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

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

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.

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[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-

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[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 Frenxel 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-

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[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-

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[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

(1989)). Grass-roots lobbying, which encompasses any communication devoted exclusively to urging support or opposition for pending legislative or executive matters, enables this free exchange of ideas. *Cf.* Electioneering Communications, 67 Fed. Reg. 65,190, 65,201-02 (proposed Oct. 23, 2002) (discussing the wording of the FEC's proposed lobbying exceptions). Such lobbying efforts constitute core political speech essential to our system of government.

This Court has recognized that the First Amendment's protection is "at its zenith" where core political speech is implicated. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Indeed, at the time of the Founding, "Americans generally believed that freedom of thought, belief, and expression were among the natural rights of individuals. These freedoms were also regarded as inherent in republican citizenship, allowing the people to express their views on public affairs and to guard their liberties against governmental encroachment." Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1296 (1998). Thus, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Grass-roots lobbying is a fundamental element of the political discourse that the First Amendment was designed to promote. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). Advertisements run as part of a grass-roots lobbying campaign, or "grass-roots issue ads," seek to influence governmental action by energizing a broad base of support for a particular issue or idea. Regardless of the particular issue involved, all grass-roots lobbying advertisements exhort constituents to contact the very representatives they voted to elect regarding pressing

political issues. WRTL's ads, for example, urged Wisconsin residents to lobby their Senators to oppose the filibustering of judicial nominees. In this way, grass-roots issue ads serve both an education function—informing the public about pending issues—and an accountability function—fostering constituent awareness of governmental action.

When citizens organize to engage in grass-roots lobbying, they are informing, energizing, and persuading one another as well as the persons whom they elected to represent them in Congress. Such "interactive communication concerning political change" rests within the heart of the First Amendment's protections, and the government's efforts to restrict this political discourse are therefore subject to the most searching judicial scrutiny. *Meyer*, 486 U.S. at 422; *see also id.* at 428 (striking down Colorado's prohibition on payment for the circulation of ballot-initiative petitions). This exacting scrutiny is triggered whenever political speech is curtailed, even if alternate means of expression exist. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (although expenditure limitations did not restrict all avenues of speech, "[t]he fact that the statute's practical effect [was] to discourage protected speech [was] sufficient to characterize [the statute] as an infringement upon First Amendment activities").

Moreover, the misguided argument—relied upon by the court below—that corporations can use PAC funds to finance a lobbying effort, is a constitutional red herring. This "alternative" in practical reality suppresses constitutionally protected speech. The use of PAC funds to finance lobbying efforts is not a constitutionally adequate alternative to corporate-funded advertisements because funneling pre-election grass-roots lobbying through a PAC significantly burdens constitutionally protected speech. Establishing a PAC is an extremely complex endeavor—as illustrated by the voluminous guides and regulations that address the topic—and small nonprofit corporations often lack the financial resources and

manpower necessary to satisfy these onerous requirements. Indeed, the FEC's "Campaign Guide for Corporations and Labor Unions" is over 115 pages long,[5] and the federal regulations governing PACs are equally extensive. *See* 11 C.F.R. pt. 102. The difficulty of complying with these requirements is compounded by the fact that corporations seeking to run a grass-roots lobbying campaign with PAC funds must also consult more than thirty years of precedent embodied in advisory opinions and enforcement actions.

In light of the complex regulatory environment, a corporation attempting to establish a PAC must likely consult both an attorney and an accountant. A corporation must also purchase the necessary software to comply with electronic reporting requirements. The PAC start-up costs can thus total hundreds of thousands of dollars. These costs are imposed regardless of whether the corporation is a multibillion dollar operation or a small, unsophisticated nonprofit struggling to promote a particular agenda. *See Mass. Citizens for Life*, 479 U.S. at 254 (expressing concern that small entities may be unable to bear the administrative costs of running a PAC). Moreover, even if a nonprofit corporation overcomes the financial and procedural obstacles to establishing a PAC, funding restrictions still inhibit a nonprofit's ability to finance a grass-roots lobbying campaign with PAC money. Indeed, such financial constraints forced WRTL to discontinue its grass-roots lobbying initiative during BCRA's statutorily imposed black-out period. *See* J.S. at 6-7.

