

No. 08-205

In The
Supreme Court of the United States

—◆—
CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

—◆—
**BRIEF OF *AMICUS CURIAE*
NATIONAL RIFLE ASSOCIATION
IN SUPPORT OF APPELLANT**

—◆—
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INTEREST OF *AMICUS CURIAE*¹

The NRA is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its nearly four million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. *McConnell v. FEC*, 251 F. Supp. 2d 176, 298 (D.D.C. 2003). “The NRA’s frequent references to candidates for federal office and the programming it broadcasts throughout the election cycle – including the period immediately preceding primaries and general elections – are essential to its political mission of educating the public about Second Amendment and related firearm issues.” *Id.* at 316. In 2000, for example, the NRA paid for more speech on television – over 300,000 minutes – than all other issue-advocacy groups and unions combined.

The NRA’s political speech furthers a variety of purposes: the NRA educates and informs its members and the public about specific legislative threats to Second Amendment rights, as well as broader political and cultural pressures on gun rights; the NRA also defends itself against attacks on its positions and reputation made by the media and by anti-NRA

¹ The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

politicians; and the NRA recruits members and raises funds throughout the year. In almost all of this speech, the NRA refers to federal officeholders and candidates. *Id.* And yet the bulk of its political speech that furthers these purposes is not intended to influence a federal election.

The NRA funds its speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members and the contributions that it receives from such corporations are negligible. *Id.* at 317. The average individual annual contribution to the NRA is \$35. In short, the NRA is an organization comprised of ordinary Americans of moderate means who join their voices in a common effort to defend, promote, and enjoy a constitutional freedom that is precious to them.



SUMMARY OF ARGUMENT

Donations received by nonprofit advocacy groups from individual members and supporters are not the same as “resources in the treasury of a business corporation.” *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quotation marks omitted) (upholding constitutionality of regulating campaign expenditures funded largely by business corporations). Simply put, the voluntary donation box of a nonprofit organization must be distinguished from the cash register of a business when it comes to

regulating political expression. For like-minded individuals lacking great wealth, pooling their donations to fund a political message is, in a real sense, the only way for them to find meaningful voice in the marketplace of ideas. There is nothing pernicious, problematic, or distorting about individuals banding together in this fashion to express shared political values and make themselves heard. Yet campaign-finance law continues, at least presumptively, to equate donations received by the NRA from individual supporters with the funds amassed by Exxon from shareholders and profits. The law muzzles political speech of the nonprofit advocacy group no differently from that of the multinational corporation.

This procrustean regulatory approach claims core political speech as its casualty without meaningful justification. Unexamined inclusion of nonprofit advocacy groups alongside for-profit corporations within the same speech-restrictive dragnet cannot be squared with the notion, consistent with the First Amendment, that “the benefit of the doubt” must go “to speech, not censorship,” *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2674 (2007) (“*WRTL II*”) (opinion of Roberts, C.J.), or that “‘debate on public issues should be uninhibited, robust, and wide-open,’” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The instant case illustrates the continuing peril, and the continuing chill, suffered by nonprofit organizations that want simply to broadcast speech on

behalf of their individual members around election time. As things presently stand, the NRA and other nonprofits remain prohibited from funding any “electioneering communication” except to the extent that they (i) whisper through a sister PAC, or (ii) successfully litigate fact-specific, as-applied constitutional exemptions carved out in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”) and *WRTL II*. Going the PAC route is artificially constraining and enervating: by design, PACs are tightly limited in their mission, fundraising, and overall activities so as to drain them of efficacy relative to nonprofit advocacy groups’ actual, underlying support from individuals. Going the as-applied exemption route is inherently risky and costly: the Federal Election Commission typically, if not invariably, finds reason to contest any claim of exemption; as a practical matter, electioneering communications cannot be safely uttered, and the First Amendment often cannot be vindicated, unless and until a separate federal case has been brought and adjudicated with respect to a particular speaker or speech, typically well after the window for relevant speech has closed. The safe harbors, such as they are, are too hotly contested at their borders to be obtained short of pitched warfare, and any victory won on the battlefield is likely to be Pyrrhic – secured at great cost, only after the fact. Constitutional protections for speech such as *Hillary: The Movie* are subject to guesswork and obtained only through litigation.

While supporting the arguments of Citizens United as to why its speech is not subject to restriction (up to and including the argument that *Austin* should be overruled rather than extended), *amicus* here draws attention to one crucial aspect of BCRA that has long been overlooked – the provision applying the ban on corporate electioneering communications specifically to 501(c)(4) corporations funded by individuals. This provision is unconstitutional as applied to such corporations, and it is due to be severed. Once it has been, the entitlement of nonprofits such as Citizens United and the NRA to fund electioneering communications with donations from individuals will be clear to all; case-by-case adjudication of challenges such as this may then be dispensed with, to the lasting benefit of the courts, the parties, the polity, and the First Amendment.

