No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC., ET AL.

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the three-judge district court erred in holding that the federal statutory prohibition on a corporation's use of general treasury funds to finance "electioneering communications" is unconstitutional as applied to three broadcast advertisements that appellee proposed to run in 2004.

PARTIES TO THE PROCEEDINGS

The Federal Election Commission is the appellant in this Court and was the original defendant in the three-judge district court.

Wisconsin Right to Life, Inc., is an appellee in this Court and was the plaintiff in the district court.

The following individuals intervened as defendants in the district court: United States Senator John McCain, United States Representative Tammy Baldwin, United States Representative Martin Meehan, and United States Representative Christopher Shays.

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OPINIONS BELOW

The opinion of the three-judge district court (App. 1a-48a) is not yet reported. Prior opinions of the district court (App. 55a-56a, 57a-71a) are unreported.

JURISDICTION

The decision of the three-judge district court was issued on December 21, 2006. On December 28, 2006, the district court issued an order stating that the December 21 order was "a final appealable order as to those issues decided in the opinion accompanying that order," and that there was "no just reason to delay an appeal." App. 51a. The Federal Election Commission timely filed a notice of appeal on December 29, 2006. App. 53a-54a. The intervenor defendants filed a notice of appeal on the same day. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act

of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns the constitutionality of the "electioneering communication" provision contained in Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91. The provision prohibits corporations, labor unions, and national banks from using their general treasury funds to pay for any "electioneering communication," defined as a communication that refers to a candidate for federal office and is broadcast within the 30 days before a federal primary election or the 60 days before a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. IV 2004)). In *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), this Court sustained the constitutionality of BCRA § 203 against a facial challenge.

Appellee filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to three broadcast advertisements that appellee had proposed to run in 2004. The three-judge district court concluded that appellant's claim was foreclosed by *McConnell* and accordingly dismissed the complaint. App. 55a-56a; see App. 57a-71a. This Court reversed, clarifying that BCRA § 203 is subject to as-applied challenges of this nature. See *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL I*) (per curiam). On remand, the district court held by a divided decision that BCRA § 203 is unconstitutional as applied to the 2004 advertisements and granted summary judgment to appellee. App. 1a-48a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq*., and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d) (Supp. IV 2004); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for

political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) *(MCFL)*, this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210; 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omit-

ted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices following numerous hearings, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at

194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. IV 2004). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88 (2 U.S.C. 434(f)(3)(A)(i) (Supp. IV 2004)).[1] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications from that fund. See 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. IV 2004).

3. Three years ago, in *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209.

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[1] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a) (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. IV 2004)). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. Appellee Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. App. 2a. Appel-

lee's amended complaint asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C.), and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. paras. 20, 22; see App. 57a. Appellee asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. See App. 3a n.2, 58a. Appellee maintains a PAC for election-related activity. App. 58a.

United States Senator Russell Feingold of Wisconsin, a Democrat, ran for reelection in 2004. App. 58a. "In March 2004, [appellee's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." *Ibid.* "In a news release on July 14, 2004, [appellee] criticized Senator Feingold's record on Senate filibusters against judicial nominees." *Ibid.* On July 26, 2004, appellee began to use its corporate treasury funds to finance the airing of three broadcast advertisements critical of the filibusters that identified Senator Feingold, as well as Senator Kohl, who was not up for reelection, by name. App. 3a-6a, 60a; see App. 66a-71a (text of advertisements).

5. On July 28, 2004, appellee filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to the three specific broadcast advertisements and any "materially similar ads" that appellee might seek to run in the future. App. 7a. Appellee sought a preliminary injunction barring enforce-

ment of the statute against it. *Ibid.* Because Senator Feingold was a candidate for reelection in 2004, appellee "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." App. 59a. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

The district court denied appellee's request for a preliminary injunction. App. 57a-71a. In holding that appellee had not established a substantial likelihood of success on the merits, the district court construed this Court's decision in *McConnell* to foreclose as-applied challenges of the sort brought by appellee in this case. App. 61a. The district court further stated that the specific facts of this case "suggest that [appellee's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." App. 62a. The court explained:

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

> names in its broadcast advertisements, and the PAC announcing as a priority "sending Feingold packing."