The black-out period restricts a nonprofit corporation's ability to run issue advocacy campaigns in the days immediately preceding an election, which is the period when the public is most receptive to political advertisements and when ads urging constituents to contact their elected officials are most

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[5] FEC, Campaign Guide for Corporations and Labor Unions, *available at* http://www.fec.gov/pdf/colagui.pdf.

effective. This is also the time frame when Congress is most likely to be addressing major issues affecting United States citizens. *See* Presidential Signing Statement (highlighting the "serious constitutional concerns" raised by BCRA's restrictions on speech about "issues of public import in the months closest to an election"). Because core First Amendment speech is restricted, the government must demonstrate that BCRA's electioneering communications provisions are narrowly tailored to further a compelling interest. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990). In light of the critical First Amendment values associated with grass-roots lobbying, the government cannot meet this heavy burden.

A. Grass-Roots Lobbying Is Protected Under The Petition Clause Of The First Amendment.

The First Amendment protects the exchange of ideas between citizens and their elected officials. The Petition Clause promotes popular sovereignty by ensuring that the people can make their opinions known to their elected representatives. *See* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 730 (2002). The right of the people to assemble peaceably and to petition the government for a redress of grievances is but one aspect of the broader right of the people to "communicate their will to their government." Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 673-74 (2000).

James Madison discussed the manner in which the Petition Clause interrelates with the Speech and Press Clauses to protect the people's right to communicate with the government:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government; *the people may therefore publicly address their repre-*

> *sentatives*, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will.

House Debates (Aug. 15, 1789) (emphasis added), *reprinted in* Andrews, *supra*, at 800 n.32.

The right to petition at any time is a fundamental feature of American government. *See generally* Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 180 (1993) (surveying the history of the Petition Clause). Historically, the right to petition traces its roots to the Magna Carta, which formally recognized the concept that "'the king was the source of justice and that in providing this justice he and his government must be accessible to all.'" *Id.* at 181-82 (quoting RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 9 (1979)). Early Americans regarded the right as "implied in the very nature of republican government and as a birthright worthy of constitutional protection both at the federal and state level." *Id.* at 182 (internal quotation marks omitted).

The Petition Clause has been interpreted to protect a variety of activities, including the right of access to the courts, the right to engage in nonviolent political boycotts, and—most importantly—the right of the people to lobby their elected representatives. *See McDonald v. Smith*, 472 U.S. 479, 484 (1985) (lawsuits); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (nonviolent political boycotts); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (lobbying legislators).

The right to petition would be illusory, however, without the companion rights of association and assembly. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in

respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). The rights of assembly and association are, to a large extent, interrelated. *See, e.g.*, David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 226 (1999).[6] These rights are so vital that "it is impossible to imagine a democratic society—much less the First Amendment rights of speech, assembly, religion, and petition—without a corresponding right of association." *Id.* at 203. Specifically, both the right to assemble and the right of association give meaning to the right to petition. They work together to ensure that the people's voice is heard by their elected officials. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Here, association and assembly amplify the viewpoints of individuals by coordinating their message to the government. Indeed, the "freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively." *United States v. Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting). BCRA's electioneering communications provisions, however, impede nonprofit corporations' ability to amplify the voices of their members and like-minded citizens on issues of political import.

