No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

For the past three decades, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, from *Buckley v. Valeo,* 424 U.S. 1 (1976), where we represented our affiliate, the New York Civil Liberties Union, to *McConnell v. FEC,* 540 U.S. 93 (2003), where the ACLU was both co-counsel and plaintiff. In the intervening years, the ACLU has participated in numerous campaign finance cases, both in this Court and in the lower state and federal courts. Currently, we are counsel in *Randall v. Sorrell,* 382 F. Supp. 91 (2d Cir. 2004), *cert. granted,* 126 S.Ct. 35 (2005)(No. 04-1528), which will be argued later this Term.

Even in the context of that long history, the present case raises issues of particular significance for the ACLU. With increasing frequency in recent years, the ACLU has relied on broadcast ads to promote its position on civil liberties issues. Those issues, and the need to discuss them, arise throughout the year. But those discussions are often most urgent, and the public most engaged, in the period preceding elections when crucial legislative votes are frequently scheduled.

Until passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), the ACLU was free to determine the manner and content of its political speech so long as it respected the

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus curiae,* its members, or its counsel made a monetary contribution to the preparation of this brief.

limits on partisan political activity imposed by its tax-exempt status under the Internal Revenue Code and its own bylaws, and so long as it did not expressly urge a vote for or against a particular candidate. Under the BCRA, the ACLU now faces criminal penalties if it broadcasts any ad during a defined pre-election period that mentions the name of a federal candidate, even if no reasonable person would construe the ad as advocating that candidate's election or defeat.

The question presented by this case is whether that categorical ban can be enforced in circumstances where its underlying rationale simply does not apply. Put in more direct and immediate terms, can a prohibition against "sham" issue ads be enforced in a manner that prohibits the ACLU from broadcasting "genuine" issue ads that are not only protected by the Constitution but involve speech that lies at the very heart of the First Amendment?

This Court's answer to that question will have a substantial impact on the free speech rights of the ACLU and its members.

STATEMENT OF THE CASE

In *McConnell v. FEC,* 540 U.S. 93 (2003), this Court addressed a facial challenge to numerous provisions of the BCRA, including § 203, which bars corporations and unions from engaging in "electioneering communications" with general treasury funds. 2 U.S.C. § 441b (b)(2). That prohibition applies to non-profit corporations as well as for-profit corporations.

An "electioneering communication" is defined by § 201 of the BCRA as any "broadcast, cable, or satellite communication" that (1) refers to "a clearly identified candidate" for federal office, (2) is made during a blackout period that applies 60 days before a general election and 30 days before a primary election or party convention, and (3) is

targeted at the candidate's constituency. 2 U.S.C. § 434(f)(3)(A).

The definition of an "electioneering communication" set forth in the BCRA was intended to close what Congress perceived as a loophole in prior law. Specifically, the pre-existing bar on corporate or union expenditures "in connection with a federal election," 2 U.S.C. § 441b(a), had been widely construed to reach only ads that met the so-called "magic words" test – that is, ads that expressly urged voters to cast their ballot either for or against a specific candidate. Section 203 of the BCRA was designed to reach further and to prohibit what many in Congress perceived to be "sham" issue ads that omitted the "magic words" but were nevertheless intended to deliver a partisan message and influence electoral choices.

This Court accepted the legitimacy of that concern in *McConnell* when it upheld the facial validity of the BCRA's ban on "electioneering communications." At the same time, the Court recognized that some ads that fit within the literal definition of an "electioneering communication" do not in fact have an "electioneering purpose." *McConnell*, 540 U.S. at 206. The Court described those ads as "genuine" issue ads rather than "sham" issue ads. The Court further acknowledged that both the parties and the members of the three-judge district court in *McConnell* had disagreed on how many ads fit within each category. No one, however, doubted the existence of such ads, including the staunchest proponents of the BCRA. In the end, this Court found it unnecessary to resolve that dispute in the context of the substantial overbreadth challenge that plaintiffs had presented in *McConnell*. Based on its review of the record, the Court was convinced that the "vast majority" of "electioneering communications" had an "electioneering purpose" and that was sufficient to defeat plaintiffs' substantial overbreadth claim. *Id* at 206.

McConnell was decided in December 2003. Eight months later, Wisconsin Right to Life (WRTL) filed this action seeking a declaratory judgment that the BCRA's ban on "electioneering communications" was unconstitutional as applied to three specific ads that it had been running on Wisconsin radio. It also sought a preliminary injunction that would allow it to continue broadcasting the ads specified in its complaint during the BCRA's blackout period, which extended for 79 days from August 15 to November 2, 2004, because of the state's election calendar.[2]

WRTL's motion for a preliminary injunction was denied by the district court on the ground that this Court's decision in *McConnell* "leaves no room for the kind of 'as applied' challenge that WRTL propounds before us." J.S. App 7a. WRTL's complaint was subsequently dismissed on the same basis. This appeal followed.

