Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

SENATOR JOHN MCCAIN, *et al*.,
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

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

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

JONATHAN P. HIATT
LAURENCE E. GOLD *
AFL-CIO
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5130

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 54 national and international labor organizations with a total membership of 10 million working men and women, files this brief *amicus curiae* in support of Appellee with the consent of the parties as provided for in the Rules of this Court.[1]

INTEREST OF AMICUS

As plaintiffs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1755), the AFL-CIO and its connected federal political committee, AFL-CIO COPE PCC (together, "the AFL-CIO Plaintiffs"), brought a facial challenge, under the First Amendment to the United States Constitution, to § 203 of the Bipartisan Campaign Reform Act ("BCRA") of 2002, 2 U.S.C. § 441b(b)(2) and (c) (amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq*.), which proscribes union and corporate funding of "electioneering communications."[2] The AFL-CIO

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

[2] 2 U.S.C. § 434(f)(3)(A)(i), contains what is generally termed the "primary definition" of this term, and 2 U.S.C. 434(f)(3)(A)(ii) contains a "backup definition" that would apply instead if the primary definition were held to be unconstitutional. The primary definition includes a transmission element ("any broadcast, cable or satellite communication"); a content element ("refers to a clearly identified candidate for federal office"); a temporal element (within 60 days before "a general, special or runoff election," or within 30 days before "a primary or preference election" or nominating "convention or caucus" "for the office sought by the candidate") and an audience element ("can be received by 50,000 or more persons" in the relevant electoral jurisdiction). *See McConnell*, 540 U.S. at 189-90. The term "clearly identified" means the candidate's "name," "photograph" or "drawing," and where "the identity of the candidate is apparent by unambiguous reference" otherwise. See 2 U.S.C. § 431(18). As elaborated by an FEC regulation, "the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent'", or through

Plaintiffs did so because this provision threatened to impair the AFL-CIO's use of the broadcast medium as a legislative and policy advocacy tool, marked an unprecedented legislative incursion on labor organizations' ability to speak out on matters of public concern by treating substantial portions of their public advocacy as electoral in nature, and would impose a substantial and unwarranted burden on AFL-CIO COPE PCC.

The AFL-CIO Plaintiffs placed in the record of that case compact discs and videotapes of approximately 85 different television and radio advertisements that the AFL-CIO had sponsored throughout every year from 1995 through 2001; virtually every ad in turn had numerous versions, the difference in almost every case being the name of the incumbent Member of Congress to whom the ad referred. See Joint Appendix ("J.A."), Vol. I, pgs. 440-62 (Declaration of Denise Mitchell); J.A. Vol. II, pgs. 464-587 (Index of AFL-CIO Issue Advertising, 1995-2001); Brief of AFL-CIO Appellants/ Cross-Appellees at 1-7. *McConnell v. FEC*, No. 02-1674, *et al*. Without specifically addressing the AFL-CIO Plaintiffs' evidentiary submission, however, the Court held that the various *McConnell* plaintiffs had not "carried their heavy burden of proving that [§ 203] is overbroad." *See* 540 U.S. at 203-11.

The AFL-CIO subsequently filed a brief *amicus curiae* in support of the appellant in *Wisconsin Right to Life, Inc. v.*

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an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'" See 11 C.F.R. § 100.29. A person becomes a "candidate" under FECA upon receiving contributions or making expenditures in excess of $5,000, *see* 2 U.S.C. § 431(2)(A), a threshold routinely met by incumbent Members of Congress almost immediately after winning their most recent election. *See also* 11 C.F.R. § 100.3. As a practical matter, only a Member of Congress who has announced retirement or lost a nomination contest is not a "candidate" at all times, including those periods during which § 203 applies.

FEC, 546 U.S. 410 (2006) (*per curiam*) ("*WRTL I*"), arguing both that as-applied challenges to § 203 were justiciable and that the advertisements at issue were entitled to protection under the First Amendment. In January 2006, the Court unanimously held that its decision in *McConnell* "did not purport to resolve future as-applied challenges," 546 U.S. at ____, 126 S. Ct. 1016, 1018, and observed that "[a]lthough the [Federal Election Commission] has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here." *Id*. at ___, 126 S. Ct. at 1017.

The following month, the AFL-CIO joined with a usual policy adversary, the Chamber of Commerce of the United States, and three other organizations in a petition asking the Federal Election Commission ("FEC") to initiate a rulemaking to exempt "at least some forms of grassroots lobbying" from that prohibition, in effect a safe harbor for messages that bore particular characteristics. See Petition for Rulemaking: Electioneering Communications and Grassroots Lobbying Exemption (Feb. 16, 2006), www.fec.gov/pdf/nprm/lobbying/orig_petition.pdf. However, after considering 192 comments on the petition (all but one of which supported it), the FEC declined to undertake such a rulemaking, pointing to the pendency of both the case at bar and another pending as-applied challenge (No. 06-589, *Christian Civic League of Maine v. FEC*), and expressing concern that any exemption might become the subject of "new litigation." FEC, "Exception for Certain 'Grassroots Lobbying' Communications from the Definition of 'Electioneering Communication,'" 71 Fed. Reg. 52295, 52296 (Sept. 5, 2006). The AFL-CIO has a considerable stake in judicial recognition of a meaningful standard for as-applied exceptions to § 203's otherwise absolute prohibition.

SUMMARY OF ARGUMENT

1. In *McConnell v. FEC*, 540 U.S. 93, 206 (2003), the Court upheld the BCRA § 203 prohibition of corporate- and union-financed so-called "electioneering communications" "to the extent that the issue ads broadcast during the pre-election periods…are the functional equivalent of express advocacy." In so holding, the Court focused on one advertisement in the record and posited a hypothetical message that satisfied that standard, neither of which included a reference to a candidate acting in the capacity of an incumbent office-holders. The Court acknowledged that the compelling governmental interests underlying § 203 might not apply to "genuine issue ads" pertaining to "political policy or advocacy of the passage or defeat of legislation," whose existence during the § 203 timeframes it acknowledged. *Id.* at 205.