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[6] "[W]hile the right of association is not literally mentioned in the Constitution, it nevertheless finds solid textual support in the First Amendment as the modern-day manifestation of the right of assembly." Cole, *supra*, at 226. Indeed, this Court has declared that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

The ability to influence the government through lobbying is central to the American system. Although this Court has never expressly defined the scope of protection afforded lobbying activity under the Petition Clause, it has explicitly recognized that lobbying is protected. Specifically, this Court concluded in *Noerr* that First Amendment considerations protected advertising activity undertaken by a paid, professional lobbying organization. In *Noerr*, truck operators and their trade associations asserted that an association of railroads violated the Sherman Antitrust Act when it engaged a public relations firm to orchestrate a publicity campaign designed to influence legislation adverse to the trucking industry. 365 U.S. at 129. This Court concluded that the Sherman Act's history did not evidence an intent to regulate political action, and it therefore found no antitrust violation. The Court reiterated that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138; *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring) ("lobbying is protected by the First Amendment"). This Court further explained that "[i]n a representative democracy such as this, the[] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137.[7] This principle holds true during the entire year, not just the 75% of the year that falls outside of the statutory black-out period.

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[7] *Noerr*'s holding was grounded in an interpretation of the Sherman Act. It is clear, however, that First Amendment considerations greatly influenced this Court's analysis. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (noting that the *Noerr* Court interpreted the Sherman Act "in the light of the First Amendment").

Noerr recognizes the rights of a for-hire lobbying organization to petition the government; *a fortiori*, a grass-roots lobbying campaign run by a corporation dedicated to promoting an identified social cause is also entitled to protection.

B. Grass-Roots Lobbying Is Integral To Self-Governance.

Political speech must be safeguarded year-round because it is a necessary component of representative government. Because *the people*, rather than their elected representatives, are sovereign, political speech is accorded the highest level of First Amendment protection. "The First Amendment bars the state from imposing upon its citizens an authoritative vision of truth. It prohibits the state from interfering with the communicative processes through which its citizens exercise and prepare to exercise their rights of self-government." *Herbert v. Lando*, 441 U.S. 153, 184-85 (1979) (footnote omitted). All other precepts logically follow from the recognition that "we the people" are sovereign. The First Amendment's protection of political speech is essential precisely because it facilitates the ability of the people to self-govern. *See Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"). Political speech, including grass-roots lobbying, serves two complementary yet distinct functions: an accountability function and an education function.

Free speech is a necessary component of a government of the people, in which "it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15 (2005). The sovereignty of the people is threatened, however, when "law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials." *Id.* at 42. WRTL's filibuster campaign

falls squarely within this category of speech and should therefore be accorded the highest protection. BCRA's electioneering communications provisions not only restricted WRTL's ability to inform public opinion, but also significantly impeded WRTL's efforts to engage in public discourse on an important political issue. Unrestrained political speech on subjects such as the propriety of judicial filibusters is necessary to protect the people's sovereignty against encroachment by elected officials.

Thomas Jefferson acknowledged that if the people "become inattentive to the public affairs, you and I, and Congress, and Assemblies, judges and governors shall all become wolves . . . experience declares that man is the only animal which devours his own kind, for I can apply no milder term to the governments of Europe." Letter from Thomas Jefferson, to Edward Carrington (Jan. 16, 1787), *reprinted in* THE FOUNDERS' CONSTITUTION 122 (Philip B. Kurland & Ralph Lerner eds., 1987). By encouraging public debate, grass-roots lobbying brings a transparency to governmental affairs that is critical to the political system's survival. The transparency that grass-roots lobbying fosters should not be restricted during the critical period preceding an election. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Because grass-roots lobbying fosters an awareness of what the people's representatives are doing, it enables the people to hold their elected representatives accountable for their political choices. Self-governance presupposes that the electorate is informed about the positions of their elected officials, pending legislation, and potential social policy. As James Madison explained, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever gov-

ern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

Free speech's accountability function is thus closely related to its education function. Only through debate and the free exchange of ideas can citizens share the knowledge with each other that is necessary for the people to govern effectively. Grass-roots lobbying is a powerful form of political speech that fulfills this education function by informing and energizing the people about pending political issues. These issues—which may or may not be campaign issues—are important social questions that affect the fabric of American society and that warrant free and open debate. Public discussion about such core political issues is not merely a privilege: "public discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The fact that a nonprofit corporation, rather than an individual, initiates a debate does not lessen the speech's value. As this Court has recognized, protection of speech is predicated upon the intrinsic value of the speech itself, rather than upon the identity of the speaker. "The 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 Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