SUMMARY OF ARGUMENT

The ACLU is a nonpartisan organization. It does not engage in partisan political speech. It is, however, an active participant in public debates about civil liberties issues. We seek to educate the public about our views on those issues, and to influence the decisions of lawmakers and policymakers. The ability to broadcast radio and TV ads to targeted audiences is an important part of the ACLU's advocacy strategy. Indeed, the sponsors of the BCRA chose to target those ads – as opposed, for example, to newspaper ads that were left unregulated – precisely because of their communicative impact. The free speech rights of the ACLU

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[2] The 2004 Democratic primary in Wisconsin took place on September 14th, so the 30-day blackout period began on August 15th. By the time the primary was held, the 60-day blackout period preceding the general election on November 2nd had already begun. J.S. App. 5a.

are thus directly and significantly impaired by § 203 of the BCRA.

The First Amendment protects more than the speaker's right to choose what to say. It also protects the speaker's right to choose how to say it. For that reason, this Court has long held that the government must satisfy strict scrutiny whenever it regulates the content of speech. Additionally, the government must satisfy strict scrutiny whenever it deprives a speaker of access to an entire medium of communication. Section 203 of the BCRA undeniably does both.

Applying strict scrutiny, this Court nonetheless held in *McConnell* that § 203 was facially valid because of the government's compelling interest in preventing corporations and unions from using their general treasury funds – amassed for a different purpose and with the benefit of government conferred advantages – to influence the outcome of federal elections. But that fact cannot and does not justify applying § 203 in circumstances where its underlying interests manifestly do not apply. To rule otherwise, would be in effect to hold that First Amendment rights can be abridged even in the absence of any compelling justification.

At the very least, any such holding would be a dramatic departure from this Court's traditional First Amendment jurisprudence. Prophylactic rules are always easier to enforce but this Court has repeatedly rejected their application in First Amendment cases precisely because the burden they impose on constitutionally protected speech has been deemed unacceptable. The three-judge court in this case understandably focused on the language of *McConnell.* And, to be sure, there is language in *McConnell* that could be read as foreclosing future as-applied challenges to the operation of § 203. Read in context, however, that language is more ambiguous than the court below credited. It is, moreover, plainly dicta since the Court in *McConnell* was

not considering an as-applied challenge. Nothing in *McConnell,* therefore, prevents the Court from recognizing the propriety of as-applied challenges to § 203 now that the question has been squarely presented for the first time.

Of course, recognizing the possibility of an as-applied challenge does not determine whether a particular as-applied challenge will or will not succeed. As in every other First Amendment context, a plaintiff must still establish that its First Amendment rights have been burdened, and the government must be given an opportunity to prove that the burden is justified by a compelling state interest that has been narrowly pursued. For the ACLU, the burden imposed by § 203 is clear and is not ameliorated by the two possible escape routes that this Court identified in *McConnell*: either creating a PAC or seeking designation as an *"MCFL"* corporation. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

Requiring the ACLU to speak through a PAC is not the equivalent of asking a group of demonstrators to re-route their march down Sixth Avenue rather than Fifth Avenue. PAC's are associated in the public mind with partisan political activity. The formation of a PAC would therefore threaten one of the ACLU's most valuable organizational resources – its nonpartisan reputation as an impartial advocate on behalf of civil liberties. Furthermore, the detailed rules governing PAC contributions enhance the risk of diverting funds that would otherwise be available as general support for the ACLU's overall program. These burdens might have to be borne if the ACLU were in fact broadcasting "sham" issue ads designed to influence federal elections. It is not, and no one in the *McConnell* litigation, where the ACLU was a plaintiff, ever claimed otherwise. Under existing FEC rules, moreover, the ACLU simply does not qualify for "MCFL" designation.

There are a variety of ways that an as-applied challenge to § 203 of the BCRA could be framed and resolved. First, as here, nonprofit advocacy groups could seek judicial approval for particular ads that they wish to broadcast during the pre-election blackout period. That approach, however, has both practical and doctrinal disadvantages. It exacts a heavy toll on the limited resources of both nonprofit speakers and the judiciary although, over time, a common law set of rules might develop that provide sufficient guidance for all involved to reduce the need for repetitive litigation.

Second, nonprofit speakers can broadcast ads at their own peril and then raise a First Amendment defense in any administrative enforcement proceeding or criminal prosecution. The disadvantage of that approach is that its chilling effect will inevitably lead to self-censorship by speakers unwilling to run the risk of civil or criminal sanctions.

Third, the Court could adopt a speaker-based rather than a speech-based approach. Just as organizations can seek an exemption from disclosure rules by demonstrating that their contributors will suffer retaliation if their identities are disclosed, *see Brown v. Socialist Workers '74 Campaign Committee (Ohio),* 459 U.S. 87 (1982), nonprofit advocacy organizations could seek an exemption from § 203 based on their history and practice of avoiding partisan political activity. Such an exception would not permanently immunize organizations like the ACLU if they crossed the line, but it would create a presumption in their favor that would at least reduce the peril of otherwise speaking at their own risk.

Fourth, this Court could rule that the interests asserted in defense of § 203 simply do not apply to speech by nonprofit corporations organized under 501(c)(4) of the Internal Revenue Code that is entirely funded by individual contributions, thus effectively reinstating the Snowe-Jeffords Amendment to the BCRA as a constitutional rule and relying

on IRS to police any alleged transgressions of the tax laws. We recognize that this final alternative would require the Court to revisit some of its conclusions in *McConnell.* But, it would also provide the greatest free speech protection while still respecting the underlying values that led Congress to pass the BCRA and this Court to uphold it against a facial challenge.