Ironically, BCRA itself has always housed a ready solution to the constitutional problems it poses for nonprofits' political expression. BCRA's principal sponsors had conscientiously differentiated, via the "Snowe-Jeffords" exemption of section 203(b), non-profit corporations funded by individuals and exempted them from the ban on corporate electioneering. Congress initially crafted a provision exempting 501(c)(4) membership organizations from the ban on corporate funding of electioneering communications, provided funds were derived solely from individuals' contributions and maintained in an account segregated from any corporate contributions. In this way, an advocacy organization's political message would be legally

tethered to its popular support in the political marketplace. The late Senator Wellstone and his supporters, however, wanted to go further still; they successfully insisted on painting over nonprofits' political speech with a broader regulatory brush. The "Wellstone Amendment" took aim specifically at the NRA, the Sierra Club, and similar advocacy groups, *see* 147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone); it was designed to prevent them and other nonprofits from funding electioneering communications with *individual* donations. Recognizing that the constitutionality of the Wellstone Amendment was dubious, however, Congress made sure it would be cleanly severable from the remainder of BCRA. 147 CONG. REC. S3073 (statement of Sen. Feingold) (daily ed. Mar. 29, 2001).

This Court should now hold that, whatever *Austin's* vitality and application may be with respect to for-profit corporations, *Austin's* anti-distortion rationale supplies no justification for regulating *amicus*, Citizens United, and their nonprofit brethren along the lines of the Wellstone Amendment, which cannot be constitutionally applied to them. Instead, the original Snowe-Jeffords exception is the less restrictive – and therefore constitutionally compelled – alternative by which to pursue any operative regulatory interest associated with *Austin*. By so holding, this Court would do much to repair the harm that campaign-finance regulation has wrought upon core political speech and to restore nonprofits and their

individual supporters to their proper standing within our polity.

Meaningful examination of this point has thus far eluded the Court. In *McConnell v. FEC*, although a challenge to the constitutionality of the Wellstone Amendment was squarely posed by *amicus* and other nonprofits, the Court appeared to sidestep it. All the Court offered, while rejecting a facial challenge, was a terse parenthetical: “As so construed [to incorporate an *MCFL* exception], the provision [banning corporate funding of electioneering communications] is plainly valid. See *Austin*, 494 U.S., at 661-665 (holding that a segregated-fund requirement that did not explicitly carve out an *MCFL* exception could apply to a nonprofit corporation that did not qualify for *MCFL* status).” *McConnell v. FEC*, 540 U.S. 93, 210 (2003). There was no meaningful treatment of extensive arguments that had been made to the Court about the disconnect between *Austin*’s specific concern with for-profit corporations and the Wellstone Amendment’s restriction of nonprofits, or about how the Wellstone Amendment had inexplicably displaced the less-restrictive alternative of Snowe-Jeffords. Then, two Terms ago, in *Wisconsin Right to Life*, the Chief Justice’s opinion expressly acknowledged the question as posed by some *amici*, but found no need to “pass on this argument” given the record presented in that “as-applied challenge.” *WRTL II*, 127 S. Ct. at 2672 n.10 (opinion of Roberts, C.J.). *Amicus* respectfully urges the Court to address it here.

In the instant case, the Wellstone Amendment can and should be struck down and the bright-line safe harbor of Snowe-Jeffords restored for nonprofit advocacy corporations funded by individual members and supporters. As discussed in Appellant's brief, Citizens United received only *de minimis* contributions from for-profit corporations, *see* Citizens United Br. 7; JA 244a, 251a-52a, which surely do not implicate *Austin's* concern about funds amassed in the economic marketplace potentially infecting and taking control over the political marketplace. The same \$1 million-plus behind *Hillary* would have materialized, and the same speech would have resulted, irrespective of the *de minimis* contributions by business corporations.

This Court should thus hold that a 501(c)(4) corporation that complies with Snowe-Jeffords by funding an electioneering communication exclusively with individual donations is, by virtue of the First Amendment, categorically beyond reach of the corporate ban to the extent it might otherwise apply. Thus, *Austin's* application would be properly limited to its rationale, and nonprofit corporations otherwise eager to weigh in around election time would enjoy the clear safe harbor that remains both necessary and wanting.



ARGUMENT

I. BCRA'S RESTRICTION OF NONPROFITS' CORE POLITICAL EXPRESSION FUNDED BY INDIVIDUALS IS INCOMPATIBLE WITH THE FIRST AMENDMENT.