As the Court aptly observed in *Buckley v. Valeo*, 424 U.S. 1, 42 (1976), discussion of issues "naturally and inexorably . . . exert[s] some influence on voters' choices." A meaningful opportunity to make an as-applied challenge to § 203 must include reliance upon the presence or absence of characteristics that preserve § 203 insofar as it is constitutional, that are readily and objectively determinable, and that cabin a class of communications least likely to be electorally focused. The WRTL advertisements reflect six such characteristics and should be protected.

2. In contrast, the Government and the Intervenors treat the innate fluidity of electoral and non-electoral speech as justification to resist any meaningful protection for issue speech. While the Government correctly acknowledges the problems with a wide-ranging inquiry into a particular advertisement, its analysis of the WRTL's ads belies its sensible cautions. The Government's strict adherence to § 203's "bright line" effectively deprives speakers of any meaningful exception. In conferring discretionary exemption authority

on the FEC in § 203, Congress itself did not envision that § 203's bright line would be absolute.

The Intervenors offer a variety of vague and unworkable standards for identifying what speech § 203 may constitutionally capture. They too intrusively parse the language of the WRTL ads and reach speculative and unjustifiable conclusions from contextual factors whose consideration they erroneously contend should be unlimited, and their comparative examples of speech that merit protection cannot be coherently distinguished from the WRTL advertisements. Their argument also marks an unexplained reversal of the position they urged upon the FEC in its 2002 BCRA rulemaking, when they advocated a virtually entirely content-based exemption to § 203 because it would "assure that the communication plainly and unquestionably is 'wholly unrelated to any election,'" a standard that appears even more exacting than those they urge the Court to apply to the WRTL ads that in all relevant respects fully satisfy their 2002 formulation.

3. In contrast to express advocacy and its "functional equivalent," the Court has never recognized a governmental interest in suppressing the issue speech that merits an as-applied exemption to § 203. That speech serves the First Amendment right to petition the Government, and it is core protected speech regardless of the identity of the speaker. And, the § 203 prohibition is particularly inappropriately applied where, as here, the referenced candidate was running unopposed in a political party primary.

4. The Court should reject the appellants' argument that WRTL's ads should be construed as electoral due to the distinct activities of WRTL's federal PAC. The PAC is a distinct legal entity, and it would effectively impose an unconstitutional forced choice, akin to one the Court rejected in *McConnell*, if the PAC's speech were treated as tainting that of WRTL. Concluding otherwise would disrupt dual organizational structures that both the Federal Election Campaign

Act and the Internal Revenue Code have long protected and encouraged.

Requiring a corporation's separate segregated fund to finance issue speech also unconstitutionally compels the speaker to assert an electoral character to speech against its wishes. And, due to a longstanding Internal Revenue Service rule, the PAC could lose its tax exemption as a result. Requiring groups, particularly in hierarchical structures, to rely upon a PAC for issue speech is also unduly burdensome.

5. Finally, in deciding this case the Court should not foreclose the opportunity for a union or other speaker that is not now before it to make out a class-based exception from § 230. *McConnell* predicated its holding on cases involving corporations and did not specify why § 203 is constitutional as to unions, which have "crucial differences" from corporations that are directly relevant to the justifications underlying laws restricting corporate electoral speech. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655-56 (1990).

ARGUMENT

I. A Meaningful As-Applied Exception to Section 203 Must Be Defined By Bright-Line and Readily Determinable Characteristics

BCRA's "electioneering communications" provision imposes "stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey messages of support or opposition." *McConnell v. FEC*, 540 U.S. at 239 (emphasis in original). In upholding § 203 against plaintiffs' overbreadth challenges, the Court stated that the constitutionally sufficient justifications for § 203 applied only "*to the extent that* the issue ads broadcast during the [pre-election] periods . . . are the functional equivalent of express advocacy," that is, "*if* the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206; *see also id.* at 126-27. The Court deter-

mined that "the vast majority of ads" reflected in the record before it "clearly had such a purpose"; and, in contrast, § 203's application to "pure issue ads" was not "substantial." *Id.* at 206, 207 (emphasis added). While the Court noted the "dispute" among the parties and within the three-judge court in that case as to "the precise percentage" of election-proximate ads in the record that were "genuine issue ads," *id.* at 206, every party and district judge in *McConnell* acknowledged that *some* ads run during the § 203 blackout periods *were* "genuine issue ads."

However, the Court eschewed a detailed treatment of the substantial record of broadcast advertising that was before it. Instead, the Court generally referred to ads that "although . . . not urg[ing] the viewer to vote for or against a candidate in so many words, . . . are no less clearly intended to influence the election." *Id*. at 193 (footnote omitted). The Court illustrated this concept with a single "striking example": a 1996 Montana ad consisting of an *ad hominem* statement that compared a non-incumbent congressional candidate's alleged assault of his wife and failure to pay child support with the candidate's state legislative voting record, and asked listeners to "[c]all Bill Yellowtail. Tell him to support family values." *Id.* at 193 n. 78. The Court otherwise attributed a "vote-for" message only to ads that it hypothetically described as solely "condemn[ing] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 127 (footnote omitted). Like the Montana ad, this generic ad did not include a plea that listeners call upon the candidate *as an officeholder* either to cast a legislative vote or take any other official action, and it could have been directed at a candidate who was a non-incumbent. The Court discussed no other particular advertisement or specific formulation of advertisements.

By the same token, the *McConnell* majority did not elaborate about what makes ads "genuine," other than by describ-

ing in the manner quoted above what does *not*. But the Court plainly had in mind at least "discussion of political policy or advocacy of the passage or defeat of legislation"; for, it quoted its previous comparison—for purposes of entitlement to First Amendment protection—of that speech with '"[a]dvocacy of the election or defeat of candidates for federal office"' in *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), before explaining why the government had a compelling interest in regulating certain sources of the latter. *See McConnell*, 540 U.S. at 205.

