No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF AMICI CURIAE OF NORMAN ORNSTEIN, THOMAS MANN, ANTHONY CORRADO, AND DANIEL ORTIZ IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE COURT SHOULD NOT REOPEN THE ISSUE ADVOCACY LOOPHOLE THAT BCRA SECTION 203 CLOSED.	4
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. *Rumsey*, 467 U.S. 203 (1984) 16

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ..... *passim*

Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*

FEC v. *Beaumont*, 539 U.S. 146 (2003) ..... *passim*

FEC v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001)..... 1

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 6, 7, 9

FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 5, 6

FEC v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) 2, 4, 16

McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*

McConnell v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003) ..... *passim*

Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). 2

United States v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567 (1957)..... 5

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 2

Wisconsin Right to Life, Inc. v. *FEC*, 546 U.S. 410 (2006) 2

TABLE OF AUTHORITIES—Continued

	Page
STATUTORY AND REGULATORY PROVISIONS:	
Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91-92	*passim*
Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074	6
Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*	2
2 U.S.C. § 431(9)(A)(i)	6
2 U.S.C. § 441b	6, 7, 9
2 U.S.C. § 441b(a)	6
2 U.S.C. § 441b(b)(2)	3, 14
RULES:	
S. Ct. R. 37.3(a)	2
S. Ct. R. 37.6	1
OTHER AUTHORITIES:	
144 Cong. Rec.:	
p. H6802 (daily ed. July 30, 1998)	10
pp. S1048-49 (daily ed. Feb. 26, 1998)	13
147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001)	8
148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002).	13
Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (1998)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Report of Thomas E. Mann, *at* http://www.campaignlegalcenter.org/McConnell-31.html	8, 9, 10
S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. (1947)	5

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are three political scientists who have dedicated much of their careers to studying, analyzing and writing extensively on Congress, federal elections, campaign finance, and American politics, and a law professor expert in election law.[1]

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

Thomas E. Mann is a Senior Fellow in Governance Studies at the Brookings Institution. He served as an expert witness in *McConnell* v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion in that case. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id*. at 148 & 155.

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

Stemming from their expertise and interest in federal elections and campaign finance reform, Professor Corrado, Dr. Ornstein, and Dr. Mann have filed

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

amici briefs in previous cases before this Court involving election-law issues.[2]

Daniel R. Ortiz is John Allan Love Professor of Law at the University of Virginia. He teaches and writes in the area of election law and served as coordinator of the Task Force on Legal and Constitutional Issues for the National Commission on Federal Election Reform chaired by Presidents Carter and Ford.

The *amici* have a great interest in seeing to the success of the reforms that they helped bring to fruition and that have strengthened our federal campaign finance system, and offer their views to aid the Court in this case. Their brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case involves another as-applied challenge to Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. *See FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL II*). BCRA overhauled our federal election laws by amending, *inter alia*, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 *et seq*. *See McConnell*, 540 U.S. at 114. Section 203 of BCRA amended FECA by prohibiting corporations and unions from financing, with their general treasury funds, "electioneering communication[s]"—*i.e.*, communications referring to a federal

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[2] *See FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (Corrado, Mann & Ornstein); *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam) (Corrado, Mann & Ornstein); *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell* v. *FEC*, *supra* (Ornstein); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, *supra* (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

office candidate and broadcast within 30 days of a primary or 60 days of a general election in the candidate's jurisdiction. *See* 2 U.S.C. § 441b(b)(2).

Citizens United argues that Section 203 could not, consistent with the First Amendment, bar it from using general treasury funds to make its documentary about then-Senator Hillary Clinton—*Hillary: The Movie*—available to cable subscribers "on demand" as she vied for the Democratic Party's 2008 presidential nomination. The Court has asked for supplemental briefing on the question whether it should overrule *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990)—which upheld a state statute requiring corporations and unions to use segregated funds for campaign advocacy—or *McConnell*—which, in the context of a facial challenge, held that Section 203 survived strict scrutiny. *See* 540 U.S. at 207-208.

The answer to the Court's question is no. Preventing corporations and unions from using their general treasury funds to influence federal elections is not a novel congressional objective; it is one that Congress has pursued for more than a century with this Court's approval. BCRA is only Congress's most recent effort "to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *Id.* at 115 (quotation marks & citation omitted).