Any of these alternatives, however, is preferable to a legal regime in which § 203 can never be challenged even when it silences speech that does not pose any of the problems that § 203 was enacted to prevent.

ARGUMENT

I. SECTION 203 OF THE BCRA IMPOSES A DIRECT, SUBSTANTIAL, AND UNJUSTIFIABLE BURDEN ON THE ACLU'S CORE POLITICAL SPEECH

The ACLU was founded in 1920. In 85 years, it has never endorsed or opposed a candidate for elective office.[3] Nonetheless, because the ACLU is organized as a nonprofit corporation under § 501(c)(4) of the Internal Revenue Code, it is barred by the BCRA from broadcasting any ad that mentions the name of a federal candidate in the period preceding a primary or general election based on the statute's irrebuttable presumption that such ads are intended to influence the outcome of a federal election even when they manifestly are not.

The ACLU's sole mission is to preserve and protect civil liberties. In furtherance of that mission, we seek to influence the actions of federal officials on a regular and ongoing basis. Since 9/11, for example, we have frequently criticized the balance that federal officials have struck

[3] ACLU Board Policy 519 categorically states: "The ACLU does not endorse or oppose candidates for elective or appointive office."

between liberty and security. We have met with executive branch officials to voice our concerns. And we have attempted to persuade Congress to recalibrate that balance in a variety of ways. As this brief is being written, Congress is reconsidering various provisions of the USA Patriot Act. The Senate has also recently passed a bill to bar torture that we have strongly supported.

As the ACLU has grown in size and budget, broadcast ads have become an increasingly important part of our advocacy strategy. The goal of such ads is two-fold. The first goal is to alert the public to important civil liberties issues. The second goal is to persuade the public to contact their elected representatives and urge those representatives to take a position that supports civil liberties. The timing of those issue ads is never determined by the electoral calendar. But the electoral calendar often determines when issues are brought up for a vote on the floor of Congress. That phenomenon is both easy to explain and well understood. For obvious reasons, elected officials like to build a record of accomplishment just prior to elections. In addition, politicians often perceive a political advantage in forcing their opponents to cast a controversial vote just before elections are held.

The 60 days preceding the 2004 election were typical in this regard. Congress took action on the following issues of longstanding concern to the ACLU.[4]

- On September 21st, the House voted on an amendment to the Transportation-Treasury Appropriations bill to prohibit the use of federal funds to enforce travel restrictions to Cuba. H.R. 5025, 108th Cong. (2004).

[4] These congressional actions are recorded in weekly editions of the Congressional Quarterly, as well as daily editions of the Congressional Record. They are also available on-line at http://www.cq.com.

- On September 23rd, the House voted on a billto strip the federal courts, including this Court, of jurisdiction to hear cases challenging the constitutionality of the Pledge of Allegiance. H.R. 2028, 108th Cong. (2004).
- On September 23rd, the Senate voted on an amendment directing the Secretary of Homeland Security to develop a plan to "integrate and consolidate" airline "no fly lists." S.2845, 108th Cong. (2004).
- On September 28th, the House voted on an amendment to the Defense Authorization bill to expand federal hate crimes legislation. H.R. 4200, 108th Cong. (2004).
- On September 30th, Congress voted on a joint resolution to propose a constitutional amendment banning same-sex marriage. H. R. J. Res. 106, 108th Cong. (2004).
- On October 5th, the House voted on a bill to require software companies to obtain permission from computer users before installing spyware programs that collect and distribute personal information. H.R. 2929, 108th Cong. (2004).
- On October 6th, the House voted on an amendment to fund grants to the states for DNA testing, including post-conviction testing for inmates. H.R. 5107, 108th Cong. (2004).
- On October 8th, the House voted on a series of amendments to the Intelligence Overhaul bill that authorized the death penalty for certain terrorist acts, and that altered the rules for the detention and removal of aliens from the country. H.R. 10, 108th Cong. (2004).

It is, of course, more difficult to predict what bills will be considered during the 60 days preceding the 2006 elections. Based on congressional action this year, reauthorization of the Voting Rights Act is a likely candidate. If the past is prologue, other likely candidates include: a constitutional amendment to ban flag desecration; a constitutional amendment to ban same-sex marriage; bills to restrict federal court jurisdiction; and bills to increase federal criminal penalties. Whether this list proves accurate or not, it is safe to predict that there will be numerous votes on legislative proposals of interest to the ACLU and its members as the 2006 midterm elections approach.

Members of Congress are influenced by the views of their constituents when voting on legislation. Mobilizing constituent support is therefore a principal lobbying tactic for advocacy organizations like the ACLU. Broadcast ads are an effective tool for accomplishing that end. To be effective, however, the ads must be targeted to run in the districts of pivotal legislators. Very few advocacy organizations can afford to spend their limited resources running broadcast ads in congressional districts where they will have little impact on the final legislative outcome. The ACLU certainly cannot. In addition, broadcast ads are most effective when they include a call to action: urging constituents to contact their legislative representatives. Finally, there is little point to running an ad unless the legislation discussed in the ad is under active consideration by Congress.