Title II of BCRA is, by operation and design, anti-speech. It is no accident that Title II restricts political speech by nonprofit organizations that are devoted to political missions echoing the political views of individual supporters.² Congress was very clear about its reasons for restricting nonprofits' ability to draw upon their treasury funds to fund political expression. Its reasons were, to be sure, patently unconstitutional, but they were reasons all the same. Even as a majority of the Court in *McConnell* elided reams of legislative history reflecting that Members of Congress specifically targeted disfavored speech (negative attack ads) precisely because they feared its content (criticism of Members of Congress), Justice Scalia's

² Notably, the NRA was singled out by name in relevant legislative debates as an especially worthy target. *See* 147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) (referencing the NRA and Sierra Club as prototypical organizations whose ads should be restricted); 145 CONG. REC. H3174 (daily ed. May 14, 1999) (statement of Rep. Schakowsky) (“If my colleagues care about gun control, then campaign finance reform is their issue so that the NRA does not call all the shots.”); 148 CONG. REC. H424 (daily ed. Feb. 13, 2002) (statement of Rep. Pickering) (quoting Scott Harshberger, the President of Common Cause, who championed BCRA by saying: “A vote for campaign finance reform is a vote against the second amendment gun lobby.”).

dissenting opinion observed without rejoinder that “the most passionate floor statements during the debates on this legislation pertained to so-called attack ads, which the Constitution surely protects, but which Members of Congress analogized to ‘crack cocaine,’ 144 Cong. Rec. S868 (Feb. 24, 1998) (remarks of Sen. Daschle), ‘drive-by shooting[s],’ *id.*, at S879 (remarks of Sen. Durbin), and ‘air pollution,’ 143 Cong. Rec. 20505 (1997) (remarks of Sen. Dorgan).” *McConnell*, 540 U.S. at 260 (Scalia, J., dissenting). This notion combined with a congressional concern “that there is too much money spent on elections” to serve as the animating purposes behind Title II. *Id.* at 257. Of course, with those purposes in mind, it made little, if any, difference whether electioneering communications came from wealthy businesses or from nonprofit organizations funded by millions of individual contributors. Electioneering communications themselves were bad, and Congress set out to minimize what it viewed as noxious “negative attack ads” across the board.

Still, some sponsors of BCRA recognized the need to take due account of this Court’s precedents regarding constraints posed by the First Amendment. Because the Court in *MCFL* displayed First Amendment solicitude for nonprofits and their individual donors, but in *Austin* expressed concern specifically with for-profit business corporations dominating political debate, Congress initially saw fit to draw a clear line differentiating one type of corporation from the other for purposes of Title II’s ban on corporate

electioneering. Thus, the Snowe-Jeffords provision of section 203(b) of BCRA exempted 501(c)(4) membership organizations from the law's ban on funding electioneering communications with general treasury funds, provided the relevant funds were derived solely from contributions from individuals and maintained in an account segregated from any corporate contributions. The upshot of Snowe-Jeffords was to ensure that an organization's political message would reflect its popular support in the political marketplace. At that point, the threat identified in *Austin* – namely, that business corporations or their 501(c)(6) trade associations might use wealth generated in the economic marketplace to unfairly distort the political arena with electioneering communications having “little or no correlation to the public's support for the corporation's political ideas,” 494 U.S. at 660-61 – had been wholly contained.

That ultimately was not enough to satisfy Congress, which proceeded to broaden the ban on corporate electioneering communications to include nonprofits funded by individuals. The Wellstone Amendment was added solely to nullify section 203(b) of Snowe-Jeffords – without regard for any *Austin* rationale: Congress was *not* attempting to ensure that corporations' political speech properly correlated with political support from individuals; it was trying to restrict corporations' political speech *notwithstanding* political support from individuals. Aimed specifically at the NRA, the Sierra Club, and similar advocacy groups, *see* 147 CONG. REC. S2847

(daily ed. Mar. 26, 2001) (statement of Sen. Wellstone), the Wellstone Amendment was meant to prevent *individuals* from combining their voices with others of like mind “in organizations which serve to ‘amplif[y] the voice of their adherents,’” *FEC v. NCPAC*, 470 U.S. 480, 494 (1985) (quoting *Buckley*, 424 U.S. at 22).³ Under this regime, a billionaire can spend the dividends he receives from stock investments on political speech, but Americans of ordinary means cannot pool their resources to make themselves heard through nonprofits.

Fully grasping that the Wellstone Amendment was “susceptible to a constitutional challenge,” 147 CONG. REC. S3073 (daily ed. Mar. 29, 2001) (statement of Sen. Feingold), BCRA’s sponsors opposed its adoption, but opponents of BCRA rallied behind it (presumably for the same reason), and it was passed. To ensure that it would not doom Title II as a whole, however, BCRA’s sponsors provided that the Wellstone Amendment could, as the three-judge district court put it in *McConnell*, be “cleanly struck from the law.” *McConnell v. FEC*, 251 F. Supp. 2d 176, 216 (D.D.C. 2003) (per curiam).