C. Grass-Roots Lobbying Is Integral To The Marketplace Of Ideas.

The value of free speech as a means of educating the public is closely tied to the notion that the First Amendment promotes and protects the "marketplace of ideas." Indeed, Justice Holmes argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Speech should be protected because,

"[i]f the opinion is right, [the people are] deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." JOHN STEWART MILL, ON LIBERTY 20 (Stefani Collini ed., Cambridge Univ. Press 1989) (1859).

The marketplace of ideas envisioned by the Framers is founded upon open, confrontational, and pointed discourse. "Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (internal quotation marks omitted). First Amendment protection of participation in the political marketplace also necessarily encompasses a protected right to *hear*, and it is up to the individual to choose whether to listen. "[I]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Grass-roots lobbying, as core political speech, is essential to this marketplace.

The marketplace is valued, not because it necessarily leads to a determination of "absolute truth," but rather for the integrity of its process. Justice Holmes opined that "[s]uch matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).[8] Grass-roots lobbying serves a vital purpose because

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[8] Alexander Meiklejohn recognized that "[i]t is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948). Universal suffrage is of little value, however, without the open political discourse that fosters voters' awareness of pertinent arguments and information. If the best test of truth is the power of an idea to gain acceptance in the marketplace, then in the long run the

it ensures that ideas enter the marketplace. Once in the marketplace, the ideas are vigorously debated, thereby building consensus among the people as to policy and legislation.

D. Grass-Roots Lobbying Enables All Segments Of The Population To Engage In The Political Process.

To the extent that citizens are denied access to information regarding issues pending before Congress, BCRA § 203 effectively undermines the goal of an informed electorate and thus weakens the political process. By targeting radio and television ads, the statute silences the most effective means of communicating with a large audience. Indeed,

> [t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information . . . to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the [entity imposing these restrictions] can accurately forecast the kind of information that the public would regard as relevant.

MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (discussing restrictions upon attorney advertising). Although the electorate may receive information on pending legislation from other sources, they will be denied full access to the marketplace of ideas if issue advertisements are restricted.[9] BCRA's restric-

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best test of intelligent political policy is its power to gain acceptance at the ballot box. *See* RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.34 (2005).

[9] The news media are no substitute for grass-roots lobbying efforts because journalists and the corporations for which they work are themselves

tions are especially pernicious because they prohibit the broadcast of corporate-funded issue ads during the weeks immediately preceding an election, when the public is most likely to pay attention to political advertisements and members of Congress are most likely to pay attention to lobbying efforts.

II. GRASS-ROOTS LOBBYING EFFORTS DO NOT PRESENT THE SAME CONCERNS THAT LED THIS COURT TO REJECT A FACIAL CHALLENGE TO BCRA'S ELECTIONEERING COMMUNICATIONS PROVISIONS.

Grass-roots lobbying is core political speech that plays a critical role in maintaining our system of government. Only a compelling interest can justify restricting this class of speech. The government cannot meet this burden when applying BCRA § 203 to grass-roots lobbying.

BCRA's electioneering communications provisions were designed to combat the proliferation of corporate-funded electioneering issue advertisements, which praise or denounce a candidate for public office without expressly urging the candidate's election or defeat. *McConnell*, 540 U.S. at 205-06. Because advertisements run during a grass-roots

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special interest groups that wield tremendous political influence. *See* Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at A13; Mitch McConnell, *Why Are Media Exempt?*, USA TODAY, Mar. 19, 2002, at A14. Although the average American's speech is subject to BCRA's restrictions, corporations that control the news media are free to engage in "political proselytizing." *Id.*; *see also id.* (noting that General Electric owns NBC); 2 U.S.C. § 431(9)(B)(i) (excluding from BCRA's restrictions "any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate").

lobbying campaign, or "grass-roots issue ads," are not functionally equivalent to electioneering issue ads, the anticorruption considerations motivating this Court to uphold BCRA § 203 on its face are inapplicable here.