Unfortunately, the same characteristics that make a broadcast ad effective – namely, a targeted appeal for constituents to contact a specifically identified legislator prior to a scheduled vote – are precisely the characteristics that render the ad unlawful under the BCRA if the legislator is running for reelection and is mentioned in the ad by either name or title (*i.e.,* "call your senator" or "call your representative").

In the last year, the ACLU has broadcast a series of radio ads designed to further our legislative agenda. Under slightly different circumstances, each of those ads would have been a crime under the BCRA. For example, in October 2004, right in the midst of the BCRA's blackout period, Congress was considering a bill to implement the recommendations of the 9/11 Commission. The bill included several anti-immigrant provisions that the Commission had never sought and, indeed, opposed. In seeking to have those amendments dropped from the bill, the ACLU broadcast an ad in Spanish and English in five targeted states with significant immigrant populations. The ad began by stating:

> It doesn't matter if you were the first generation to arrive here.
>
> Or if it was your parents or great-grandparents who came here for a better life.
>
> We all feel a great sense of pride to live in the United States of America.
>
> And when terrorists attacked us on September 11th, we were one nation.

The ad then ended by urging listeners to call their senator and "[a]sk him to protect our rights by opposing the anti-immigration amendments in the 9/11 bill."

The language of the ad was identical in all five states except for the senators named in the tag line. Because none of the senators was running for reelection, the ACLU's ad was protected by the First Amendment. Had any of the senators been running for reelection, the ACLU's ad would have been a federal crime. Notably, the list of senators includes both Democrats and Republicans.

In both June and August 2005, the ACLU broadcast additional radio ads focused on the Patriot Act. The June 2005 ads ran in a total of twelve states and targeted four senators and eight representatives, each of whom was

strategically selected as a potentially critical vote in the Patriot Act reauthorization battle. The August 2005 ads ran in ten states and targeted four senators and nine representatives. One ad, a 60 second spot, was entitled "Concerned Patriots." The text of the ad focused on provisions of the Patriot Act that the ACLU opposed on civil liberties grounds and that public opinion polls had identified as particularly troublesome to the American public. The text of the ad stated:

> How would you like it if someone were to sneak into your home and search through your possessions? What if someone secretly helped themselves to your personal medical records of financial statements – without your knowledge or consent? You'd want to call the authorities, right?
>
> Now, what if I told you the people who did this *were* the authorities? This is one example of what's wrong with the PATRIOT Act as it currently stands.
>
> Unfortunately, right now the federal government is trying to make the PATRIOT Act permanent and expand it – even though it contains several provisions that violate our fundamental freedoms.
>
> These provisions give the courts the power to let the federal government secretly search our homes without letting us know for weeks, months, or even longer.
>
> Last time I checked, the Constitution was supposed to stop that kind of thing. Luckily, we still have the First Amendment so we can make our voices heard to correct the PATRIOT Act before it becomes permanent.

Depending on the venue, listeners were then asked to call either their congressman or their named senator and "[l]et him know [Congress] need[s] to make these crucial changes before renewing the PATRIOT Act." The ad was narrated by Bob Barr, a well-known conservative and former Republican congressman from Georgia. The American Conservative Union and the Americans for Tax Reform joined with the ACLU in paying for the ad, although both organizations disagree with the ACLU on numerous other policy issues.

The only thing that saved these ads from being a crime is that they were not broadcast during the BCRA's blackout period. Had the Patriot Act's sunset provisions been up for reconsideration in the fall of 2006 rather than the fall of 2005, the ACLU would have been severely inhibited in its ability to communicate with the American public on an issue that has been a central concern of the organization, and the country, since 2001.

At the same time that the ACLU was running its broadcast ads, it was also running print ads. For example, in October 2004, the ACLU placed ads in both the Albuquerque Daily Journal Tribune and the Santa Fe New Mexican concerning the proposed anti-immigrant amendments then pending in Congress. The ad asked readers to register their opposition by contacting President Bush and Senator Domenici, whose office phone numbers were listed.

Although the subject matter of the print ads paralleled the subject matter of broadcast ads that were running simultaneously, they were not interchangeable. Broadcast ads and print ads reach different audiences and have different impact. To the extent that budget permits, the ACLU pursues a comprehensive and integrated communications strategy to promote its civil liberties principles and influence relevant legislative decisionmaking in Congress. Optimally,

that strategy includes both print ads and broadcast ads. It also includes the Internet, direct mail, press releases, news conferences, public appearances, and publications, among other communications strategies.

For the ACLU, this combination of earned media and paid media has nothing to do with electing or defeating particular candidates. That is not our interest or intent, and the organization has an 85-year history to substantiate that claim. Any commentary on public issues could conceivably affect the electoral choices of some voter. But to treat every comment on public issues as an "electioneering communication" – assuming it meets the definition set out in the BCRA – is stand the First Amendment on its head.

To be sure, the ACLU could avoid the strictures of the BCRA by altering its message, its medium, or its messenger. Under the First Amendment, however, those choices should be ours to make and not the government's. If the government seeks to override the ACLU's fundamental right to speak, it needs to provide a compelling justification that actually applies to the ACLU. The government, of course, is entitled to legislate on the basis of general propositions, including the proposition that most "electioneering communications" are merely disguised attempts to influence election results. But, for reasons explained more fully below, the ACLU is equally entitled to bring an as-applied challenge arguing that those general propositions do not apply in its case. Allowing exceptions to a rule undoubtedly complicates its enforcement. But the government needs to establish something more than administrative convenience to justify the suppression of First Amendment rights.