³ See 147 CONG. REC. S2848 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) (“individuals with all of this wealth” will “make their soft money contributions to these sham issue ads run by all of these . . . organizations, which under this loophole can operate with impunity” to run “poisonous ads”); *id.* at S2850 (noting that only .002% of Americans donate more than \$10,000 to candidates, and explaining, “I have an amendment that tries to make sure . . . this big money doesn’t get” through.).

As Senator Feingold explained:

I voted against adding th[e Wellstone] amendment. I thought and still think that it makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it. In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional.

147 CONG. REC. S3073 (statement of Sen. Feingold) (daily ed. Mar. 29, 2001).⁴

Notwithstanding that Congress expressly contemplated severance of the Wellstone Amendment, it has (rather incredibly) remained operative from *McConnell* forward – even in the absence of any cogent

⁴ See also 147 CONG. REC. S2882 (daily ed. Mar. 26, 2001) (statement of Sen. Edwards) (“[T]he reason Senator Feingold and Senator McCain are opposing th[e Wellstone] amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems.”); *id.* at S2847-48 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) (“I have drafted this amendment to be fully severable. In other words, no one can suggest that even if the court finds this amendment unconstitutional, it would drag down the rest of this bill or even jeopardize the other provisions of Snowe-Jeffords.”).

analysis or explication of its constitutionality.⁵ The result has been a series of challenges and continued litigation by 501(c)(4) organizations that would otherwise be wholly unnecessary. Due to the continuing

⁵ After rounds of legislation and litigation, no plausible constitutional justification has emerged for the Wellstone Amendment – not even *post hoc*. Some would posit a “fungibility of money” theory whereby the Wellstone Amendment guards against the prospect that nonprofit groups might otherwise use corporate contributions to offset their expenses, thereby freeing up individual contributions to fund “electioneering communications.” That phenomenon is an independent, persisting feature of campaign finance law, however, as corporations remain free to fund the administrative and operating expenses of their PACs out of general treasury funds. *See* 11 C.F.R. § 114.5(b). Moreover, this Court’s teaching is simply that Congress may require a corporation’s expenditures to bear a meaningful “correlation,” *Austin*, 494 U.S. at 660, or to constitute a “rough barometer” of the public’s support for its political views, *MCFL*, 479 U.S. at 258. Others would posit that the Wellstone Amendment is an “internal governance” measure that prevents advocacy groups from using general treasury monies to fund political messages with which some individual contributors may disagree. Again, that departs from this Court’s teaching that political expression need only “correlate” with or be a “rough barometer” of public support. Insisting upon *perfect* correlation would prevent nonprofit advocacy groups from making essential executive decisions on behalf of their members; it would thereby effectively disable individuals of modest means from participating meaningfully in our democracy by “delegat[ing] authority” to nonprofit organizations that spend their donations “in a manner that best serves the shared political purposes of the organization and contributor,” *MCFL*, 479 U.S. at 261; *see also* *NCPAC*, 470 U.S. at 494-95. Finally, had any such concern truly motivated Congress, it could “be met . . . by . . . simply requiring that contributors be informed that their money may be used for [an electioneering] purpose.” *MCFL*, 479 U.S. at 261.

operation of the Wellstone Amendment, nonprofit advocacy groups must struggle under the corporate ban and attempt to vindicate their constitutional right to fund electioneering communications on an election-by-election, ad-by-ad basis.

A return to first principles would spell the end of this unfortunate saga. The Wellstone Amendment runs directly contrary to this Court's consistent First Amendment teaching: "To say that [individuals'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *FEC v. NCPAC*, 470 U.S. at 495. And the only pre-*McConnell* decision of this Court ever to uphold an expenditure limit, *Austin*, 494 U.S. 652, could not possibly support the corporate ban at issue. By the most charitable (and constitutionally sanitized) account of Title II's purpose, Congress intended merely to ensure that spending on electioneering communications "reflect[s] actual public support for the political ideas espoused by corporations" and unions, rather than their success in the economic marketplace. *Id.* at 660. Such reasoning cannot justify a speech restriction that extends any further than might be necessary to ensure that a nonprofit advocacy group's independent political spending bears a fair and reasonable "correlation to the public's support for the corporation's political ideas." *Id.*

Austin's rationale finds no application here. Citizens United, like *amicus* and unlike trade or business associations, has derived only a miniscule portion of its relevant funding from corporate contributions. Yet Citizens United, like *amicus* and other nonprofit advocacy groups, remains generally prohibited from using individual contributions in its general treasury to fund independent electioneering communications. Thus, far from preventing a nonprofit advocacy group's political voice from being unfairly *inflated* by funds derived from the economic marketplace, Title II artificially *mutes* that political voice when compared to actual public support in the political marketplace.