App. 62a-63a (citations omitted). The district court subsequently dismissed appellant's complaint in an unpublished memorandum opinion and order. App. 55a-56a.

6. In *WRTL I*, this Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. 126 S. Ct. at 1018. The Court noted the district court's statement, in its opinion denying preliminary injunctive relief, that appellee's "advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The Court found it unclear, however, whether the district court had intended that statement as an alternative ground for its decision. *Ibid.* The Court remanded the case to the district court to consider the merits of appellee's as-applied challenge in the first instance. *Ibid.*

7. On remand, four individual Members of Congress were granted leave to intervene as defendants. App. 9a. By a divided vote, the three-judge district court subsequently entered summary judgment for appellee, holding that BCRA § 203 is unconstitutional as applied to the three advertisements that appellee had proposed to run during the 2004 election cycle. App. 1a-48a.[2]

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[2] On August 25, 2006, appellee filed a motion for a preliminary injunction against enforcement of BCRA § 203 with respect to a new advertisement that appellee planned to run within the 60-day period before the 2006 general election. On September 7, 2006, the district court denied that motion. On September 21, 2006, appellee moved for summary judgment with respect to the 2006 advertisement. In response, the FEC filed a motion under Federal Rule of Civil Procedure 56(f) on October 4, 2006. Those motions remain pending in the district court. See App. 15a n.15.

a. The district court began by considering its jurisdiction to address appellee's constitutional challenges. Specifically, the court held that appellee's as-applied challenge with respect to the 2004 advertisements remained justiciable because the challenge fell within the exception to mootness principles for claims that are "capable of repetition, yet evading review." App. 12a; see App. 11a-15a. With regard to the "evading review" prong of that exception, the district court found it "entirely unreasonable, if not fanciful, to expect that [appellee] could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections * * * in 2004." App. 13a. With respect to the "capable of repetition" prong, the district court concluded that, "[w]hile [appellee's] intention to run genuine issue advertisements during future BCRA blackout periods is not enough to sustain its generalized claim regarding 'grassroots lobbying advertisements,' it is enough to create a reasonable expectation that it will be subject to the same action again." App. 14a-15a (internal quotation marks omitted).

At the same time, however, the court held that it lacked jurisdiction to consider appellee's "generalized lobbying claim" because that claim was "unripe." App. 16a. That claim "feature[d] a prophylactic challenge to what [appellee] anticipates to be the prohibition by the FEC of its broadcasting 'materially similar' ads in future election contests." App. 15a. The court held that this challenge was "too speculative and thus not sufficiently concrete to state a cognizable claim under Article III." App. 16a; see App. 15a-16a.

b. On the merits, the district court stated that resolution of appellee's as-applied challenge required a "two-

step analysis of the ads in question." App. 17a. In the first step, the court sought to determine whether the 2004 advertisements were "express advocacy or its functional equivalent." *Ibid.* The court explained that, if the advertisements fit that characterization, "that would be the end of the challenge because [this] Court in *McConnell* upheld BCRA's authority to regulate [such advertisements]." *Ibid.*

In conducting the first step of its inquiry, the district court agreed with appellee that "the judicial assessment of the ads should be limited to a facial evaluation of the ads' language and images." App. 18a; see App. 19a-22a. Accordingly, the court stated that it would

> limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of legislative scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

App. 22a. Based on its analysis of those factors, see App. 23a-24a, the district court concluded that, "on their face, [appellee's] three 2004 anti-filibuster advertisements were not intended to influence the voters' decisions," App. 24a (internal quotation marks omitted), and that the advertisements therefore were "not the functional equivalent of express advocacy," App. 25a.