II. THE BCRA'S BAN ON "ELECTIONEERING COMMUNICATIONS" MUST REMAIN SUBJECT TO AS-APPLIED CHALLENGE WHEN ITS PROPHYLACTIC RULE RESULTS IN THE SUPPRESSION OF SPEECH THAT DOES NOT TRIGGER THE CONCERNS THAT THE STATUE WAS MEANT TO ADDRESS

The ACLU broadcast ads described in the preceding section are clearly entitled to constitutional protection under this Court's traditional understanding of the First Amendment. That understanding rests on a series of well-established and fundamental principles.

First, "speech concerning public affairs is more than self-expression, it is the essence of self-government." *Connick v. Meyers,* 461 U.S. 138, 145 (1983), quoting *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Second, speech cannot be curtailed because of its proximity to an election. *Mills v. State of Alabama,* 384 U.S. 214 (1966). Third, freedom of speech necessarily "embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 101 (1940). Fourth, neither the fact that the speech or criticism appears in a paid advertisement, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), nor the corporate status of the speaker, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Consolidated Edison Co. of New York v. Public Service Comm'n of New York,* 447 U.S. 530 (1980), provides a justification for suppressing speech on matters of public concern. Fifth, the Constitution protects the right of individuals to amplify their voice through group association. *DeJonge v. Oregon,* 299 U.S. 353 (1937). The government must utilize "sensitive tools," *Speiser v. Randall,* 357 U.S. 513, 525 (1958), when it seeks to limit such associational activity, even if the association chooses to incorporate, like the ACLU, as a nonprofit entity.

None of these principles was called into question by the decision in *McConnell*. To the contrary, *McConnell* was written within the framework of these principles. The Court began by recognizing a compelling state interest in prohibiting corporations and unions from utilizing general treasury funds to engage in partisan political activity. That recognition reaffirmed prior holdings, it did not depart from them. *See, e.g. Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652 (1990). The majority then credited evidence in both the congressional and judicial record that corporations and unions were in fact engaging in partisan political activity by broadcasting so-called "sham" issue ads paid for with general treasury funds, and that pre-BCRA law was inadequate to deal with it. Finally, the Court concluded that the bright lines rules adopted in § 203 of the BCRA were a permissible response, in most cases, to the problem that Congress had identified.

Fairly read, the *McConnell* opinion did not go any further then, and this Court should not go any further now.

A. *McConnell* Did Not Resolve The Issue of Future As-Applied Challenges To § 203 of the BCRA

The plaintiffs in *McConnell,* including the ACLU, challenged the BCRA's ban on "electioneering communications" as facially unconstitutional. In the context of that facial challenge, both the evidence and this Court's opinion focused on whether the strict rules on corporate and union speech set forth in § 203 would impermissibly abridge a substantial amount of constitutionally protected speech, and thus violate the overbreadth doctrine. *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). Neither the government nor the intervenors in *McConnell* ever questioned the fact that some ads barred by the literal language of § 203 were "genuine" issue ads rather than "sham" issue ads. That is, all parties in *McConnell* agreed, and the evidence indisputably showed, that § 203 barred

some ads that were never intended to influence the outcome of federal elections.

The dispute among the parties in *McConnell* was over how many ads fit into each category. The lowest estimate came from the Brennan Center, which was a strong proponent of the BCRA. A study it commissioned in anticipation of the litigation concluded that only 7% of corporate and union ads naming a federal candidate and broadcast during the blackout period in 1998 were "genuine" issue ads. *McConnell v. FEC*, 251 F. Supp. 2d 176, 309 (D.D.C. 2003). The methodology supporting this study was sharply contested, and other evidence in the record placed the figure significantly higher. *Id* at 309-312. Ultimately, this Court found it unnecessary to resolve the dispute because it concluded that plaintiffs had not satisfied the substantial overbreadth test. *McConnell*, 540 U.S. at 206 ("the vast majority of ads clearly had [an electioneering] purpose").

Even accepting the Brennan Center's figure, the question of how to handle those "genuine" issue ads that are nonetheless barred by the BCRA – including the ACLU's own broadcast ads – was simply not before the Court. To the extent that there is language in *McConnell* addressing that question, it is ambiguous and contradictory. Both the government and the district court place great weight on footnote 73, *id* at 190, where the *McConnell* majority announced that it was unnecessary to consider the backup definition of "electioneering communications" in § 201 of the BCRA because it was upholding "all applications of the primary definition." The government and the district court construe this language as a total bar to the sort of as-applied challenge that appellant has brought in this case, regardless of its merits. Footnote 73, however, does not compel that conclusion. Indeed, on its face, it does not even address the ban on corporate and union "electioneering communications" contained in § 203; rather, it addresses the

definition of "electioneering communications" set forth in § 201. Contrary to the view embraced by the government and the district court, it is equally plausible to read the language of footnote 73 in far a more limited way – namely, that the primary definition of "electioneering communications" applies whenever that phrase is used in the BCRA, including § 203. If that is the correct interpretation of footnote 73, it certainly does not follow that § 203's ban on "electioneering communications," including the nonpartisan speech of the ACLU, is likewise valid in "all applications."