Under traditional strict scrutiny, the Wellstone Amendment was doomed at birth (as many of BCRA's key supporters foresaw) and is (over)due to be struck down. It is unconstitutional either because it serves an illegitimate – and certainly not compelling – content-based purpose, or because any anti-corruption – or, more accurately, anti-distortion – purpose that it may serve per *Austin* could be achieved through the less restrictive alternative of Snowe-Jeffords. However the holding may be couched, *amicus* respectfully urges the Court to hold that Title II's ban on corporate funding of electioneering communications is unconstitutional as presently constituted and/or that Title II cannot constitutionally be applied to 501(c)(4) corporations to the extent they fund electioneering communications with individuals' donations.

II. NONPROFITS CURRENTLY REMAIN STIFLED BECAUSE ANY “SAFE HARBORS” THEY MIGHT INVOKE ARE ILLUSORY.

It has been suggested that Title II poses no real problems for *amicus* and other nonprofits given the availability of (i) PACs to fund electioneering communications, (ii) the *MCFL* exception for which some nonprofits may qualify, and/or (iii) the *WRTL II* exception for ads susceptible of any “reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). By that account, the continuing controversy and litigation manifested in this case and others like it is, in the grand scheme of things, really much ado about nothing: the contours of proper regulation of corporate speech, so the argument goes, can be entrusted to the FEC’s sound discretion to administer, with political speech by political speakers in fact left untrammelled.

When the FEC reaches this Court, it understandably presents its regulatory scheme in the most reasonable, benevolent light, insisting that all is going well below. That *Hillary* – which is no 30-second exhortation to vote, but a 90-minute documentary complete with in-depth interviews about a prior Presidential administration, the career of a sitting Senator, and the course of a Presidential candidacy – is now alleged to be beyond the scope of the Constitution’s protection and subject to criminal prohibition

should itself give the lie to any such notion. Lest there be any doubt about the problems posed by the existing regime, *amicus* wishes to emphasize that the avenues theoretically available for nonprofit advocacy groups to fund electioneering communications are, in practice, illusory.

A. Political Action Committees Cannot Speak Adequately For Nonprofit Advocacy Groups and Their Individual Supporters.

Defenders of Title II invariably emphasize that it merely restricts the *source* from which corporations may fund electioneering communications, with corporations left free to fund the very same speech through their PACs. According to them, Congress's intent for the Wellstone Amendment to stem the tide of negative attack ads by nonprofit advocacy groups was folly; the same ads would continue to run uninhibited, only funded by PACs rather than general treasuries. Congress, of course, knew better, and so should this Court.

A battery of regulatory and practical hurdles precludes groups such as the NRA from using their PACs to make independent expenditures commensurate with public support for their political message.

These regulations [governing PACs] are more than minor clerical requirements. Rather, they create major disincentives for speech, with the effect falling most heavily on

smaller entities that often have the most difficulty bearing the costs of compliance. Even worse, for an organization that has not yet set up a PAC, spontaneous speech that “refers to a clearly identified candidate for Federal office” becomes impossible, even if the group’s vital interests are threatened by a piece of legislation pending before Congress on the eve of a federal election. . . . Couple the litany of administrative burdens with the categorical restriction limiting PACs’ solicitation activities to “members,” and it is apparent that PACs are inadequate substitutes for corporations in their ability to engage in unfettered expression.

McConnell, 540 U.S. at 332 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The NRA is, to be sure, a sophisticated and well-practiced political speaker. It has a PAC and knows how to use it. But the NRA’s PAC, the Political Victory Fund (“PVF”), is strictly barred from soliciting beyond the NRA’s membership for contributions, and no portion of an NRA member’s membership fees may be allocated to PVF. *See* 11 C.F.R. § 114.7; *id.* at § 114.1. Thus, as Judge Henderson explained in the *McConnell* case: “While NRA PVF raised \$17.5 million during the 2000 election cycle, the NRA received over \$300 million in contributions from individuals during the same period. The disparity stems from the inability of NRA members – most of whom are individuals of modest means – to pay the NRA’s membership fees and then contribute beyond that amount

to NRA PVF.” *McConnell*, 251 F. Supp. 2d at 318 (internal citations omitted). Title II deprives millions of ordinary individuals who cannot afford this increased financial burden of their ability to join collectively in making “electioneering communications” to support and preserve the Second Amendment. *Id.*

Although some would justify restricting independent expenditures on political speech as necessary “to democratize the influence that money itself may bring to bear upon the electoral process,” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring), Title II stands that reasoning on its head. By requiring a group’s political speech to be channeled through its PAC, BCRA ensures that the voices of members of modest means will be muffled.⁶

