

No. 04-1581

IN THE
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

**On Appeal From
The United States District Court
For The District Of Columbia**

**BRIEF OF
UNITED STATES SENATOR MITCH McCONNELL
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT**

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QUESTION PRESENTED

Whether the prohibition on corporate disbursements for “electioneering communications” during a statutorily imposed black-out period, codified at 2 U.S.C. § 441b, is unconstitutional as applied to television advertisements that are devoted exclusively to urging constituents to contact named elected officials regarding pending governmental matters.

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**BRIEF OF
UNITED STATES SENATOR MITCH McCONNELL
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

INTEREST OF *AMICUS CURIAE*¹

The question presented in this case is whether the prohibition on “electioneering communications,” codified at 2 U.S.C. § 441b, is unconstitutional as applied to grass-roots lobbying. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an elected official with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He also is the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate’s foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, “*Reform*” *Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

¹ Pursuant to this Court’s Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court’s Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell’s strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.² Senator McConnell’s position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the Bipartisan Campaign Reform Act’s application to the grass-roots lobbying efforts at issue here.

STATEMENT

1. In 2002, Congress passed—and the President signed—the Bipartisan Campaign Reform Act (“BCRA”), which amended the Federal Election Campaign Act of 1971 (“FECA”) to curb corruption or the appearance of corruption in federal elections. *See McConnell*, 540 U.S. at 115 (calling BCRA the most recent federal enactment designed to “purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions” (citing *United States v. Auto. Workers*, 352 U.S. 567, 572 (1957))). When signing BCRA into law, President Bush cautioned that several of its provisions “present serious constitutional concerns.” Press Release, Office of the Press Secretary, Presi-

² *See* Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee, as *Amici Curiae* in Support of Respondents, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D’Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenzel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 614 (1996) (No. 95-489).

dent Signs Campaign Finance Reform Act (Mar. 27, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/03/20020327.html> [hereinafter Presidential Signing Statement]. The President expressed specific “reservations about the constitutionality of [BCRA § 203’s] broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election.” *Id.*

A year later, this Court upheld most of BCRA’s provisions, and considered—and rejected—a facial challenge to BCRA § 203’s restrictions on issue advertising. *McConnell*, 540 U.S. at 207. That provision prohibits any corporation from “mak[ing] a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . for any political office.” 2 U.S.C. § 441b(a). The terms “contribution” and “expenditure” are defined to include “electioneering communications.” *Id.* § 441b(b)(2).

An “electioneering communication,” in turn, is defined as any broadcast, cable, or satellite communication that (i) refers to any clearly identified federal candidate; (ii) is made within 30 days of a primary or 60 days of a general election; and (iii) is targeted to the electorate of the identified candidate. 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(b)(2) (explaining that “[r]efers to a clearly identified candidate means that the candidate’s name, nickname, photograph, or drawing appears”). Once these provisions are triggered, a corporation “may not use [its] general treasury funds to finance electioneering communications”; if it intends to run advertisements referring to particular federal officeholders during this black-out period, it must first create a distinct organization—a separate segregated fund (or PAC)—in order to speak. *McConnell*, 540 U.S. at 204; *see also* 2 U.S.C.

§ 441b(b)(2)(A)-(C).³ BCRA § 203 thus extended FECA’s existing restrictions on “express advocacy,” which applied to corporate-funded advertisements that explicitly advocated a candidate’s election or defeat, to electioneering issue advertisements, which did not expressly advocate a vote for or against a candidate. *McConnell*, 540 U.S. at 193-94.

In *McConnell*, the parties challenging BCRA’s constitutionality argued that § 203’s restriction on electioneering communications was substantially overbroad and thus facially unconstitutional. 540 U.S. at 204. The Court rejected this facial challenge because it believed that “the vast majority” of issue ads aired during the weeks immediately preceding an election served an electioneering purpose (*id.* at 206) and that restrictions on such ads were necessary to combat the potentially distorting impact of corporate wealth on elections. *Id.* at 205. The Court explained that the “justifications for the regulation of express advocacy apply equally to [issue] ads aired during those periods *if* the ads are intended to influence the voters’ decisions *and* have that effect.” *Id.* at 206 (emphases added). The Court recognized that restrictions on issue ads that are *not* intended to serve an electioneering purpose are constitutionally suspect and are thus amenable to an as-applied challenge. *See id.* at 206 n.88 (“interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads” that do not serve an electioneering function). This Court is now squarely confronted with the as-applied constitutional challenge that *McConnell* invited for another day.

2. During the summer of 2004, Wisconsin Right To Life, Inc. (“WRTL”), a nonprofit, 501(c) tax-exempt Wiscon-

³ Section 441b(b)(2)(C) provides that “the term ‘contribution or expenditure’ . . . shall not include the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.”

sin corporation, ran a series of advertisements urging Wisconsin residents to lobby United States Senators Feingold and Kohl to oppose filibusters of judicial nominees. *See* Jurisdictional Statement (“J.S.”) at 4-5. As is the case today, the filibuster issue was then receiving significant national attention, and there was a vigorous public debate about the judicial confirmation process.