At the second step of its analysis, the district court considered whether the government had established a state interest sufficient to justify regulation of appellee's advertisements. App. 25a-29a. The court stated that, "[b]y permitting as-applied challenges to section 203's constitutionality, * * * [this] Court has now put in play the question it left open in *McConnell* as to whether the government interests that justify regulating express advocacy and its functional equivalent also apply to the regulation of genuine issue ads." App. 26a-27a. The district court held that the interests supporting restrictions on corporate financing of express electoral advocacy are inapposite here. App. 27a-28a. The court stated that,

> while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such.

Ibid. The court also dismissed Congress's interest in establishing a "bright-line rule" for determining what qualifies as an "electioneering communication" subject to regulation under BCRA. App. 28a. Because the district court found no compelling government interest in regulating appellee's 2004 advertisements, the court declined to "address whether [appellee] could/should have pursued other options for the financing of its advertisements or altered the content of its ads so as to avoid BCRA section 203's regulation altogether." App. 29a n.24.

c. Judge Roberts dissented from the district court's grant of partial summary judgment to appellee. App. 30a-48a. He found the court's refusal to look beyond the four corners of the 2004 advertisements to be inconsistent with this Court's decision in *McConnell* and with the district court's own rulings at earlier stages of this case. See App. 30a, 34a-40a. He explained that "[a] purpose and effect-based inquiry seems necessary to determine if [appellee's] ads are genuine issue ads or are instead express or sham issue advocacy because the 'presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.'" App. 36a-37a (quoting *McConnell*, 540 U.S. at 193). Judge Roberts concluded that, "[b]ecause a contextual analysis is warranted and discloses deep factual rifts between the parties concerning the purpose and intended effects of the ads, neither side is entitled to judgment as a matter of law." App. 30a. In particular, Judge Roberts stated that "[a] genuine issue of material fact exists as to whether [appellee's] 2004 advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads." App. 47a.

d. On December 28, 2006, on the FEC's motion, the district court clarified that its December 21 order was "a final, appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." App. 51a; see Fed. R. Civ. P. 54(b); BCRA § 403(a)(3), 116 Stat. 114.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The divided district court has declared BCRA's restrictions on corporate financing of "electioneering communications" unconstitutional as applied to the advertisements at issue here. This case presents issues of

substantial and recurring importance concerning the framework for determining whether BCRA § 203 is unconstitutional as applied to particular advertisements falling within the statutory definition of "electioneering communication." Congress has vested this Court with exclusive jurisdiction to review any "final decision" of a district court in a suit brought pursuant to BCRA's special judicial-review provision. The FEC and the regulated public need guidance from this Court as to the proper framework for considering as-applied challenges to BCRA § 203. The Court should therefore note probable jurisdiction over the appeal in this case.[3]

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[3] Appellee does not assert a continuing intent to broadcast the particular advertisements that were the subject of the district court's as-applied analysis. Based on that fact, the intervenor-defendants argued in the district court (after the case was remanded by this Court) that appellee's suit is no longer justiciable because no live controversy remains. The FEC took no position on that issue below. The district court held that appellee's suit remains justiciable under the "capable of repetition, yet evading review" exception to mootness principles. See App. 11a-15a; p. 11, *supra*. In doing so, the district court disagreed with the mootness analysis of the district court in *Christian Civic League of Maine, Inc.* v. *FEC*, No. 06cv0614 (D.D.C. Sept. 27, 2006) (*CCLM*), juris. statement pending, No. 06-589 (filed Oct. 26, 2006). See App. 14a n.14.

In the FEC's motion to dismiss or affirm in *CCLM*, the FEC argues (at 15-23) that the distinct as-applied challenge to BCRA § 203 presented in that case is moot, and that the "capable of repetition, yet evading review" exception is inapplicable because, based on several circumstances, there is no reasonable prospect that CCLM will again become a party to the same controversy. As that motion explains (at 27-28), that case and this one present distinct mootness issues in light of the different circumstances involved in the *CCLM* litigation. See *id.* at 17-23. However, the better view appears to be that this dispute, at least as framed by the district court, is moot as well. Although appellee has alleged in general terms that it "intends to run materially similar grass-roots lobbying ads" in the future, App. 16a; see App. 2a, 15a-16a,

1. BCRA § 403(a)(1) states that a suit challenging the constitutionality of any provision of the statute "shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court." 116 Stat. 114. Pursuant to that provision, a three-judge district court was convened in this case. BCRA § 403(a)(3) states that a "final decision" in such a suit "shall be reviewable only by appeal directly to" this Court. 116 Stat. 114.