⁶ The recent general election no doubt demonstrated that people of moderate means can still pool their monies by contributing directly to a candidate. See Michael Luo, *Obama Hauls in Record \$750 Million for Campaign*, N.Y. TIMES, Dec. 4, 2008, at A29. But many of the methods President-Elect Obama used to collect three-quarters of a billion dollars in this election cycle are unavailable to PACs, which are restricted to soliciting only their membership. Thus, effective use of broad-based Internet, television, and direct-mail solicitations – which, in 2008, set a record for bringing money into politics despite BCRA – are all out of bounds for anyone but the candidates themselves. And, of course, candidate speech is no substitute for speech by outside interests, and funding a candidate one generally agrees with is not the same thing as collectively funding a specific, shared message. Indeed, one of Congress’s main purposes in enacting BCRA was to ensure that politicians themselves, especially incumbent politicians, control the terms of political debate. See, e.g., 143 CONG. REC. S10,105 (daily ed. Sept. 29, 1997) (statement

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For this reason, Title II works a similar inversion of the *Austin* Court’s reasoning. There, the Court upheld a limit on corporate independent expenditures as justified to prevent wealth generated in the economic marketplace from unfairly *inflating* the strength of the corporation’s political voice beyond the “public’s support for the corporation’s political ideas.” 494 U.S. at 660. The NRA’s wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury “accurately reflects members’ support for the organization’s political views. . . .” *Id.* at 666. By requiring an advocacy group’s political speech to be channeled through a PAC, Title II *deflates* the strength of the organization’s voice in the political marketplace vastly below its “contributors’ support for the corporations’ political views.” *Id.* at 660-61. Far from ensuring that “resources amassed in the economic marketplace [are not] used to provide

of Sen. McCain) (“These groups often run ads that the candidates themselves disapprove of.”); 144 CONG. REC. S10,169 (daily ed. Sept. 10, 1998) (statement of Sen. Boxer) (“[O]utside special interest groups regularly spend millions of dollars . . . often leaving those candidates mere spectators in their own election campaigns.”); 144 CONG. REC. H4787 (daily ed. June 18, 1998) (statement of Rep. Wamp) (“Pretty soon we as candidates will not even be able to control the message in our own campaigns.”); 145 CONG. REC. S12,608-09 (daily ed. Oct. 14, 1999) (statement of Sen. Boxer) (“It brings in other issues that the two candidates themselves do not even want to talk about.”). *See also* 144 CONG. REC. S917 (daily ed. Feb. 24, 1998) (statement of Sen. Jeffords); 148 CONG. REC. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Cantwell).

an unfair advantage in the political marketplace,” *MCFL*, 479 U.S. at 257, Title II ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came. Characterizations of Title II as a mere “source” restriction cannot disguise this reality.

B. The *MCFL* Exception Is Grudgingly Administered and Difficult To Satisfy In Practice.

As administered by the FEC, the existing *MCFL* exception is but a narrow aperture through which few nonprofit advocacy groups may squeeze. While providing relief for a limited subset of “qualified nonprofit corporations,” the FEC’s regulations employ procrustean criteria to minimize that subset; in the FEC’s hands, the existing exception is substantially narrower than this Court’s decisions in *MCFL* and *Austin* warrant. Specifically, the FEC has fashioned and imposed four requirements purportedly drawn from *MCFL* dicta, each of which unnecessarily limits the universe of speakers afforded the protections of the First Amendment.

First, the FEC would deny First Amendment protection to any voluntary membership corporation that did not have as its “*only* express purpose . . . the promotion of political ideas.” 11 C.F.R. § 114.10(c)(1) (emphasis added). Of course, many nonprofit issue groups, including the NRA, not only advocate for the preservation of certain fundamental rights, but also

sponsor programs designed to further the exercise and enjoyment of those rights. According to the FEC, such diversity of purpose beyond that which is expressly and exclusively political can itself be disqualifying.

Second, the FEC denies the protection of the First Amendment to any nonprofit that “engage[s] in business activities.” 11 C.F.R. § 114.10(c)(2). Such activities are defined to include “*any* provision of goods or services that results in income to the corporation.” *Id.* at § 114.10(b)(3)(i)(A) (emphasis added). Although the NRA sells numerous items that bear its name, such as hats and shirts, and generates advertising revenue from its magazines, those who purchase such items are plainly supporters of the organization. Thus, its “political resources reflect political support,” *MCFL*, 479 U.S. at 264, and do not present the dangers identified in *MCFL* or *Austin*, even though it falls within the FEC ban. Moreover, the NRA *loses money* on the sales of these items, such that these “business activities” drain corporate wealth rather than amass it. But such “business activities,” as construed by the FEC, can be disqualifying even so.