Because § 203 may be constitutionally applied only to the "functional equivalent" of express advocacy, at the core of this case is the question of how to identify candidate-referential messages that do not so qualify. The difficulty in distinguishing the broadcast electoral advertising about which Congress was concerned from other messages arises from inevitable circumstances that this Court aptly described in *Buckley*:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[50]
>
> [50] *". . . Discussions of those issues, as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."*

424 U.S. at 42 and n.50 (emphasis added), quoting *Buckley v. Valeo*, 519 F. 2d 817, 875 (D.C. Cir. 1975).

The district court below undertook a careful and practical review in concluding that the as-applied analysis should proceed almost entirely on the basis of the "four corners of the

. . . ads" themselves, rather than an unbounded consideration of other material and analysis in order to ascertain a speaker's "subjective intent" or a broadcast message's "likely effect"—matters that, it concluded, were "too conjectural and wholly impractical [to determine] if future as-applied challenges are going to be evaluated on an emergency basis by three-judge panels," as BCRA commands. *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 205 (D.D.C. 2006). In evaluating whether or not the Wisconsin Right to Life, Inc. ("WRTL") ads merit First Amendment protection from the application of § 203, this Court too should consider what characteristics of a constitutionally protected advertisement will preserve the reach of § 203 insofar as *McConnell* upheld it, and enable speakers, often in exigent circumstances, to proceed without having to "'hedge and trim'" their speech. *See Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). These factors should supply as bright a line as possible and cabin a class of communications that are least likely to be electorally focused, and their presence or absence should be readily determinable without entailing the kind of intrusive discovery and litigation donnybrook that ensued when WRTL sought preliminary relief below, and that would risk an irreparable loss of First Amendment rights.[3]

The WRTL ads that are actually before the Court for decision satisfy the six characteristics enumerated below, and because they do the § 203 prohibition must yield.[4] More objective than several of the considerations enumerated by the district court, these characteristics mark communications

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[3] If the Court determines that there is no constitutionally sufficient means to enable meaningful as-applied challenges to § 203, then it should reconsider its decision in *McConnell* that the § 203 prohibition is itself constitutional, either in deciding the case at bar on the current record, or following supplemental briefing on that question.

[4] These characteristics track those that the AFL-CIO and others proposed that the FEC adopt in 2006.

that in substantial measure *belie* electoral advocacy and are very far removed from the Court's two exemplars—the Montana ad and the Jane Doe ad—of communications that *are* electoral in nature:

> 1. The "clearly identified federal candidate" is an incumbent public officeholder;
>
> 2. The communication discusses a particular current legislative or executive branch matter;
>
> 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate in that capacity and urge him or her to do so;
>
> 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter;
>
> 5. The communication does not refer to an election, the candidate's candidacy or a political party; and
>
> 6. The communication does not refer to the candidate's personal character, or qualifications or fitness for office.[5]

We acknowledge that an ad that reflects all of these elements nonetheless conceivably could exert some impact under some circumstances on an election, as *Buckley*, 424 U.S. at 42, generally observed. While it is possible to define the sort

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[5] The texts and circumstances of six exemplars of broadcast advertisements that also would satisfy this test are detailed in District Judge Leon's opinion in *McConnell v. FEC*, 251 F. Supp. 2d 176, 488-96 (D.D.C. 2003), as "[r]epresentative [e]xamples of [g]enuine [i]ssue [a]dvertisements" that unconstitutionally would have been subject to § 203 had it been in effect; all are AFL-CIO ads from 1998 or 2000. Each ad discussed a current legislative issue and referred to a "candidate" (each an incumbent Member of Congress) only in calling on him or her to take particular action on the issue. *See id.*

of speech that *necessarily will* influence an election—express advocacy, which is "unambiguously related to [a] campaign," *id.* at 80—it is not possible to devise a definition of speech that *necessarily will not*. We believe that the above characteristics, relevant to deciding the case at bar, carefully "identify[] cases far from the troublesome border," *Brown v. Hartlage*, 456 U.S. 45, 56 (1982), and appropriately balance the competing constitutional considerations at hand, while not foreclosing consideration of other factual circumstances, many of which might not now be easily foreseeable.

II. The Appellants' Analyses Effectively Preclude As-Applied Exceptions and Are Incoherent and Self-Contradictary

1. In sharp contrast to the district court and the proposed analysis above, the Government and the Intervenors treat the innate fluidity of electoral and non-electoral speech as justification to subject virtually all of the latter to the prohibition that § 203 was intended to and constitutionally may impose only on the former. While the Government calls upon WRTL to supply "a legal test that avoids the pitfalls of undue complexity *and* susceptibility to evasion," FEC Br. at 27 (emphasis in original), the Government proposes a standard for an as-applied challenge that simply cannot be met, if indeed it can be understood. Surprisingly, the Government rejects "functional equivalence" to express advocacy as a "workable or administrable" standard for as-applied challenges, terming it a "useful concept" only for "upholding the bright-line limitations" of § 203. *Id*. at 29 n.7. Relying upon the Court's exemption of certain ideological corporations from FECA's independent expenditure ban in *FEC v. Massachusetts Citizens for Life, Inc*., 479 U.S. 238, 263 (1986) ("*MCFL*"), the Government instead asserts that an ad is protected only if it "do[es] not pose the danger at which § 203 is directed," FEC Br. at 40, "*at all*, rather than [presenting] differences of degree." *Id*. at 27 (emphasis added).

The Government's analysis does not acknowledge that, at some point, the § 203 "danger" is far too attenuated to justify application of the prohibition. Its analogy to *MCFL* fails because the Court there identified a precisely and objectively determinable class of *speaker* that would be exempt from the ordinary strictures against corporate independent expenditures. *See MCFL*, 479 U.S. at 262-65. But in describing what should be exempted from the § 203 bright-line, the Government suggests no similar precision as to what circumstances—either textually or contextually—do not "pose" the § 203 "danger" "at all." This poses the problem that § 203 was supposedly drafted to solve: avoiding "the vagueness concerns that drove [the] analysis in *Buckley*." *McConnell*, 540 U.S. at 194. Instead, the Government's approach "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. at 535.

