular application of a statute unconstitional, a court should not then throw up

> its hands and despair of delineating the area of unconstitutionality.

513 U.S. at 486.

Similarly here, the specific circumstances presented by WRTL illustrate a category of corporate speech to which the electioneering communication standard cannot constitutionally be applied.[11] In addition to protecting that particular speech, this Court can best advance First Amendment goals by delineating that category. The Chamber suggests that category of speech has two defining characteristics: (i) it addresses an active legislative issue, and (ii) it refers to candidates only in their capacity as incumbent elected officials with responsibility for the issue being discussed.

A legislative issue is active when it is pending for action in Congress during the electioneering communication blackout period. For example, the judicial filibuster issue addressed by the WRTL ads was active because filibustered nominations were pending in the Senate, the Senate remained in session, and Senators were actively considering potential solutions. Such an active legislative issue urgently and logically justifies discussion during the blackout period and is not mere "past history" dredged up as a pretext for candidate advocacy.

Similarly, incumbent legislators who have responsibility for acting on such an active issue are logical and necessary persons to be named in such issue discussions. In the case of the WRTL ads, whom else should viewers in Wisconsin petition to end judicial filibusters than their own elected

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[11] Of course, there is no need for the Court to identify all categories to which a standard may not be applied. The Court may proceed incrementally as particular challenges illuminate particular categories that should be protected from the general rule. However, given the First Amendment imperative to suppress no speech unnecessarily, the Court should not be unduly restrained in identifying the categories or principles that justify as applied protection.

Senators? Referring to elected representatives only in that role, and not as candidates or the subject of electoral exhortation, allows effective petitioning without inviting candidate campaigning.

An exception to the definition of electioneering communication that these two elements mark as true issue advocacy would be clear and objectively determinable.[12] It would not replace that essential bright line that this Court has required is necessary before regulating core speech, *Buckley* 424 U.S. at 42-44, but will provide fallback protection for speech this Court has never empowered Congress to regulate.

Such an exception would restore the core First Amendment right of the Chamber and other business organizations to speak out on active legislative issues of importance to the business community whenever they arise. *See supra* at 17 regarding ads urging Senate votes on federal nominees and ads supporting the President's proposed tax plans. The exception would also avoid incentivising incumbent federal office holders to avoid public criticism for their official acts by scheduling them during the electioneering communication blackout period.

[12] WRTL offers a list of further criteria confirming that its proposed speech would not justify suppression. The Chamber submits that most of these factors simply are not necessary and would pointlessly circumscribe this Court's delineation of the protected category.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.

Respectfully submitted,

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APPENDIX

106th Congress
Congressional Action During the 60 Days Prior to November Election on Bills of interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Chruch-State:

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backlog of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court: decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local or federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix `96" (HR 5062); Passed House 9/19/2000.

Internet Filtering

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.
- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed 10/19/2000; House debates conference report 10/25/2000;

- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception "morning after pill" on elementary or secondary school premises (HR 4577, Labor/ HHS Approp.): Pre. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence

- Makes it harder for INS to use secret evidence to deport immigrants or to deny tem [sic] asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA (HR 1248): Passed House 9/26/2000; Passed Senate as par [sic] of HR 3244 0/11/2000 [sic].

Voting Reform

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.