Third, the FEC denies First Amendment rights to any corporation whose members “receive *any* benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation’s position on a political issue.” 11 C.F.R. § 114.10(c)(3)(ii) (emphasis added). The FEC would silence corporations that provide “[t]raining” and

“education” that are not “necessary to enable recipients to engage in the promotion of the group’s political ideas.” *Id.* at § 114.10(c)(3)(ii)(B). In contrast, however, the Court in *Austin* asked whether an advocacy organization’s “political agenda is sufficiently distinct from its educational and outreach programs,” 494 U.S. at 663 – not whether the organization’s educational programs are designed to teach recipients how to advance the group’s political agenda. Yet the FEC employs the latter inquiry as a ground for disqualification from *MCFL* status.

Fourth, FEC regulations deny *MCFL* status to any nonprofit that “accept[s] donations of anything of value from business corporations, or labor organizations.” 11 C.F.R. § 114.10(c)(4)(ii). The lower courts have consistently rejected this ironclad prohibition on the acceptance of corporate donations, which precludes advocacy groups, however large they may be, from engaging in express advocacy if they accept so much as a penny of corporate contributions. *See FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995). The courts of appeals, however, remain divided as to whether it is the percentage or the absolute amount of corporate donations that counts, and where precisely the line is to be drawn. As a result, potential entitlement to *MCFL* status remains that much cloudier.

In sum, it is a rare 501(c)(4) corporation, from among the wide field whose expression is restricted by the Wellstone Amendment, that can find shelter under the FEC's administration of the *MCFL* exception. It is therefore disingenuous to claim that *MCFL* solves the problems outlined herein, even as the operative law purposely leaves a body of 501(c)(4) corporations funded by individuals to be ground under its heel no differently from for-profit corporations.

C. The *WRTL* Exception Is Subject To Uncertainty and Disagreement As Applied In Particular Cases.

For the mine run of speakers who cannot satisfy the FEC that they qualify for the *MCFL* exemption, the only available protection is that provided by the test enunciated in *WRTL II*: An electioneering communication may be prohibited as “the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S. Ct. at 2667 (opinion of Roberts, C.J.). This is, by design, a speech-protective standard, and it is a welcome one. But the standard is not a bright line that would remove the chilling specter of an FEC enforcement action. As the dispute in this case demonstrates, an ad’s “reasonable interpretation” may be subject to competing glosses. Within the hotly-contested realm of campaign finance litigation, the

test is liable to serve largely as a jumping off point for lawyers and judges of differing views to stake out opposing positions. When disputes arise, resolution takes years, by which time the relevant elections have passed and the speech at issue has fallen stale; the mounting lesson of recent cases could not be clearer in this regard.

It bears noting that the *WRTL II* standard closely resembles the back-up definition of electioneering communications that Congress included in Title II of BCRA. Under that definition, an “electioneering communication” would have been “any broadcast . . . communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office . . . and which is also suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” 2 U.S.C. § 434(f)(3)(A)(ii). That backup definition had, in turn, been modeled upon a test the Ninth Circuit formulated in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). *See* 147 CONG. REC. S2704-13 (daily ed. Mar. 22, 2001) (statement of Sen. Specter) (introducing the backup definition and explaining it was derived from *Furgatch*).

Suffice it to say that tests such as these, which depend upon vague words and the Government’s tin ear to differentiate between speech that is criminal and speech that is constitutionally protected, have long been thought to be suspect. *See, e.g., Chamber of Commerce v. Moore*, 288 F.3d 187, 194 (5th Cir. 2002) (finding the *Furgatch* standard unconstitutionally

vague and citing other cases to the same effect). The record in *McConnell* reflects the difficulties of crafting a safe harbor that depends upon the content of an ad. *McConnell*, 251 F. Supp. 2d at 802 (opinion of Leon, J.) (finding the final clause of the backup definition unconstitutionally vague because “it is extremely difficult, if not impossible, for a speaker to determine with any certainty *prior* to airing an ad that it” is “suggestive of no plausible meaning other than an exhortation to vote”) (internal quotation marks omitted).⁷ In an “area permeated by First Amendment interests” any restriction on speech requires “‘precision.’” *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). *Buckley* warned against “supposedly clear-cut distinction[s]” that nonetheless “put[] the speaker . . . wholly at the

⁷ As the deposition testimony in *McConnell* made plain, people “of common intelligence” are left to “guess at [the fallback definition’s] meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). For example, when shown an ad that referred to candidate Al Gore and broadcast within sixty days of the 2000 general election, Senator Feingold was unsure whether the ad was pro-Gore or anti-Gore, while Senator McCain called it a “damning indictment” of Gore, and Representatives Meehan and Shays believed it promoted Gore. See Br. for Appellants/Cross Appellees Senator Mitch McConnell et al., *McConnell*, 540 U.S. 93 (2003) (No. 02-1674) at 59-60 (citing the record for this and other examples). Thus, as Senator McCain himself stated regarding materially identical statutory language: “I am not a lawyer, but I have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague.” 147 CONG. REC. S3116 (daily ed. Mar. 29, 2001).

mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.” 424 U.S. at 43.