The Government does claim to agree with the district court that "requir[ing] examination of *all* facts that are potentially relevant to the ascertainment of an advertisement's purpose or effect" is infeasible, FEC Br. at 27 (emphasis in original), as is any "ad hoc, case by case basis" for doing so, *id*. at 30, and it disclaims on First Amendment grounds "close parsing of the nuances of an advertisement's text." *Id*. at 27. The Government also correctly recognizes that "potential speakers may be chilled if the legality of particular communications or financing arrangements turns on an unstructured post hoc inquiry into the speaker's likely intent." *Id*. at 42. But the Government then ignores its own wise counsel.

First, the Government agrees with the dissenting judge below that WRTL's advertisement that, on its face, complained about judicial filibusters would be "logically directed only at the legislators who have already supported or employed the device," so "'even a textual approach could suggest that . . . [the advertisements] might have implicitly

discouraged Sen. Feingold's election.'" FEC Br. at 37, quoting 466 F. Supp. 2d at 216 (Judge Roberts, dissenting). This reading certainly "close[ly] pars[es] the nuances" of the ad, and if a circumlocution that "*might* have *implicitly* discouraged" a candidate's election "pose[s] the danger at which § 203 is directed" then the Government's standard both "disserve[s] First Amendment values," *id*. at 27, and sets the as-applied bar unreachably high for a speaker to surmount.

Second, despite its rhetorical rejection of a wide-ranging contextual inquiry, the Government urges the Court to consider and evaluate the significance of numerous contextual factors, including the timing of the WRTL ads, the content of WRTL's website, WRTL's conduct over the *subsequent year*, and both prior and contemporaneous speech and activities by WRTL and its federal PAC with respect to Sen. Feingold. *Id*. at 40-48.

By effectively depriving corporations and unions of any opportunity to fund "genuine" broadcast issue advertising during the § 203 timeframes, the Government's test does not comport with our constitutional jurisprudence. "[T]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2003).[6]

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[6] Similarly, precisely because "speech on matters of public concern needs 'breathing space' . . . in order to survive," *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer J., dissenting), *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964), where a corporation's regulable "purely commercial" speech is "inextricably intertwined" with "non-commercial" (public issue-oriented) speech, it must not be subject to state "false advertising" and related "unfair competition" regulation because that would chill corporations from "issu[ing] significant communications

2. Nonetheless, the Government touts the § 203 "bright line" as justification in itself to resist recognizing WRTL's, and likely any, as-applied challenge. See FEC Br. at 42-43. But in *MCFL* the Court squarely rejected the same argument, holding that where "the rationale for restricting core political speech is simply the desire for a bright-line rule[, t]his hardly constitutes the *compelling* state interest necessary to justify *any* infringement on First Amendment freedom." 479 U.S. at 263 (first emphasis in original; second emphasis added). Bright-line rules are necessary in areas implicating First Amendment freedoms in order to *protect* speech from governmental interference, not to facilitate governmental *restrictions* on speech. Thus, in *Buckley*, the Court fashioned the bright line of express advocacy in order to clarify and narrow a vague and overbroad statute that otherwise would have trammeled upon non-electoral issue speech and unduly inhibited speakers uncertain about how their speech might be perceived. *See* 424 U.S. at 42-44. And, having done so, the Court then invalidated FECA's $1,000 expenditure limit, both because independent express advocacy did not "presently appear to pose dangers of real or apparent corruption," *id.* at 46, and because a great deal of other speech could be devised that "skirted the restriction on express advocacy of election or defeat but nonetheless benefited the candidate's campaign," *id.* at 457—rationales that *McConnell* explicitly reaffirmed. *See* 540 U.S. at 190-92.

Moreover, Congress itself did not seek to maintain a "bright line" where the application of § 203 would have inappropriate consequences. Thus, BCRA authorizes the FEC by regulation to exempt from the definition of "electioneering communications" "any . . . communication . . . to ensure the ap-

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relevant to public debate" and "thereby limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important issues." *Id.* at 682-83 (interim quotation marks omitted). *See also id.* at 663-65 (Stevens J., concurring).

propriate implementation" of the law, so long as the communication does not "promote[] or support[]" or "attack[] or oppose[]"[7] a "clearly identified federal candidate." See 2 U.S.C. § 434(f)(3)(B)(iv), incorporating by reference 2 U.S.C. § 431(20)(A)(iii). The need for a "bright line" standard can hardly be regarded as compelling when Congress itself explicitly allowed the FEC to create exceptions that would breach one.

3. The Intervenors, who were the primary congressional sponsors of BCRA, describe numerous formulations of what § 203 constitutionally covers that are even vaguer and less workable than the Government's: "[a]ny ad that is likely to influence voters' decisions, based on an examination of the ad's objective content and context, sufficiently evinces an electioneering purpose and implicates the legitimate goals of BCRA," Int. Br. at 16; "whether Congress may regulate an ad's financing turns not on whether it uses particular words, or whether it makes its election-related nature explicit, but whether it is likely to function as election advocacy by affecting voters' decisions," *id.* at 23; "an as-applied challenge should succeed only if the plaintiff can show that the ad itself and the circumstances of its creation and airing

[7] The quoted phrases (sometimes abbreviated as "PASO") are undefined in the statute. In *McConnell*, the Court concluded that these terms, as used in § 431(20)(A)(iii) with respect to political parties, were not unconstitutionally vague. *See* 540 U.S. at 170 n.64. But the same conclusion would not be appropriate if these terms are applied to the speech of entities, like corporations and unions, that are neither parties, candidates nor political committees. Accordingly, that phrase should not demarcate a constitutional line for an as-applied challenge. Neither the Government nor the Sponsors suggest otherwise, and various of their *amici* rightly caution against doing so. *See* Brief for *Amicus Curiae* The League of Women Voters of the United States *et al*. ("LWV Br.") at 10-13. *See also McConnell*, 540 U.S. at 337-38 (Kennedy, J., dissenting). The district court thus erred in recognizing PASO as an element in evaluating as a *constitutional* matter the merits of an as-applied challenge to § 203.

demonstrate that there is no reasonable prospect the ad is likely to influence the election," *id.* at 39; "any ad whose objective characteristics and context indicate that it is likely to have a material effect on voters' choices—and thus to function as the equivalent of express advocacy . . ." *Id.* at 41. And, the Intervenors urge, there should be no restriction on contextual considerations. *Id.* at 31-42.