WRTL’s lobbying campaign did not reference the Senators’ party affiliations, their voting records, or their personal lives. *See* Jurisdictional Statement Appendix (“J.S.A.”) at 13a-17a. In fact, the ads mentioned the Senators’ names only once, concluding with the suggestion that listeners “[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster.” *See id.* at 13a, 15a, 17a (wording of three filibuster ads). It is undisputed that, because the ads made reference to Senator Feingold, who was then seeking re-election, they fell within the plain terms of BCRA’s electioneering communications provisions for approximately a two-and-a-half-month period, beginning August 15, 2004. J.S. at 4.⁴

3. On July 28, 2004, WRTL filed suit in the United States District Court for the District of Columbia and sought a preliminary injunction allowing it to continue running the filibuster ads with general treasury funds during the statutorily imposed black-out period. J.S. at 4. A three-judge panel was convened pursuant to BCRA § 403(a)(1). The court denied WRTL’s preliminary injunction request on August 12 and subsequently dismissed WRTL’s complaint with prejudice. J.S.A. at 2a-4a.

The three-judge panel’s opinion denying WRTL’s request for injunctive relief interpreted *McConnell* as precluding all as-applied challenges to BCRA’s electioneering com-

⁴ Because Senator Feingold was a candidate in the September 14 primary and the November 2 general election, WRTL was prohibited from running the filibuster ads from August 15 to November 2, 2004.

munications provisions. J.S.A. at 8a. The court also opined that WRTL had not established its entitlement to a preliminary injunction on the merits. *Id.* In reaching this conclusion, the court suggested that WRTL’s ads were the very type of activity that *McConnell* found Congress had a compelling interest in regulating. *Id.* at 8a-9a. Specifically, the court expressed concern that grass-roots issue ads focused on filibustering—arguably an issue in Senator Feingold’s re-election campaign—could “convey a message of support or opposition regarding candidates.” *Id.* at 9a (internal quotation marks omitted).

The court opined that because WRTL could conceivably finance its filibuster ads with PAC funds, it would not suffer irreparable harm if a preliminary injunction were denied. J.S.A. at 10a-11a. The court also found that the Federal Election Commission would suffer a “substantial injury” if it were not able to comply with its statutorily imposed duty to enforce BCRA. *Id.* at 11a. Finally, the court rejected WRTL’s contention that an injunction would further the public interest, because this Court had already determined that BCRA facially serves a compelling governmental interest. *Id.*

WRTL filed a notice of appeal and a jurisdictional statement, and this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

This case presents the exceptionally important question whether BCRA § 203’s restrictions on electioneering communications can be constitutionally applied to all grass-roots lobbying. This Court’s resolution of the issue must give due regard to the essential freedoms embodied in the First Amendment.

In holding that § 203 is facially constitutional, the *McConnell* Court preserved the availability of as-applied challenges to the statute. Indeed, the Court explicitly acknowledged the serious constitutional concerns that would be raised by the application of BCRA’s electioneering commu-

nications provisions to genuine issue advocacy. *See McConnell*, 540 U.S. at 206 n.88 (“interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads” that do not serve an electioneering purpose); *see also* Presidential Signing Statement (expressing “reservations about the constitutionality of the broad ban on issue advertising”). Because the ability of citizens to express their views is the essence of self-government, BCRA § 203’s limitations on grass-roots lobbying are unconstitutional.

The district court erred in denying WRTL’s request for an injunction permitting it to run its grass-roots lobbying ads during the statutorily imposed black-out period. Specifically, the district court failed to give adequate weight to the significant First Amendment interests implicated by a grass-roots lobbying campaign. A generalized concern about protecting the integrity of the election process does not justify imposing restrictions upon grass-roots issue advertisements because such restrictions do not further the government’s asserted anticorruption interest.

Political speech is obviously “[a]t the core of the First Amendment.” *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). Grass-roots lobbying, a traditional means of influencing governmental action through citizen participation, fits squarely within the scope of core political speech and is also a manifestation of the people’s constitutionally protected right to petition the government. To restrict this class of favored speech, the government must therefore establish that the restriction is narrowly tailored to serve a compelling governmental interest.

This demanding level of scrutiny is warranted because political speech underlies every facet of the American system of government. Without robust political debate, the people cannot govern themselves effectively. Grass-roots lobbying facilitates self-governance by encouraging citizen participation, the exchange of ideas, and—through these mecha-

nisms—citizen education. Open discourse thus serves a consensus-building function, which ensures that “the best” ideas win out in the political marketplace.

The government has not identified a compelling interest sufficient to justify the imposition of BCRA’s restrictions on grass-roots lobbying advertisements during the weeks immediately preceding an election, when constituents are most receptive to political ads and Congress is often at the height of its legislative activity. A desire to insulate incumbents from public scrutiny is not a compelling interest that warrants restricting debate on issues of political import.

Grass-roots issue advertisements are not functionally equivalent to electioneering issue advertisements because grass-roots issue ads do not urge a candidate’s election or defeat, either in appearance or actuality. Indeed, the only link between grass-roots issue ads and elections is the fact that such ads are run during the time frame immediately preceding an election, and that they exhort citizens to contact named elected officials with respect to pending legislative or executive matters.

This Court should consider this case against the backdrop of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Restricting grass-roots lobbying efforts would silence core political speech that is integral to the functioning of our form of government.

ARGUMENT

I. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH.

The First Amendment embodies this Court’s “profound national commitment to the free exchange of ideas.” *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 686

