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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 *AMICI CURIAE* CALIFORNIA BROADCASTERS ASSOCIATION, ILLINOIS BROADCASTERS ASSOCIATION, LOUISIANA ASSOCIATION OF BROADCASTERS, MAINE ASSOCIATION OF BROADCASTERS, MICHIGAN ASSOCIATION OF BROADCASTERS, MISSOURI BROADCASTERS ASSOCIATION, MINNESOTA BROADCASTERS ASSOCIATION, NEBRASKA BROADCASTERS ASSOCIATION, NEW YORK STATE BROADCASTERS ASSOCIATION, AND TENNESSEE ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLANT

♦

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are the California Broadcasters Association, Illinois Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Michigan Association of Broadcasters, Missouri Broadcasters Association, Minnesota Broadcasters Association, Nebraska Broadcasters Association, New York State Broadcasters Association, and Tennessee Association of Broadcasters (collectively the "Named Associations"). Each of the Named Associations is, in turn, a voluntary association of broadcasters who are licensees of radio and television stations serving communities within their respective states.

Each of the Named Associations represents its members in matters relating to the broadcasting industry. Each has a keen interest in ensuring that the First Amendment protects access to all forms of media for the exercise of political speech.

SUMMARY OF ARGUMENT

The Court has long rejected attempts by the government to channel political speech to favored forms of media while foreclosing access to others. Yet Section 203 of the Bipartisan Campaign Reform Act ("BCRA") does exactly this by prohibiting

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

corporations and unions from using broadcast media for communications that merely refer to a federal candidate and that are disseminated in defined periods before an election.

McConnell v. FEC, 540 U.S. 93 (2003), erred in sustaining Section 203 against a facial challenge. A speaker's choice of media is intertwined with the message itself. Media choice determines the sensory impact of the message, the audience the message is likely to reach and the interest it generates. The reason that *McConnell* upheld Section 203 – that broadcast advertising by corporate or labor interests may excessively skew public opinion and diminish the impact of other voices – is no constitutional basis for curbing that speech. Simply put, it is not for the government to elevate the rights of some speakers over others, differentiate between acceptable and unacceptable media, and deprive the public of the right to hear competing political views and determine which views are worthy of adherence.

Even if these objectives were not constitutionally fatal, Section 203 is not narrowly tailored, as is constitutionally required. It bars speech that poses no threat to the law's ostensible objectives, while permitting the very same speech when it is communicated through favored forms of media or paid for by favored speakers. Finally, the as-applied test established by the Court in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (WRTL) chills speech by requiring speakers to make complex and subtle judgments that can expose them to criminal prosecution.

For these reasons, the Court should overrule the portion of *McConnell* that upheld the facial validity of Section 203.

ARGUMENT

A. BCRA Violates The First Amendment By Restricting The Content Of Political Speech Communicated Through Broadcast Media.

Section 203 of BCRA makes it a federal crime for corporations or unions to fund "electioneering communications," defined as broadcast, cable or satellite communications aired 60 days before a general election or 30 days before a primary election that refer to a clearly identified federal officeholder or candidate. 2 U.S.C. § 434(f)(3) (2007). In so doing, BCRA disenfranchises certain speakers from expressing political opinion in a manner of their own choosing.[2]

[2] The Court has never singled out corporations for lesser First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 n.14 (1978) ("In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved."). In fact, the Court has applied strict scrutiny in various contexts involving the First Amendment rights of corporations. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (compelled speech); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 260 (1974); ("right of reply*"); N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . " *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Moreover, Section 203 is a content-based restriction, barring access to the airwaves if an officeholder or candidate is "clearly identified" by including the person's name, nickname, photograph, or other likeness, or where the identity of the candidate is otherwise apparent through an unambiguous reference. 11 C.F.R. § 100.29(b)(2) (2005).