Other language in *McConnell* is also inconsistent with the district court's refusal to entertain an as-applied challenge. In rejecting the argument that only "express advocacy" could be prohibited under the First Amendment, the *McConnell* majority wrote:

> 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 voters' decisions and have that effect.

McConnell, 540 U.S. at 206 (emphasis added). While this passage does not refer specifically to as-applied challenges, an as-applied challenge is the conventional means for testing, in a specific factual context, the Court's own proposition that the justifications for regulation of express advocacy *do not* apply to ads that *are not* intended to influence the voters' decisions and *do not* have that effect.

Similarly, the district court attached undue significance to the fact that the majority in *McConnell* expressly acknowledged the possibility of future as-applied challenges when discussing other provisions of the BCRA but not when

discussing § 203. Inferences from silence are always problematic, but they are especially problematic here given the conflicting message that can be drawn just as easily from the majority's silence in response to Justice Kennedy's assertion, in dissent, "that corporations and unions may bring as-applied challenges on a case-by-case basis." *McConnell*, 540 U.S. at 336. If the majority disagreed with that statement, it presumably would and could have said so explicitly.[5]

For decades, this Court has treated as-applied challenges as the constitutional safety net when facial challenges are denied. *E.g. Virginia v. Hicks,* 539 U.S. 113, 123 (2003). Absent a clearer statement than *McConnell* provides, it should not be assumed that this Court intended to depart from that well-settled doctrine. To the contrary, the Court has consistently rejected arguments suggesting that well-settled principles of constitutional jurisprudence have been overruled *sub silentio. See Gonzaga University v. Doe,* 536 U.S. 273, 300 n.8 (2002).

B. As-Applied Challenges Are Necessary To Ensure That The BCRA Does Not Abridge Constitutionally Protected Speech

There is no mystery about the purpose behind Section 203. As this Court recognized in *McConnell,* it was enacted to prevent corporations and unions from using general treasury funds for partisan political purposes by broadcasting so-called "sham" issue ads on radio and television in the critical period preceding a federal election. The defining

[5] In response to Justice Kennedy's different point that § 203 should have been struck down as facially invalid because it reaches constitutionally protected speech, the *McConnell* majority rejected what it described as Justice Kennedy's "premise" that "sham" issue ads and "genuine" issue are entitled to the same protection. *McConnell*, 540 U.S. at 206, n.88. The function of an as-applied challenge is precisely to distinguish between the two, a distinction that the majority cited as central to its holding.

characteristic of a "sham" issue ad, described as an "electioneering communication" in the BCRA, is that it refers to "a clearly identified candidate" for federal office during the statutory blackout periods.

That definition is clearly content-based. In order to suppress a disfavored message of support or opposition for particular candidates, it limits the words that a speaker can use in its broadcast ads. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 295 (1984). Content-based restrictions on speech are subject to strict scrutiny and *McConnell* properly proceeded on that assumption. But its holding that the government had sufficiently established a compelling state interest to justify the BCRA's ban on "electioneering communications" must be understood in light of the facial challenge that the Court was considering. As the Court explained: "Even if we assumed that [the] BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not justify prohibiting *all* enforcement of the law . . ." *McConnell*, 540 U.S. at 207 (internal quotations and citation omitted)(emphasis added).

The opposite, however, is also true. The fact that § 203 of the BCRA is supported by a compelling state interest in the "vast majority" of cases, to use the Court's language in *McConnell,* does not mean that its enforcement in *all* cases is therefore constitutionally valid. If state-bestowed corporate advantages are not being used to engage in partisan political activity, then the ban on broadcast ads not only deprives speakers of their First Amendment rights without any constitutionally adequate justification, it deprives the public of information that can be useful in understanding the policy decisions facing government. Without that information, it is plainly more difficult for the public to participate intelligently in the process of democratic decisionmaking.

The First Amendment disfavors prophylactic rules, *see, e.g., Speiser v. Randall,* 357 U.S. 513 (1958), and statutes restricting free speech must be narrowly tailored both on their face and as applied. In *McConnell,* this Court held that the ratio of "sham" issue ads to "genuine" issue ads was sufficient to sustain § 203 against facial attack, but there is no constitutionally compelling justification to uphold the statute in circumstances where its asserted justifications do not apply.

Only two possible explanations have been offered for this anomalous result. The first explanation is that it is too difficult to distinguish between "genuine" issue ads and "sham" issue ads and thus the former must be sacrificed in order to ensure that the latter are prohibited. However, as the Court said in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002), that notion turns the First Amendment "upside down." Constitutionally protected speech cannot be criminalized merely because it resembles constitutionally unprotected speech. *Id.* If that is true for sexually explicit speech, it certainly should be true for political speech that lies at the core of the First Amendment.

The second explanation is that § 203 imposes only a minor burden on speech because corporations and unions can speak through PAC's, and nonprofit corporations that qualify for *MCFL* status are not bound by the BCRA's ban on "electioneering communications."[6] There are several problems with this approach.