In the instant case, the district court issued an opinion and order on December 21, 2006, granting appellee's motion for summary judgment and holding that BCRA § 203 is unconstitutional as applied to the advertisements that appellee had proposed to run in 2004. See App. 1a-48a, 49a-50a. The court subsequently clarified that the December 21 order was a "final appealable order as to those issues decided in the [accompanying] opinion," and that the court found "no just reason to delay an appeal." App. 51a. Pursuant to Federal Rule of Civil Procedure 54(b), the district court's December 21 opinion and order is therefore a "final decision" within the meaning of BCRA § 403(a)(3), and this Court is vested with exclusive appellate jurisdiction over the instant appeal.

2. The district court's decision is erroneous for several reasons, including the following:

a. Confining its inquiry to the four corners of appellee's 2004 advertisements, the district court observed

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appellee has not demonstrated that it is likely to run advertisements having the specific characteristics that the district court found dispositive here, see App. 22a. In any event, the mootness issue can be addressed in the briefing on plenary review. If the Court were to determine that appellee's action is moot, it should vacate the judgment below and remand with instructions to dismiss.

that "the language in [appellee's] advertisements does not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office." App. 23a. The court concluded that, "on their face, [appellee's] three 2004 anti-filibuster advertisements were not intended to influence the voters' decisions." App. 24a (internal quotation marks omitted). Congress crafted the BCRA definition of "electioneering communication," however, in direct response to the demonstrated inadequacy of the prior "express advocacy" test. See *McConnell*, 540 U.S. at 126-129, 193-194; pp. 5-6, *supra.* That definition represents Congress's considered effort, based on the substantial experience of its Members as participants in the political process and on evidence obtained through numerous hearings on the matter, to identify through objective criteria a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect. In exempting an indeterminate subset of "electioneering communications" from the financing restrictions imposed by BCRA § 203, the district court improperly substituted its judgment for that of Congress with respect to the inferences to be drawn from the timing and content of appellee's advertisements.

b. The district court found "no evidentiary or common sense basis to believe" that communications having the characteristics of appellee's 2004 advertisements "are *necessarily* intended to affect an election, or will *necessarily* be viewed as such." App. 27a-28a. Contrary to the court's suggestion, however, it was not the government's burden to prove, in this as-applied challenge, that the generalization on which BCRA's "electioneering communication" provisions are based "necessarily"

holds true in this case. This Court in *McConnell* upheld BCRA § 203 against a facial constitutional challenge, see 540 U.S. at 203-209, and it recognized that the "vast majority" of pre-BCRA advertisements "that clearly identified a candidate and were aired during [the 30- and 60-day preelection timespans]" had an electioneering purpose, *id.* at 206. To establish its entitlement to a constitutional exemption from BCRA § 203's financing restrictions, appellee bore the burden of demonstrating (at least) that the generalization reflected in BCRA's definition of "electioneering communication" actually does *not* hold true here.

That allocation of burdens is consistent with prior decisions of this Court that have sustained as-applied challenges to other provisions of the campaign-finance laws. In *Buckley*, for example, the Court held that the FECA's disclosure provisions are constitutional on their face and as applied to minor parties generally. See 424 U.S. at 64-74. The Court noted, however, that a particular minor party could establish a meritorious as-applied constitutional challenge by demonstrating "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassments, or reprisals." *Id.* at 74. When the Court later addressed such an as-applied challenge in *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), it followed *Buckley* and based its decision on the party's "proof of specific incidents of private and government hostility toward the [minor party] and its members." *Id.* at 99.