Section 203 advances that goal by extending a longstanding prohibition against the use of corporate and union treasury funds for ads that expressly advocate the election or defeat of a federal candidate to cover a newly-defined form of communication—*i.e.*, electioneering communications. Based on overwhelming evidence, Congress concluded that this extension was necessary to prevent corporations and unions from circumventing the pre-existing FECA prohibition by funding with treasury revenues ads

that, while falling short of prohibited "express advocacy," were no less calculated to influence federal elections and likely had that effect. Section 203 thus closed a loophole in FECA that corporations and unions exploited during past elections.

The Court should not reopen that loophole by overruling either *Austin* or *McConnell*. This Court has consistently affirmed the constitutionality of restrictions on corporate express advocacy and its equivalent in recognition of the effect of unchecked corporate spending on federal elections. There is simply no reason to think that rationale, which underpins *Austin* and *McConnell*, is no longer relevant—only a few years after *McConnell* upheld Section 203 and on the very heels of the reaffirmation of that judgment a Term ago in *WRTL II*.

ARGUMENT

I. THE COURT SHOULD NOT REOPEN THE ISSUE ADVOCACY LOOPHOLE THAT BCRA SECTION 203 CLOSED.

"Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul." *FEC* v. *Beaumont*, 539 U.S. 146, 153 (2003). Section 203 and the definition of "electioneering communication" fall into the former category. That provision extends the prohibition on the spending of corporate and union general treasury funds in connection with federal elections to encompass a newly-defined form of communication. But since the Court's seminal ruling in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203. Section 203 is no more than a

refinement needed to " 'plug [an] existing loophole' " in that longstanding prohibition. *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 582, 585 (1957) (*UAW*) (quoting S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. 38-39 (1947)).

1. The Court does not confront Citizen United's challenge to Section 203 in a vacuum, but instead should bear in mind that statute's "historical prologue." *Beaumont*, 539 U.S. at 156; *see UAW*, 352 U.S. at 570 ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). That prologue is critical: The prohibition on corporate and union general treasury expenditures in connection with federal elections has long been a cornerstone of federal election law. *See Beaumont*, 539 U.S. at 152-154. As this Court has recognized, that restriction reflects an abiding concern with the ability of corporations and unions to leverage their state-sanctioned privileges and to aggregate large amounts of capital into unfair political advantages. *See Austin*, 494 U.S. at 658-659; *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (*NRWC*).

Congress made its initial foray into the arena of campaign finance regulation more than a century ago—in 1907. The Tillman Act responded to the controversy over corporate contributions in the 1904 elections and President Roosevelt's call for a ban on corporate political contributions by banning "any corporation whatever from making a money contribution in connection with federal elections." *Beaumont*, 539 U.S. at 153 (quotation marks & citation omitted). In 1925, Congress extended the Tillman Act's prohibition on corporate contributions to encompass "anything of value" and by criminalizing the giving and receiving of corporate contributions. *See*

NRWC, 459 U.S. at 209 (citing Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074). With the Taft-Hartley Act of 1947, Congress later extended the scope of this prohibition to include labor unions and "expenditures." *See McConnell*, 540 U.S. at 117.

In its "steady improvement of the national election laws," *id.*, Congress enacted FECA in 1971, which "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures." *Id.* at 118. Specifically, FECA Section 441b, which constituted "merely a refinement of th[e] gradual development of the federal election statute," *NRWC*, 459 U.S. at 209, made it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any" federal election. 2 U.S.C. § 441b(a); *see FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (*MCFL*). The term "expenditure" included "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). While barring expenditures of general treasury funds, however, FECA "expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *McConnell*, 540 U.S. at 118.

2. FECA Section 441b's prohibition against corporate expenditures of "anything of value" in connection with federal elections was later modified by this Court in a way that ultimately prompted Congress to enact BCRA Section 203. In *MCFL*, this Court accepted the argument that FECA Section 441b "necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," 479 U.S. at 248, and held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.*

at 249. This requirement stemmed from the Court's prior decision in *Buckley*, which—in order to avoid vagueness and overbreadth concerns inhering in a different FECA provision—held that "expenditure encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' " *Id.* at 248-249 (quoting *Buckley*, 424 U.S. at 80). *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *MCFL*, 479 U.S. at 249. *Buckley* identified eight "more pointed exhortations," 424 U.S. at 44 n.52, which later became "known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

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

3. The prohibition contained in FECA Section 441b (qualified by the magic words requirement) proved no exception to the lesson of experience that "candidates, donors, and parties test the limits of the current law." *Beaumont*, 539 U.S. at 155 (quotation marks & citation omitted). After *MCFL*, corporations tested FECA Section 441b's prohibition by making expenditures on ads that eschewed *Buckley*'s "magic words" but were no less effective at influencing federal elections than communications containing

"pointed exhortations" of support for or opposition to candidates for federal office. *See McConnell*, 251 F. Supp. 2d at 526 (Kollar-Kotelly). As Dr. Mann explained in his report in the *McConnell* litigation, research concerning this period reveals "extensive and elaborate efforts by parties, candidates, unions, corporations and groups to exploit this new issue advocacy loophole to avoid the strictures of federal election law." Report of Thomas E. Mann 20-21 [Mann Report].