It is the Intervenors, then, who have drawn "a line in the sand . . . on a windy day." *Id*. at 35. And, not surprisingly, under their analysis "electioneering"—and *only* "electioneering"—lurks everywhere in the WRTL ads. First, the Intervenors emphasize regarding the ads' *content*:

1. Because the ads call on listeners to lobby Sen. Feingold to oppose filibusters, he must be one of the "group of Senators" referred to in the ads who supports them; otherwise, the plea would be "gratuitous." *Id*. at 23. (But this interpretation, like the Government's textual approach, excessively "pars[es] . . . nuances" to discern suspect intent.)

2. Asking listeners also to contact non-candidate Sen. Kohl is simply a "tactic . . . [to] shield . . . otherwise obvious electioneering." *Id.* at 23. (But if objectively non-electoral characteristics of issue advocacy are simply tricks, no message could pass muster.)

3. The ads provide "no contact information" for Sens. Feingold or Kohl. *Id*. at 27. (But in the Internet age, such information may be unnecessary.)

Second, they emphasize regarding the ads' *context*:

1. The website to which the ads directed listeners *did* contain contact information for the two Senators but also material "criticizing [Sens.] Feingold and Kohl for their role in the filibusters." *Id.* at 27. (But even if that website excerpt were relevant to the ad itself, a

website is too dynamic and dense with material to attribute everything on it to a message that simply refers to its URL.)

2. Because Sen. Feingold had "publicly defended the filibusters," listeners would associate him with the "group of Senators" mentioned in the ad. *Id*. at 23. (But this opens the door to speculative and unpredictable considerations of context and general listener awareness.)

3. The ads were broadcast immediately after four Senate cloture votes on judicial nominations and then continued for one week during a Senate recess, and they did not resume later, including the next year when "the filibuster controversy peaked." *Id*. at 28. (But a variety of legitimate tactical considerations influence the timing of advertising, and the determination as to whether a particular broadcast message is constitutionally protected must be made immediately, not in light of what transpires in the future.)

4. WRTL and its PAC previously criticized Sen. Feingold on the filibuster issue. *Id*. at 24. (But see pp. 25-27, *infra*.)

5. WRTL and its PAC opposed Sen. Feingold's 2004 reelection. *Id*. at 24. (But see pp. 25-27, *infra*.)

6. WRTL and its PAC had opposed Sen. Feingold's election in 1992 and reelection in 1998. *Id*. at 24 n.8. But see pp. 25-27, *infra*.)

7. *Others*, including the Wisconsin Republican Party and Republican Senate primary candidates, "invoked [Sen.] Feingold's participation in the filibuster as a central reason he should be defeated," as shown in a newspaper article "a year before the election." *Id*. at 26. (But a group's right to speak cannot be condi-

> tioned on the distant actions of others over which the group has no control.)

The Intervenors then contrast the WRTL ads with ads that, they say, would be "truly different in kind" and "might well be deemed to have no realistic connection with the election or the candidate's fitness for public office." *Id*. at 40 n.27. But, in fact, applying the Intervenors' own analysis, those examples cannot be distinguished from the WRTL ads, and they only underscore that the Intervenors offer no workable standard at all.

First, they posit an ordinary commercial ad by an automobile dealership whose founder and namesake is a candidate. *Id.* But it seems plain that, by the Intervenors' logic, such an ad would promote that candidate's name and inherently remind voters of his business acumen and success; indeed, these could be qualifications that his campaign emphasizes.

Second, they posit a consulting firm that is in the business of ensuring compliance with the Sarbanes-Oxley law running an ad mentioning that statute where Rep. Oxley is a candidate. *Id*. But again, under the Intervenors' approach, such an ad surely would remind voters of Rep. Oxley's signature legislative achievement, which his campaign and others likely are emphasizing as a reason to reelect him.

Third, they posit "a candidate's business enterprise, named after him or her, sponsor[ing] a fall charity event every year and want[ing] to publicize it during an election year." *Id*. But, again, that public reminder of the candidate's business success, coupled here with a charitable good work, could be said to be highly influential to a prospective voter.[8]

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[8] Appellants' *amici* posit a similar ad that they deem to be acceptable under their equally vague proposed standard, namely, whether or not "[a] communication is unlikely to have any appreciable effect on voters' choices in an election." Brief *Amicus Curiae* of Richard Briffault and Richard L. Hasen in Support of Appellant and Intervenor-Appellants at 24

4. The Intervenors' approach is not only self-contradictory and incoherent, but also marks a notable and unexplained reversal. In the case at bar, the Intervenors acerbically characterize the district court's principal reliance on the text of the WRTL ads as a "'see-no-evil' approach" that "threatens to open the floodgates to renewed evasion of BCRA's regulations." *Id*. at 32. But in the FEC's rulemaking to implement § 203, the Intervenors urged the agency to adopt the following virtually *content-only* exemption from that prohibition:

> The term "electioneering communication" does not include any communication that: (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party. (B) The criteria in Para-

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(emphasis deleted) ("Hasen/Briffault Br."). *See also id.* at 27 ("it is quite plausible the [WRTL] ads could affect voters' choices"). These *amici* describe a baseball card corporation advertising its product by using "the name and likeness of a former baseball star who also happens to be the incumbent Senator running for reelection." *Id*. at 26. They say "it is highly unlikely that voters would use an ad so far removed from anything relevant to the candidate or his or her performance in assessing the candidate." *Id.* at 25-26. But celebrity in non-political fields is a demonstrably potent aspect of many successful candidacies— for example, Sen. Jim Bunning (baseball), Rep. Heath Shuler (football), and, of course, Gov. and President Ronald Reagan and Gov. Arnold Schwarzenegger (acting). Accordingly, these *amici* offer no objective and administrable mode of analysis either.