The Court in *MCFL* employed a similar mode of analysis. The defendant corporation in that case argued that FECA's ban on the use of corporate treasury funds to finance express electoral advocacy (see p. 3, *supra*)

was unconstitutional as applied to the defendant's own campaign-related expenditures. Although this Court ruled in the corporation's favor, the Court did not suggest that the government bore the burden of proving that MCFL's campaign spending would actually cause the problems at which the statutory prohibition is directed. Rather, the Court held the statute unconstitutional as applied only after concluding that the corporation's expenditures would *not* cause those problems—*i.e.*, that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." 479 U.S. at 263; see *id.* at 264 (identifying specific attributes of MCFL that "ensure[d]" that the organization's election-related spending would not implicate the policy rationales underlying the FECA ban on corporate campaign expenditures).

Placing the burden of proof on the party seeking a constitutional exemption from a facially valid law is especially appropriate in the present context because BCRA § 203 imposes relatively minor burdens on corporate speakers who do not seek to influence federal elections. As the Court in *McConnell* observed, "corporations and unions may finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. Thus, even if a particular corporation actually lacks the intent to influence federal elections but is unable to establish that fact with sufficient clarity to meet its burden of proof, it will suffer no substantial impairment of its ability to engage in issue advocacy. The district court, however, expressly refused to take into account the availability of those alternatives in conducting its constitutional analysis. See App. 29a n.24.

c. As Judge Roberts explained in dissent, App. 41a-45a, a substantial body of evidence in this case—including but not limited to the text of the 2004 advertisements and materials directly referenced in those advertisements—suggests that the advertisements were intended at least in part to affect electoral outcomes or could have that effect. The district court in denying appellee's request for a preliminary injunction had previously relied on that evidence in concluding that appellee's 2004 advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." App. 62a. In granting appellee's motion for summary judgment, however, the court misconstrued the text of the 2004 advertisements and improperly declined to consider any evidence outside the advertisements' four corners. App. 19a-22a. The court relied in part on the practical concern that "as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." App. 19a-20a. The court also stated that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." App. 20a-21a. At the same time, however, the court declined to look at the advertisements' likely effect, independent of the speaker's intent. App. 24a-25a. The net effect of the court's unwillingness to look beyond the face of the advertisements and its inquiry into whether they were "necessarily" intended to influence an election is essentially to ask, in the context of an as-applied challenge, whether the advertisements were on their face incapable of being valid issue advertisements. That cannot be the correct inquiry.

To be sure, an entirely unstructured inquiry, in which the court in each as-applied challenge must hear and evaluate *all* potentially relevant evidence to ascertain the corporate advertiser's subjective intent, would reintroduce the indeterminacy that Congress and this Court have specifically sought to dispel in this important context. Minimizing such indeterminacy promotes First Amendment values and thus provides a compelling reason for adhering as strictly as possible to the bright-line definition drawn by Congress and upheld on its face by this Court. But the district court failed to explain how the infeasibility of determining appellee's actual intent could justify declaring BCRA § 203 unconstitutional as applied when the provision has already been upheld against a facial challenge. In any event, the district court offered no sound explanation for ignoring other evidence that (1) tends to confirm the generalization on which BCRA's definition of "electioneering communication" is based and (2) is readily ascertainable and capable of objective measurement, even within the context of "expedited" litigation in the closing days before an election.

For example, appellee in this case began to run its anti-filibuster broadcast advertisements in July 2004, "days after the last of the judicial filibuster cloture votes had occurred during that session and the Senate had departed for a six-week recess." App. 43a (Roberts, J., dissenting). Appellee "did not run any additional anti-filibustering ads after the 2004 election in either 2004 or 2005 during the height of the [filibuster] controversy." *Ibid.* (citations omitted). Appellee's effort to finance the advertisements was thus limited to the 2004 campaign season, even though public controversy over the filibustering of judicial nominees continued (and indeed gained

greater prominence) during the months following the election.