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[6] If anything, the decision in *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986), underscores the propriety of as-applied challenges in this sensitive First Amendment area. The Court in *MCFL* did not question the facial validity of the federal ban on the use of corporate funds for express advocacy. 2 U.S.C. § 441b. It nonetheless held that the general ban could not be applied to nonprofit corporations that satisfy three criteria: (1) they are formed to promote ideological goals; (2) they have no shareholders; and (3) they are not established by a for-profit corporation or union, and do not accept contributions from either.

Although a *de minimis* burden on speech will not trigger strict scrutiny, the government cannot avoid the rigors of strict scrutiny by characterizing § 203 as a regulation rather than a ban. "The distinction between laws burdening and laws banning speech is but a matter of degree. The government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 812 (2000).

Furthermore, the existence of alternative avenues of communication is not normally enough to satisfy strict scrutiny. The adequacy of communication alternatives is a relevant factor when analyzing content-neutral laws. In a strict scrutiny context, however, the Court has long held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey Town of Irvington,* 308 U.S. 147, 151-52 (1939).

Shutting down an entire medium of communication triggers strict scrutiny in any event. *City of Ladue v. Gilleo,* 512 U.S. 43, 55 (1994)("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression."). It is no answer to say that the broadcast medium remains open to corporations or unions that are willing to alter their message because that was equally true in *Ladue.* There, the challenged ordinance allowed homeowners to display "for sale" signs on their property but prohibited them from displaying political signs. The Court properly viewed that discrepancy as enhancing rather than diminishing the constitutional violation. Here, it might be argued, the content-based discrimination is less stark because all that must be omitted from the proposed political broadcast is any reference by the speaker to a "clearly identified candidate." It is not a change of subject, just a change of script. Under the First Amendment, however, it is the speaker who gets to determine the political script and not

the government, absent a compelling justification. *See McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 348 (1995).

In short, the government cannot escape the demands of strict scrutiny or the judicial inquiry it demands. As this Court explained in *McConnell,* "we must examine the degree to which [the] BCRA burdens First Amendment expression and evaluate whether a compelling interest justifies that burden." *McConnell*, 540 U.S. at 205.

For the ACLU, the burden is high and the compelling justification is non-existent for the very same reason. The ACLU is a nonpartisan organization. The government has no legitimate interest, let alone a compelling one, in regulating our nonpartisan political speech. *See ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C.1973) (holding that the ACLU could not be regulated as a "political committee" because it does not engage in speech designed to influence elections). And, the government has no right to jeopardize our nonpartisan reputation by forcing the ACLU to create a PAC that the public is likely to perceive as a symbol of partisanship, however we name it. Nor does the government have any right to demand that the ACLU adopt new fundraising strategies that the organization believes will operate to its detriment, simply to satisfy a law that has nothing to do with the manner in which the ACLU actually advocates on behalf of civil liberties.[7] This Court cannot and should not resolve those issues in this litigation. But the ACLU should not be foreclosed from raising them before an appropriate court in an as-applied challenge to § 203, if it chooses to do so.

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[7] This Court has, on occasion, minimized the regulatory burdens associated with PAC's, *see FEC v. Beaumont,* 539 U.S. 146, 163 (2003); *FEC v. National Right to Work Comm.,* 459 U.S. 197, 201-02 (1982), but always in the context of contribution limits. *MCFL,* 479 U.S. at 259-60. Like *MCFL,* this case does not involve political contributions, it involves political speech.

Likewise, the *MCFL* exception has been so narrowly construed by the FEC that it is unavailable to many non-profits, including the ACLU, that do not present any of the dangers of corporate speech articulated in *Austin, supra,* and relied on by Congress in crafting § 203 of the BCRA.[8] The First Amendment rights of the ACLU ought not to be sacrificed based on categorical assumptions about the burdens imposed by § 203 that might well be disproved in an as-applied challenge.

That is especially so because the *MCFL* criteria were developed for nonprofit organizations that want to engage in "express advocacy" by taking positions in partisan political races. This Court's embrace of the *MCFL* option in *McConnell* rested on the premise that "electioneering communications" were the functional equivalent of "express advocacy." When that premise does not apply, as it does not for "genuine" issue ads, the *MCFL* analogy becomes less relevant in assessing the burden on organizations like the ACLU.

C. An As-Applied Challenge To § 203 Could Be Framed In A Variety Of Ways

Appellant has presented this Court with a traditional as-applied challenge. It concedes that the ads at issue fall within the literal language of § 203 but argues that the statute unconstitutionally limits its speech in this instance because the ads in fact are "genuine" issue ads rather than "sham"

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[8] Under existing law in the District of Columbia Circuit, *see FEC v. National Rifle Association of America,* 254 F.3d 173 (D.C.Cir. 2001), and governing FEC regulations, 11 CFR § 114.10, the ACLU appears not to qualify for an *MCFL* exemption because it has not returned the exceedingly modest funds that have been contributed to the organization in recent years from sources other than individuals. Regulating the ACLU to relinquish these minimum funds without justification converts the *MCFL* criteria into an unconstitutional tax on speech. *See Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936)

issue ads, and were intended to influence policy decisions rather than electoral outcomes. If this Court agrees, appellant is entitled to a remand or an outright reversal. To affirm under these circumstances would be to sanction the suppression of constitutionally protected speech without any compelling justification. This Court should not endorse a result that so plainly offends the First Amendment.