> graph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 10 (Aug. 23, 2002), www.fec. gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf). As the Intervenors then explained, "[t]his formulation allows individuals and entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows," because it "*assure[s] that the communication plainly and unquestionably is 'wholly unrelated' to any election.*" *Id*. at 11 (emphasis added). The Intervenors also urged the FEC to "preserve the 'bright line' quality" of the electioneering communication definition with respect to "entities other than parties or candidates" because it must "give clear guidance," and "[a]n exemption that creates uncertainty about whether a communication will be covered by the law undermines that crucial aspect of the definition . . ." *Id*. at 6.[9]

All of the WRTL ads at issue here satisfy the Intervenors' 2002 proposed exemption, save for their utterances of Sen. Feingold's actual name.[10] Nothing has changed since these

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[9] Appellants' current *amicus curiae* Common Cause also supported this exemption because it "protect[s] against the possibility that sham communications that are in fact campaign ads continue to escape [§ 203's] coverage." See Letter from Donald J. Simon to Mai T. Dinh at 12 (Aug. 22, 2002), www.fec.gov/pdf/nprm/electioneering_comm/comments/common_cause_and_democracy_21.pdf. Now, however, Common Cause excoriates the district court's similar analysis as a "magic features test" that would "eviscerate" § 203. LWV Br. at 6-8 and n.2.

[10] In their 2002 comments to the FEC, the Intervenors asserted that "prohibit[ing] use of a candidate's name makes it less likely that the ex-

2002 comments to require or warrant a different analysis—certainly not this Court's decision in *McConnell*, which essentially embraced the analysis that the Intervenors, as intervenors in that litigation as well, urged the Court to adopt. To be sure, while one's support of a discretionary *regulatory* exemption does not necessarily mean that one believes that it is *constitutionally* mandated, as noted above the Intervenors contended in 2002 that the exemption they supported '"plainly and unquestionably' is wholly unrelated to an election"—so, surely, it must neither have any "reasonable prospect . . . to be likely to influence the election," Int. Br. at 39, nor be "likely to have a material effect on voters' choices." *Id.* at 41. The Intervenors, who assured this Court in *McConnell* that as-applied challenges to § 203 would be justiciable, see Brief for Intervenor–Defendant Senator John McCain, *et al.* at 64, 74-75, *McConnell*, Nos. 02-1674, *et al.*, and then vigorously argued the opposite in *WRTL I*, have reversed field again in order to render the as-applied option that this Court recognized in *WRTL I* effectively a null set.

III. There Is No Governmental Interest in Suppressing Issue Advocacy Broadcast Messages

The Intervenors also contend that in *McConnell* the Court determined that issue advocacy "is entitled to no greater pro-

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emption will be used to accomplish an electoral objective." *Id*. at 11. Surely, that one circumstance has no legal salience. Since well before BCRA, a "clearly identified candidate" has been defined in part to include one who is referred to, without name or image, as "your Congressman" or "the incumbent." 2 U.S.C. § 431(18); 11 C.F.R. § 100.17. As Judge Leon stated below, the record in *McConnell*, including testimony by the AFL-CIO's communications director, demonstrated that actually naming an official was crucial to motivating constituents to contact him or her in response to an ad. *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d at 207 n.19. That evidence was uncontested in *McConnell*. Moreover, if, as the Intervenors now say, the constitutionally significant context includes the fact that listeners may be assumed to know that Sen. Feingold supported judicial filibusters, see Int. Br. at 23, then surely they can be assumed to know the more elementary fact of his *name*.

tection under the First Amendment" than express advocacy, so § 203 may be applied where it is "impossible to disentangle" them. See Int. Br. at 42 n.28; *see also id.* at 19-20. Again, however, that inverts the teaching of *Buckley* that in such circumstances the First Amendment requires the censor to desist. And, while the Court has recognized a compelling governmental interest in regulating express advocacy and its "functional equivalent," it has never recognized any governmental interest at all in prohibiting corporate or union funding of *other* advocacy; and, the Government does not suggest any such interest now.

Indeed, in *McConnell* 540 U.S. at 206 n. 88, the Court stated that, "[a]s Justice Kennedy emphasizes in dissent, post, at 326-328, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of issue ads," for "unusually important interests underlie the regulation of corporations' campaign-related speech," and "BCRA's fidelity to these imperatives sets it apart from the statute in *[First National Bank of Boston v.] Bellotti* [,435 U.S. 765 (1978)] . . . ," namely, a state criminal provision that barred corporations from making contributions or expenditures in connection with ballot measures other than those that materially affected themselves. In striking down that prohibition, the *Bellotti* Court reasoned that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue," *id.* at 790, and corporate advocacy "affords the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted).

That kind of advocacy exercises the right to petition the government, which is "one of the most precious of the liberties safeguarded by the Bill of Rights, . . . and . . . implied by the very idea of a government, republican in form," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (interior quotation marks, citations and brackets omitted), and

is entitled to "a wide measure of 'breathing space' protection," *id*. at 531, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 279. "At the heart of the First Amendment's protection" is speech on '"issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."' *First National Bank of Boston v. Bellotti*, 435 U.S. at 776, quoting *Thornhill v. Alabama*, 308 U.S. 88, 102 (1940). See also *Consolidated Edison Co. v. Public Service Comm*., 447 U.S. 530 (1980) (state cannot preclude corporation from including with customer bills its own newsletter that discusses public policy matters).