4. The 1990s witnessed an explosion of issue advocacy in which corporations and unions "spent hundreds of millions of dollars of their general funds to pay for these ads." *McConnell*, 540 U.S. at 127. The Annenberg Center for Public Policy concluded that "the numbers of ads, groups, and dollars spent on issue advocacy * * * climbed" markedly from the 1996 to the 2000 election cycle. *McConnell*, 251 F. Supp. 2d at 879 (Leon). It found that the 1995-96 election cycle saw about "$135 million to $150 million * * * spent on multiple broadcasts of about 100 ads." *Id.*

The numbers only grew during the next election cycle: "77 organizations aired 423 advertisements at a cost of between $250 million and $340 million." *Id.* And during the "1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements." *Id.* The Annenberg Center's tracking of the rise of organizations' reliance on issue advocacy did not escape Congress's attention. *See* 147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001).

5. The meteoric rise in issue ads was not a coincidence but a strategy adopted by organizations intent on influencing federal elections. As Dr. Mann has explained, "[p]arties and outside groups used issue advocacy as a cover to finance campaigns for and against federal candidates in targeted races." Mann

Report 24. Two judges on the three-judge District Court convened to review the pre-enforcement challenge to BCRA similarly found that organizations used issue ads to influence federal elections. Judge Kollar-Kotelly found "uncontroverted" evidence "that by the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words." *McConnell*, 251 F. Supp. 2d at 528 (quotation marks, alteration & citation omitted). Judge Leon likewise concluded that the "factual record unequivocally establishes that [issue ads] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." *Id.* at 800.

6. *Buckley*'s line between express advocacy and issue advocacy—later imported into FECA Section 441b in *MCFL*—was not only easily and frequently circumvented but largely illusory from the start. *See* 424 U.S. at 42. This Court in *McConnell* confirmed that the express advocacy test is "functionally meaningless." 540 U.S. at 193, 217. In other words, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *Id.* at 126.

Experience powerfully demonstrated that the express advocacy test and the focus on "magic words" failed accurately to identify communications designed to influence federal elections. As Dr. Mann has explained, "research by political scientists confirmed the suspicion" that there is "little difference in purpose and content between express advocacy and candidate-specific issue advocacy communications financed by parties and groups." Mann Report 24. The result: "Voters were unable to differentiate candidate-specific issue ads * * * sponsored by par-

ties and outside groups from campaign ads run by candidates." *Id.*

That the dichotomy between express advocacy and issue advocacy is a false one was further born out by the *McConnell* litigation. All three of the judges of the District Court agreed that few ads run by candidates, parties or interest groups rely on words of express advocacy. *See* 251 F. Supp. 2d at 303 (Henderson); *id.* at 529 (Kollar-Kotelly); *id.* at 874 (Leon). The record before them confirmed that media professionals actually disfavored such heavy-handed tactics. *Id.* at 529-530 (Kollar-Kotelly); *see also id.* at 305 (Henderson); *id.* at 874-875 (Leon). Rather, the "most effective" course, as "[a]ll advertising professionals understand," is to "lead[ ] the viewer to his or her own conclusion without forcing it down their throat." *Id.* at 529-530 (Kollar-Kotelly); *id.* at 875 (Leon).

Members of Congress themselves—some of them "seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years"[3]—confirmed that the "magic words" of express advocacy "do not distinguish pure issue advertisements from candidate-centered issue advertisements." *Id.* at 532 (Kollar-Kotelly). The Congressional Record is replete with such views. *See*, *e.g.*, 144 Cong. Rec. H6802 (daily ed. July 30, 1998) (statement of Rep. Shays) ("They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such.").

7. The widespread practice of using soft money to fund issue ads designed to influence federal elections was further documented in the six-volume report—spanning nearly 10,000 pages—that the Senate

[3] *Buckley*, 424 U.S. at 261 (White, J., concurring in part & dissenting in part).