Prior to BCRA's enactment, FECA's expenditure limitations and disclosure and reporting requirements applied only to communications that expressly advocated the election or defeat of a clearly identified candidate. *See McConnell*, 540 U.S. at 126. Unlike such "express advocacy" communications, "issue advocacy" was not regulated by federal election laws. Under this system, an advocate could run an electioneering issue ad condemning an incumbent's record "before exhorting viewers to call Jane Doe and tell her what you think." *Id.* at 127 (internal quotation marks omitted).

The *McConnell* Court's analysis of BCRA's electioneering communications provisions was informed by this history and thus was focused upon electioneering issue ads, or issue ads that were "functionally identical" to express advocacy. 540 U.S. at 126. "Both were used to advocate the election or defeat of clearly identified candidates, even though the so-called issue ads eschewed the use of magic words." *Id.* This Court assumed that the "vast majority" of issue ads run during the black-out period had an electioneering purpose, and rejected a facial challenge to BCRA § 203's prohibition on the use of corporate funds to finance electioneering communications. *See id.* at 206. The Court also upheld § 204's restriction on not-for-profit corporations' use of general treasury funds to pay for electioneering communications. *See id.* at 211. In so doing, however, the Court acknowledged that the rationale for restricting electioneering issue ads is inapplicable to grass-roots issue ads that are not designed to serve an electioneering purpose. *See id.* at 206 ("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" (emphases added)).

Indeed, unlike electioneering issue ads, grass-roots issue advocacy by a nonprofit, issue-oriented citizens' group like WRTL does not raise the two broad concerns that troubled the *McConnell* Court: the distorting effect of corporate wealth on the political marketplace and the use of issue ads intended to serve an electioneering purpose to circumvent funding restrictions imposed on express advocacy ads. *See* 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).

This Court has observed that the regulation of corporate political activity is permissible to combat the "unfair deployment" of wealth for political purposes. *See, e.g., Mass. Citizens for Life*, 479 U.S. at 259; *cf. Austin*, 494 U.S. at 460 (expressing concern about the "use of immense aggregations of wealth that are accumulated with the help of the corporate form and that may bear no relation to the corporation's speech activity"). But any concerns that this Court may have about the perceived distorting impact of corporate wealth on the political process are inapplicable when the speaker is—like WRTL—a nonprofit organization. Indeed, WRTL was "formed to disseminate political ideas, not to amass capital. The resources that it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *Mass. Citizens for Life*, 479 U.S. at 259. Individuals who contribute financial support to WRTL are fully aware of the public policy issues about which WRTL is concerned.

Moreover, the *McConnell* Court's observation that electioneering issue ads were being used to evade the restrictions imposed upon express advocacy communications is also inapplicable to WRTL's grass-roots initiative. Asking constituents to contact a named politician—even when the politician's name is tied to a controversial campaign issue—is not functionally equivalent to electioneering advocacy and thus does not present the same concerns that motivated the

McConnell Court to reject a facial challenge to BCRA's electioneering communications provisions. The fact that a nonprofit organization's commercial mentions the name of an incumbent does not inextricably lead to the conclusion that the ad advocates a candidate's election or defeat. This is especially true given the changing face of political discourse. Political television advertisements, which were once run only in the weeks preceding elections, are now run year-round and focus on a variety of issues. Editorial, *Year-Round Political Ads?; The Campaign to Persuade Is Never Ending, Alas*, PITTSBURG POST-GAZETTE, Aug. 2, 2005, at B-6. "These days, conservatives and liberals have taken to the airwaves with a near-constant barrage of ads aimed at persuading voters and politicians to support their views." *Id.*

Judge Leon's opinion in the *McConnell* district court proceedings identified several instances where it would be "helpful, if not necessary, to mention a candidate's name in . . . advertisements" during the black-out period for non-electioneering purposes. 251 F. Supp. 2d at 794. One example to which Judge Leon referred was an issue ad urging constituents to contact an elected official and to communicate a specific policy position on pending legislation. He also referenced a statement by Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, "explaining that it is often necessary to refer to a federal candidate by name because the express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." *Id.* (citations omitted). The effectiveness of a grass-roots initiative is irreparably undermined if viewers are not told whom they should contact with their positions. BCRA's electioneering communications provisions do just that by prohibiting the ads from offering even generic instructions to contact "your Senator" or "your Congressman."