And, where a speaker on *non*-electoral matters of public concern is a labor union, a corporation or some other organized group, no lesser or different First Amendment protection is at stake than it would be for a different speaker. "[T]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777.

It bears emphasis on this point that absent a meaningful as-applied exception, § 203 proscribes *all* union- and corporate-financed broadcast references to *all* Members of Congress who are also candidates, even if they are literally unopposed for reelection or, as is the case for so many of them due to partisan gerrymandering, the "functional equivalent" of being so. Notably, the application of § 203 against WRTL that is at issue here concerns *a primary election in which Sen. Feingold was unopposed*. Under no formulation of an election-influencing standard could the "dangers" that inspired § 203 be considered to arise under that circumstance, as even some of the appellants' *amici* acknowledge. See Hasen/Briffault Br. at 25 and n.9. In *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 95 (1982), the Court stated

that "because minor party candidates are unlikely to win elections, the government's general interest in 'deterring the "buying" of elections' is 'reduced' in the case of minor parties," quoting *Buckley*, 424 U.S. at 70; and, that fact, coupled with evidence of past harassment, warranted under the First Amendment an exemption for a minor party from the State of Ohio's campaign contribution and expenditure disclosure requirements. *Brown*, 459 U.S. at 420-25. By a similar token, because a candidate who is *unopposed* in a primary election is *certain* to win, the governmental interest in regulating election-"influencing" speech is not just "reduced," but entirely absent.

The § 203 prohibition also applies to broadcast references to the incumbent elected leaders of the Executive Branch, the President and the Vice President, whenever either is a candidate for reelection or the Vice President is a candidate for the presidency, as was the case in every election from 1932 to 2004 (and in only 1952 was the incumbent President or Vice President not one of the eventual major-party presidential nominees). As both history and contemporary circumstances make clear, the *official* conduct of the President and the Vice President is a matter of the most acute public concern irrespective of their electoral ambitions and prospects. Yet § 203 uniquely insulates them from broadcast issue commentary.[11] There is no governmental interest, let

[11] During the 2003-04 election cycle, the first to which BCRA applied, it was a federal crime for union- or corporate-financed broadcast advertising to refer in any manner to President Bush during substantial periods of time and locations while he was an *unopposed* candidate in primaries and caucuses for the Republican Party nomination; that prohibition continued throughout the 50 states with respect to both President Bush and Vice President Cheney during the 30-day period prior to the August 30 – September 2, 2004, Republican National Convention, even though their nominations were likewise uncontested; and, it then continued without pause during the 60 days remaining before the November 2 general election. Notably, in 2008 the two major-party conventions will be held

alone a compelling one, in barring genuine issue communications referring to the President, the Vice President or Members of Congress during those periods.

IV. The Appellants' Arguments Concerning WRTL's Separate Segregated Fund Should Be Rejected

There is also no constitutional basis for compelling unions and corporations to finance their genuine issue advocacy through a separate segregated fund.[12] The Government's and the Intervenors' arguments regarding the significance of WRTL's connected federal political committee should be rejected for three principal reasons.

First, accepting their arguments would impose a substantially disruptive burden on long-established and widespread organizational structures developed in reliance upon both FECA and the Internal Revenue Code. Appellants contend that the WRTL ads are tainted in purpose and effect by the distinct electoral activities of WRTL's PAC. However, that separate segregated fund is a distinct legal entity from its

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just before the 60-day pre-November 4 Election Day "blackout" period begins on September 4 – during August 25-28 (Democratic Party) and September 1-4 (Republican Party). Although it appears that no incumbent President or Vice President will then be a candidate, if this timing becomes the norm then in future elections then the 2004 experience is sure to be repeated.

[12] Although the Court has rejected the characterization of the segregated-fund requirement as a "complete ban" on corporate or union political activity, *see FEC v. Beaumont*, 539 U.S. 146, 194 (2003), it is most certainly fair to characterize § 203's proscription of union- and corporate-paid independent speech as a "prohibition," as this Court has done on both occasions that it has considered it. *See WRTL I*, 546 U.S. at ___, 126 S. Ct. at 1017; *McConnell*, 543 U.S. at 203. Section 203 itself was entitled "Prohibition of Corporate and Labor Disbursements for Electioneering Communications," 116 Stat. 81, 91, and, as codified, 2 U.S.C. § 441b(a), provides that unions and corporations are "prohibited" from making any "contribution or expenditure," including an "applicable electioneering communication." 2 U.S.C. § 441b(b)(2).

corporate sponsor, and the sponsor's control over it does not render the sponsor or its officers subject to the enforcement of laws barring the *sponsor* from making political contributions or expenditures. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 401-32 (1972). FECA incorporates these principles. 2 U.S.C. § 441b(b)(2)(C).

Similarly, while the Internal Revenue Code precludes a § 501(c)(3) charitable organization from engaging in any partisan political activity, *see* 26 U.S. C. § 501(c)(3), it is well-established that a charity does not violate that prohibition simply because it is affiliated with a § 501(c)(4) entity that sponsors and administratively supports a federal political committee. See Internal Revenue Service ("IRS"), "Election Year Issues" 365-69, 473-80 (2003). Indeed, the Court has recognized the utility of the "dual structure" of § 501(c)(3) and § 501(c)(4) arms to enable an organization to pursue distinct objectives. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). For these reasons, innumerable organizations maintain multi-affiliate structures. But appellants' "taint" argument would render these various affiliation arrangements traps for the unwary.