The *WRTL II* exception certainly marks an improvement over prior law. But it still requires a speaker to divine what “reasonable interpretation” will be ascribed to any given ad, and empowers government censors to push the outer limit of an imprecise, subjective, shifting line. Uncertainty, and therefore the chilling of core political speech, persist under *WRTL II*. By contrast, a speaker-based safe harbor promises clear, stable boundaries that protect and promote free speech.

III. THIS IS AN APPROPRIATE CASE IN WHICH TO STRIKE DOWN THE WELLSTONE AMENDMENT AND VINDICATE THE FIRST AMENDMENT RIGHTS OF NONPROFIT ORGANIZATIONS AND THE INDIVIDUALS WHO SUPPORT THEM.

Since BCRA became law in 2002, this Court has yet to squarely address the constitutionality of the Wellstone Amendment as it applies to nonprofit advocacy groups that would draw upon individual donations to fund their electioneering communications.

In *McConnell*, the NRA and others argued the facial unconstitutionality of the Wellstone Amendment specifically (along with Title II generally). All the majority opinion said on this point was this: “As

so construed [to incorporate an *MCFL* exception], the provision [banning corporate funding of electioneering communications] is plainly valid. *See Austin*, 494 U. S., at 661-665 (holding that a segregated-fund requirement that did not explicitly carve out an *MCFL* exception could apply to a nonprofit corporation that did not qualify for *MCFL* status).” *McConnell*, 540 U.S. at 211. Thus, the Court read into the law an *MCFL* exception that was irreconcilable with the express prescription and clear legislative history of the Wellstone Amendment. The Court then stopped short of offering any analysis as to why the Snowe-Jeffords exception that Congress itself had crafted was not a less restrictive alternative to the Wellstone Amendment. The pertinent question loomed large: Why – consistent with *MCFL* and *Austin* – should 501(c)(4) corporations that might fail to qualify for any *MCFL* exception not still be permitted to fund their political speech, including electioneering communications, with donations they received from individual supporters for that very purpose? The Court said nothing apart from the parenthetical citation to *Austin* quoted above. *Amicus* submits, therefore, that *McConnell* either contains no holding on this point or contains a holding so passing and unexamined that it falls at the lowest ebb of the already weak *stare decisis* applicable to constitutional rulings.

The Court has yet to return to the question. The controlling opinion in *WRTL II* did, however, bracket it, saying there was “no[need to] pass on this

argument,” as urged by some *amici*, given the record presented in that “as-applied challenge.” 127 S. Ct. at 2673 n.10. There is compelling reason to pass on the question here and now. Some six years and three election cycles have elapsed since the Court decided *McConnell*, during which time nonprofit advocacy groups have remained subject to criminal prosecution simply for broadcasting the political speech their individual members support in the periods preceding elections. All the while, the threshold question of whether and how the Wellstone Amendment is constitutional has remained dangling.

As discussed in Appellant’s brief, Citizens United received only *de minimis* contributions from for-profit corporations, *see* Citizens United Br. 7; JA 244a, 251a-52a, which should not impact the constitutional calculus. *Cf. FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001) (finding a \$1,000 contribution to be *de minimis* and thus concluding that the Federal Election Campaign Act of 1971 “cannot constitutionally be applied to the NRA” for the relevant election cycle). If this case does not suffice to provoke a decision by this Court, it seems that none will, for there is an obvious chicken-and-egg problem: Absent the protections of the Snowe-Jeffords exception or something similar, a putative nonprofit corporate speaker lacks incentives to strictly limit itself to individual donations for purposes of funding a electioneering communication that would, as the law presently stands, be destined for prohibition in any event. This Court should therefore hold that the First Amendment protects a 501(c)(4)

corporation that *does* comply with Snowe-Jeffords and funds its electioneering communications exclusively with individual donations.

Were the Court to deem *McConnell's* holding inconsistent with the safe harbor sought here by *amicus*, it should at least clear the way for a narrower version of the approach suggested by Snowe-Jeffords. Specifically, in order to meet the concerns of *Austin*, the safe harbor could be limited to speech funded by individual contributions to 501(c)4's whose donors were on notice that their contributions would be used for political purposes. *MCFL* itself suggests that, "if political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities." 479 U.S. at 264. This standard was not before the Court in *McConnell*, and thus *stare decisis* could not possibly counsel against its adoption here.



CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and Title II's prohibition on corporate funding of electioneering communications should be held unconstitutional as applied to 501(c)(4) advocacy groups to the extent they fund their political speech with donations from individuals.

Respectfully submitted,

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