Governmental Affairs Committee (Committee), led by Chairman Fred Thompson and Ranking Member John Glenn, produced following its investigation into campaign finance law abuses during the 1996 presidential campaigns. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) (Thompson Report). This Court has characterized the Committee's findings as "disturbing." *McConnell*, 540 U.S. at 122.

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

The Thompson Report found that both national parties used soft money to fund issue ads intended to influence the 1996 presidential election. The Democratic National Committee (DNC) spent $44 million on issue ads during the 1996 presidential election, while the Republican National Committee (RNC) spent $24 million. *See* Thompson Report at 4482; *id.* at 8294 (minority views).

Just as the national parties exploited the issue-advocacy loophole, the Thompson Report also concluded that corporations and unions did too. Such

organizations spent "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." *Id.* at 3993. These ads were likewise intended to influence federal elections and were often coordinated with the presidential candidates' campaigns or their respective national parties. *Id.* The Thompson Report found, for example, that "[e]vidence * * * indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 elections." *Id.*; *see also id.* at 128.

Groups backing Republican candidates similarly used issue ads to influence federal elections. For instance, The Coalition: Americans Working for Real Change, a group formed to counter issue ads aired by the AFL-CIO, produced ads nearly identical to those run by the National Republican Congressional Committee (NRCC), a division of the RNC, aired them at the same time as the NRCC's ads and "in districts where the Republican incumbent's seat was vulnerable." *Id.* at 8944 (minority views). Another group, Triad Management Services, also "channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' " *Id.* at 4569 (minority views).

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

8. "*Buckley*'s express advocacy line [did] not aid[ ] the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 193-194. The legislative process culminating in the passage of BCRA spanned more than six years and generated multiple reform bills introduced in Congress. *See McConnell*, 251 F. Supp. 2d at 434 & n.1. This process was influenced by the failings of the pre-BCRA campaign-finance regime brought to light by the Thompson Report as well as the reforms that the report proposed.[4] Senator Feingold, for example, opined that, "in the wake of the Thompson investigation, we reluctantly concluded that we need to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold); *see also* 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998) (statement of Sen. Glenn).

9. Section 203 directly combats the well-documented problem of issue ads that avoided express advocacy but nevertheless have the purpose and likely effect of influencing federal elections. That section extended FECA's pre-existing prohibition on the use of corporate and union general treasury funds to finance communications influencing federal elections—which *MCFL* had limited to communications expressly advocating election or defeat of a particular candidate—to cover any "electioneering communication." 2 U.S.C. § 441b(b)(2). As a result, "corporations and unions may not use their

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

general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204.

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

Second, the definition of electioneering communication encompasses only messages that refer to clearly identified candidates for federal elected office. During the pre-enforcement challenge, "[f]ederal officeholders and candidates * * * testif[ied] that, based on their experience, the intent behind issue

advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election." *McConnell*, 251 F. Supp. 2d at 534 (Kollar-Kotelly). These politicians' intuitions were confirmed by political consultants' "uncontroverted testimony that when designing pure issue advertisements, it was never necessary to reference specific candidates for federal office in order to create effective ads." *Id.* at 628 (quotation marks & ellipsis omitted).

Third, the 30- and 60-day pre-election blackout periods applicable to electioneering communications also strongly correlate to the periods during which ads aimed at influencing federal elections are most likely to air—the time period immediately preceding an election. And, in *McConnell*, this Court similarly concluded that, although "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [30 and 60 day] preelection time spans but had no electioneering purpose is a matter of dispute * * * the *vast majority* of such ads clearly had such a purpose." 540 U.S. at 206 (emphasis added) (citations omitted).

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

10. Acknowledging that "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference," *McConnell*, 540 U.S. at 117 (quotation marks & citations omitted), this Court in *McConnell* upheld Congress's corrective measure embodied in BCRA Section 203, and BCRA's primary definition of "electioneering communication" on which it relies, against a facial constitutional attack. *See id.* at 189-194, 203-209. And only last Term, the Chief Justice, author of the controlling opinion in *WRTL II*, reiterated that "[t]his Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent." 127 S. Ct. at 2664.

There is no "special justification" for revisiting that holding (or *Austin*'s on which it relied in part) now. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984) (in constitutional cases, "any departure from the doctrine of stare decisis demands special justification"). Overruling *McConnell* would free corporations and unions to engage in the very advocacy that Congress, political scientists, and this Court have concluded is harmful to the electoral process. In view of the long history of efforts to prevent corporations and unions from deploying war chests to unfairly influence federal elections that ultimately led to Congress's passage of BCRA Section 203, there can be no question that they would take full advantage of their newfound liberty to do just that.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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