We suspect, although we do not know, that one explanation for the district court's opinion was a reluctance to be placed in the position of reviewing the numerous as-applied challenges to § 203 that it could probably anticipate. That concern is understandable, and it applies to litigants as well as the judiciary. The time and expense of judicial proceedings is a problem for everyone. In particular, smaller nonprofits that are least likely to engage in electoral advocacy are also least likely to be able to afford the cost of seeking declaratory and injunctive relief, especially on an emergency basis. Having to seek judicial approval prior to speaking is not a solution that anyone favors, but it is preferable to the total denial of any opportunity to challenge the government's regulation of speech in a particular factual setting.[9]

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[9] In response to a Notice of Proposed Rulemaking from the FEC, the BCRA's sponsors submitted comments that set forth their version of what speech could be allowed notwithstanding the categorical ban on "electioneering communications" in § 203. Even the sponsors would allow broadcast ads that (1) only concern a legislative or executive branch matter; (2) only refer to a clearly identified candidate as part of a statement urging the public to contact their representative about the pending matter; (3) only refer to the candidate by title – *e.g.*, "your congressman" or "your senator." But to qualify for this exception, the broadcast ads could not mention party affiliation, contain the name of likeness of the federal official, or mention the candidate's position on any issue, including the issue that is the subject of the ad. *See* Letter from Senator McCain, et al. to the FEC (dated August 23, 2002), available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf (last visited on November 5, 2005).

If speakers are denied the opportunity to bring an as-applied challenge, they can always speak at their peril and then raise a First Amendment defense to any enforcement proceeding. Under those circumstances, however, many organizations will choose not to speak. The FEC could dissipate that chilling effect by clarifying its enforcement policy. But, in the absence of clarification, this Court has routinely allowed pre-enforcement challenges to discourage self-censorship and preserve First Amendment rights. *E.g. Steffel v. Thompson,* 415 U.S. 452, 459 (1974). It should do so here, as well.

An as-applied challenge that focused on the speaker rather than the speech is another alternative. In all likelihood, it would reduce the number of potential challenges and perhaps lead to more predictable results. That is the approach this Court followed in *MCFL,* and it is also the approach this Court followed in *Brown v. Socialist*

It is hard to believe that the ACLU's First Amendment right to speak can or should hinge on whether its broadcast ad says "Contact your Senator" or "Contact Senator McCain." Similarly, it is hard to believe that the First Amendment permits the government to tell the ACLU that it can broadcast an ad saying "Ask your congressman to vote against the Flag Amendment," but that the ACLU is subject to criminal prosecution if its ad copy says "Ask you congressman to switch his vote from yes to no on the Flag Amendment."

For present purposes, however, it is sufficient to note that the government can have no possible justification for barring ads that even the BCRA's sponsors admit would not imperil the underlying purposes of § 203. On the other hand, it is unfair to ask potential speakers to rely on a three year old letter from members of Congress who are not ultimately responsible for enforcing the BCRA's provisions. Given *McConnell,* the only way to resolve this conundrum is through an as-applied challenge.

Workers '74 Campaign Committee (Ohio), 459 U.S. 87 (1982)(recognizing an organizational exception to campaign disclosure rule based on a reasonable fear of retaliation). The ACLU, as noted previously, has never endorsed a candidate for elective office in its 85-year history. It should not have to go to court merely to continue doing what it has always done – namely, engage the public in a discussion about civil liberties, whether that discussion is provoked by events occurring before, during, or after an election. However, if the ACLU does go to court with an as-applied challenge to obtain the protection of a judicial order its history should entitle it to a presumption that its broadcast ads are "genuine" issue ads and thus not subject to § 203. Conversely, if the government initiates its own enforcement proceeding, it should have to shoulder the burden of proving that the ACLU has suddenly departed from its long and consistent nonpartisan past.

Finally, this Court can and should take the opportunity to reconsider its holding on the Snowe-Jeffords Amendment. The Snowe-Jeffords Amendment was adopted as § 203(b) of the BCRA. Contrary to the seemingly absolute language of § 203(a), it permitted nonprofit corporations organized under § 501(c)(4) of the Internal Revenue Code, like the ACLU, to engage in "electioneering communications" if those communications were funded by individuals and governed by certain disclosure rules. Section 204 of the BCRA, known as the Wellstone Amendment, then negated what the Snowe-Jeffords Amendment had seemingly allowed by reinstating the prohibitions of § 203(a) for § 501(c)(4) corporations.

In *McConnell,* this Court ruled that the Wellstone Amendment was controlling as a matter of legislative intent, subject to the judicially-imposed caveat that it could not apply to *MCFL* corporations. That decision may well have been correct as a matter of legislative construction. But, as a matter of First Amendment law, the Snowe-Jeffords

Amendment provides a more narrowly tailored response to the asserted congressional interests by leaving IRS in charge, as it has always been, of policing the line between permissible and impermissible partisan activity by nonprofit entities. Congress got it right when it first drafted the Snowe-Jeffords Amendment and the Court is now in a position to say so. As applied to § 501(c)(4) nonprofit corporations, the BCRA's ban on "electioneering communications" goes farther than it needs to go.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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