Adoption of appellants' position would unconstitutionally burden WRTL and its PAC, for the PAC would no longer be available to provide "a constitutionally sufficient opportunity [for WRTL] to engage in express advocacy." *McConnell*, 540 U.S. at 203-05.[13] In *McConnell*, the Court invalidated BCRA's requirement that a political party forgo its First Amendment right to undertake express-advocacy independent expenditures if it (or an affiliated party committee) previously made coordinated expenditures with a party's nominee for

[13] The Court's comment in *McConnell* that in "doubtful cases" such a fund may be used to pay for "genuine issue ads," 540 U.S. at 206, cannot be construed as a command that such a fund be used to finance an ad that merits an as-applied exception; if it were, there could be no such exception.

federal office, because this forced choice placed an "unconstitutional burden" on that right. *Id.* at 213-14. The invalid choice there was between "a constitutional right and a statutory benefit," 540 U.S. at 28; here, the invalid *de facto* forced choice is between two *constitutional* rights: a PAC's right to make independent expenditures and an affiliated § 501(c) organization's right to finance issue-oriented broadcast speech.[14] Section 203 cannot constitutionally force a speaker to make that choice.

Second, requiring a non-electoral entity like a union or a corporation to employ an electoral entity as the sponsor of its *non*-electoral message violates the First Amendment "principle of autonomy to control one's own speech." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). *See generally Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-200 (1999); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 11 (1986). For, whenever a federal political committee makes a communication, it must both identify itself and either affirm or disclaim "candidate" authorization of its speech. 2 U.S.C. § 441d(a). This deprives the organization and its members of the "right . . . to advocate their cause" by "what they believe to be the

[14] Although it is unclear whether or not any of WRTL's other communications about Sen. Feingold were confined to WRTL's members, insofar as they were the appellants presumably would consider them to be pertinent and discoverable "context." Yet the First Amendment precludes incursions by federal campaign finance laws on a union's or other membership organization's partisan internal communications, s*ee United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121 (1948), and FECA explicitly provides that union and corporate internal communications "on any subject" are exempt from treatment as either "contributions" or "expenditures." 2 U.S.C. § 441b(b)(2)(A). If the exercise of such protected *internal* speech and association effectively forfeits a group's ability to undertake *external* issue speech, then that is also an unconstitutional condition on the exercise of those rights.

most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Moreover, under a longstanding IRS rule, if the separate segregated fund of a § 501(c) organization "expends more than an insubstantial amount . . . for activities that are not for an exempt function [that is, election-influencing activity, see 26 U.S.C. § 527(e)(2)], during a taxable year, [then] the fund will not be treated as a segregated fund for such year," and all of its receipts will be taxed to its § 501(c) sponsor. 26 C.F.R. § 1.527-2(b)(1). Thus, compelling WRTL's separate segregated fund to pay for *non*-electoral advertising subjects it to a substantial risk of loss of its tax exemption.

Third, as applied to "genuine" issue speech, the segregated-fund requirement entails unduly complicated and burdensome administrative and other requirements. In *MCFL* the Court held that those burdens made it a "severely demanding task" for a nonprofit ideological corporation to engage in express-advocacy independent expenditures. 479 U.S. at 256. That burden is at least as severe for organizations that wish to broadcast speech that poses no greater threat of corruption or its appearance than does an *MCFL* organization itself. And, for unions and corporations that operate in a hierarchical, affiliated structure, typically only the national affiliate sponsors and controls a federal PAC, because FECA treats all affiliates of a national organization as comprising a single entity for purposes of political committee sponsorship, fund-raising and spending.[15] See 2 U.S.C. § 441a(a)(5); 11 C.F.R.

[15] So, for example, there are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries, see "Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?", Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002), but there are only 283 union-sponsored federal political committees. www.fec.gov/press/press2006/20060714paccount.html.

§§ 110.3(a)(2)(ii) and (iii). Absent meaningful as-applied recourse, a typical organization coping with an immediate and unforeseen legislative problem would have to either create its own PAC to fund "electioneering communications" or try to persuade its national parent affiliate, perhaps on very short notice, to spend its PAC money—which it raised for contributions and express-advocacy spending—for that affiliate's non-electoral issue message. That consequence is constitutionally unacceptable.

V. The Court Should Not Foreclose the Possibility That Labor Organizations as a Class of Speaker Are Exempt From Section 203

The Court has long recognized and afforded protection to the vital role of labor organizations in the *non*-electoral public arena as advocates for legislation and public policies in the interests of both their members and all workers. *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters Local Union No. 562 v. United States, supra; Machinists v. Street*, 367 U.S. 740, 767 (1961); *id*. at 798, 800-03, 812-816 (Frankfurter, J., dissenting); *United States v. United Auto Workers*, 352 U.S. 567, 578-86 (1957); *United States v. Congress of Industrial Organizations*, 335 U.S. at 115-21; *id*. at 143-46 (Rutledge, J., concurring). The case at bar provides no occasion to foreclose the question as to whether § 203 itself is constitutional with respect to labor organizations as a distinct class of speaker.

With the sole exception of *MCFL* corporations, *McConnell* did not distinguish among the various entities regulated by § 203 in analyzing the record of their broadcast advertising practices. And, in upholding the prohibition, the Court recited only its "prior decisions regarding campaign finance regu-

lation, which represent respect for the legislative judgment that the special characteristics of the *corporate* structure require particularly careful regulation." See 540 U.S. at 205 (emphasis added) (interior quotation marks and citations omitted). *See also* Hasen/Briffault Br. at 9 n.5. The Court did not explain why § 203 is constitutional as applied to *unions*.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990), the Court rejected the claim by a business trade association that the State of Michigan's proscription of corporate-financed electoral independent expenditures was fatally under-inclusive because it did not also apply to unincorporated labor organizations, explaining that unions have "crucial differences" from corporations: although unions too "may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure," and "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury." In deciding the case at bar, the Court should not foreclose the ability of unions, or other entities regulated by § 203 whose claims are not now before the Court either, to make out a broader as-applied challenge on some future occasion.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment below.

Respectfully submitted,

JONATHAN P. HIATT
LAURENCE E. GOLD *
AFL-CIO
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5130

* Counsel of Record