BCRA stipulates that a federal candidate is "clearly identified" for the purpose of triggering the electioneering communications provisions if the name, or a photograph or drawing, of the candidate appears in the advertisement, or if the identity of the candidate is otherwise apparent by unambiguous reference. 2 U.S.C. § 431(18). The statute does not define the term "unambiguous reference," but, in order to give independent meaning to this clause, it must denote something other than the mere mention of the candidate's name or the depiction of her likeness, otherwise the term is merely redundant. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992) (declining to adopt a construction that would violate the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

A current FEC regulation, 11 C.F.R. § 100.29(b)(2), provides concrete guidance, indicating that unambiguous references to "'the President' or 'your Congressman'" would trigger BCRA.[10] *Id.* As a result, any grass-roots issue advertisement urging constituents to contact an elected official must be immediately discontinued during the statutorily imposed black-out period unless the corporation can secure sufficient alternate funding through its PAC. In many cases where the corporation's PAC funds are inadequate, BCRA's electioneering restrictions will preclude a corporation from running its ads at all. *See* J.S. at 6-7. This is true whether or not the advertising initiative focuses on a "campaign issue"

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[10] The full text of 11 C.F.R. § 100.29(b)(2) provides that "'[r]efers to a clearly identified candidate' means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through 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.'"

and is true whether the elected official supports or opposes the initiative.

Ultimately, then, the concerns that motivated this Court to uphold BCRA § 203 on its face are not implicated when a corporation organizes a grass-roots lobbying campaign. The potential for corruption that this Court perceived in connection with electioneering advertisements is minimized even further when, as here, WRTL intends to comply with all applicable disclosure and disclaimer requirements.

Finally, there are significant countervailing First Amendment considerations that weigh strongly in favor of exempting this class of core political speech from BCRA's electioneering communications provisions.

Although BCRA may impact only a small number of grass-roots issue advertisements, this Court has cautioned that it is necessary to be as

> vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.

Mass. Citizens for Life, Inc., 479 U.S. at 264-65. As applied to nonprofit corporations' grass-roots lobbying generally, BCRA § 203 sweeps more broadly than is necessary to accomplish the government's anticorruption objective, and its application in this setting is therefore unconstitutional.

* * *

A nonprofit organization's grass-roots lobbying campaign does not pose the threat of corruption that prompted Congress to enact BCRA's electioneering communications provisions. It is therefore appropriate for this Court to conduct a searching review of the as-applied constitutionality of

these provisions. Indeed, President Bush entreated this Court to do just that when signing BCRA into law, noting that he had "reservations about the constitutionality of the 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." Presidential Signing Statement. Because courts "properly look to presidential signing statements to assist in the interpretation of statutes," 14 Op. Off. Legal Counsel 84, 91 n.9 (1990), this Court should accord substantial weight to the President's concerns about the constitutionality of BCRA's issue advertising restrictions.

This Court has cautioned that its "pursuit of other governmental ends . . . may tempt [it] to accept in small increments a loss that would be unthinkable if inflicted all at once." *Mass. Citizens for Life, Inc.*, 479 U.S. at 264-65. This case calls upon the Court to act as a bulwark against the gradual erosion of the fundamental freedoms embodied in the First Amendment. Indeed, freedom of speech is the "indispensable condition[] of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Political speech, in particular, is the "essence of self-government," *Garrison*, 379 U.S. at 75, and must therefore be vigilantly protected against legislative and judicial encroachment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Counsel for Amicus Curiae

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