BCRA's definition of the term "electioneering communication," which is limited to advertisements broadcast during the 30- and 60-day periods before federal primary and general elections, reflects Congress's judgment that the timing of advertisements that mention a federal candidate is an important indicator of the speaker's intent. In discussing the use of purported "issue" advertisements during the pre-BCRA period, this Court in *McConnell* likewise recognized that "the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." 540 U.S. at 127. The district court nevertheless refused to consider what inferences might be drawn from the timing of appellee's advertisements.[4]

The district court also treated as irrelevant the fact that appellee had frequently and explicitly opposed Senator Feingold's 2004 reelection effort through other communications. See App. 41a-43a (Roberts, J., dissent-

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[4] Of course, an as-applied challenge to BCRA § 203 can by definition arise only with respect to advertisements to which that provision applies—*i.e.*, broadcast advertisements aired or sought to be aired during the pre-election periods defined by the statute. In this case, however, the relevant "timing" evidence goes well beyond the fact that appellee proposed to broadcast its anti-filibustering advertisements during those pre-election windows. Appellee commenced its advertising campaign at a time when Congress was out of session, and it abandoned its efforts after the election occurred, even though public controversy over the filibustering of judicial nominees reached its height during the spring of 2005. Those facts cast serious doubt on any contention that the pre-election timing of the advertising campaign was simply fortuitous.

ing). "Senator Feingold's participation in judicial filibustering was a particular focus of criticism by [appellee], which distributed a voter guide endorsing one of Feingold's opponents who pledged to allow judicial nominees an up or down vote." App. 42a (Roberts, J., dissenting). The district court concluded that, unless a particular communication was itself subject to regulation under BCRA, the existence of the communication would have "no bearing" on the resolution of appellee's as-applied constitutional challenge. App. 23a n.18. Appellee's pattern of electoral advocacy during the 2004 campaign, however, is directly relevant to the question whether the generalization on which BCRA § 203 is based—*i.e.*, Congress's determination that advertisements falling within the BCRA definition of "electioneering communication" will typically reflect an intent to affect electoral outcomes—has been proved by appellee to be inaccurate in this case.[5]

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[5] In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address. Appellee's 2004 advertisements differed from the "Jane Doe" hypothetical in that they contained no explicit criticism of Senator Feingold's record on the issue of judicial filibusters. See App. 19a. The significance of that omission is sharply reduced, however, by the fact that appellee was simultaneously engaged in other communications that *did* disparage Senator Feingold's record on that issue.

As a final example of the district court's unwillingness to look beyond the four corners of the advertisements—despite a recognition that the ultimate test focused on the advertisements' purpose, and not just their effect, see App. 24a-25a—the court refused to consider the content of the website that the advertisements urged the audience to contact. See App. 22a n.18. That refusal is particularly striking because one of the five aspects of the advertisements that the court scrutinized was whether the advertisements "exhort[ed] the listener to do anything other than contact the candidate about the described issue." App. 22a. Here, the advertisements exhorted listeners and viewers to visit appellee's website, which in turn featured "e-alerts" excoriating Senator Feingold on the filibuster issue. App. 41a (Roberts, J., dissenting).

3. The divided district court's decision in this case purports to establish a framework for future as-applied challenges to the financing restrictions that apply to "electioneering communications" under BCRA § 203. The district court's mode of analysis is seriously flawed. Restrictions on corporate financing of "electioneering communications" are a critical component of the campaign-finance reform that Congress enacted in BCRA, and this Court has declared those restrictions to be constitutional on their face. See *McConnell*, 540 U.S. at 204-207.

This Court's guidance is needed to establish the appropriate scope and contours of as-applied challenges to BCRA § 203 and to ensure that the framework for adjudicating such challenges does not have the practical effect of vitiating BCRA § 203 altogether. Under a proper inquiry, BCRA § 203's financing restrictions may constitutionally be applied to the advertisements at issue in

this case. At a minimum, however, the current record does not support the district court's grant of summary judgment in favor of appellee with respect to those advertisements.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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