"Content-based restrictions are the essence of censorial power." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Kennedy, J., dissenting). The First Amendment countenances few exceptions to the right of speakers to decide which public policy views are worthy of expression. The mere fact that political communications mention candidates or take the form of paid programming cannot serve as the basis for censorship. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).[3] Indeed, "the most exacting scrutiny [applies] to regulations that suppress, disadvantage, or impose differential

[3] Section 203 also intrudes into the editorial function of broadcasters by determining when political opinion is acceptable and when it must be excluded. Just as the government has no authority to compel a newspaper to publish editorial views that the newspaper would not otherwise put into print, it cannot dictate to the media what political views must be left out. "Any other accommodation – any other system – would make the government the censor of what the people may read and know." *Tornillo*, 418 U.S. at 260.

burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

McConnell held that the content-based restriction in Section 203 of BCRA is a constitutionally-permissible effort to "stanch [the] flow of [soft] money" from corporations and unions because of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 205-207 (quoting *Austin*, 494 U.S. at 660). The Court characterized Section 203 as an incremental approach, justified by the record, noting that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207 (quoting *Buckley*, 424 U.S. at 105).

In upholding a scheme that forcibly diverts political speech to certain kinds of media, *McConnell* departs from a long history of reserving such decisions to the speaker. Prior to *McConnell*, this Court time and again "voiced particular concern with laws that foreclose an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* The First

"Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

It is "no answer to say that the speaker should 'take the simple step of utilizing a [different] medium.'" *Ashcroft v. ACLU*, 535 U.S. 564, 596 (2002) (Kennedy, J., concurring). In *Reno v. ACLU*, 521 U.S. 844, 879 (1997), the Court concluded that this was a constitutionally-unacceptable option:

> The Government first contends that, even though the [Communications Decency Act of 1996] effectively censors discourse on many of the Internet's modalities – such as chat groups, newsgroups, and mail exploders – it is nonetheless constitutional because it provides a 'reasonable opportunity' for speakers to engage in the restricted speech on the World Wide Web. . . . The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafleting on the streets regardless of their content – we explained that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other

> place.' *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939).

Moreover, the choice of media is an essential element of one's speech. Television allows a speaker to deploy words, moving images and music to make a connection with a broad audience. As Chief Justice Roberts observed, "Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness." *WRTL*, 551 U.S. at 477 n.9.

In fact, it is the very effectiveness of broadcast speech – evidenced by the so-called "torrent of television election-related ads," *McConnell*, 540 U.S. at 207 – that led Congress to restrict it. *See*, *e.g.*, 148 Cong. Rec. S2135 (March 20, 2002) (statement of Sen. Snowe) ("What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections."); 147 Cong. Rec. S2457 (March 19, 2001) (statement of Sen. McCain) ("Guess what. The ads [that survey respondents] viewed to be the most influential of all the ads run were the ones that were run by interest groups that mentioned a candidate, that are supposedly issue ads, even more than the ads that were run by the candidates themselves.").

The government has no business making distinctions on this basis. "Nothing could be further removed from the spirit of the First Amendment than labeling speech corruptive merely because it is effective." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 295 (4th Cir. 2008). As the Court declared in *Bellotti*:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.

435 U.S. 765, 790 (1998). *See also McConnell*, 540 U.S. at 284 (Thomas, J., concurring in part and dissenting in part) ("One would think that *The New York Times* fervently hopes that its endorsement of Presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?").

Indeed, the effect of singling out broadcast media is to restrict the medium that Americans still rely on most to inform their decision-making on political issues. An April 2009 study by the Pew

Internet and American Life Project found that television remains the dominant medium for political news: nearly 80% of those surveyed report getting most of their campaign news from television. Aaron Smith, *The Internet's Role in Campaign 2008*, Pew Internet and Am. Life Project, April 15, 2009, http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx.

No doubt aware that Section 203 raised grave constitutional concerns, some Members of Congress argued that stricter regulation of broadcast media could be justified based on the limited availability of television and radio frequencies.[4] This rationale was first applied by the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969), to promote a diversity of voices, "which would otherwise, by necessity, be barred from the airwaves." *See also CBS v. FCC*, 453 U.S. 367, 396 (1981) (law requiring broadcasters to give "reasonable access" to federal candidates justified as means for increasing

[4] *See*, *e.g.*, 147 Cong. Rec. S2611 (March 21, 2001) (statement of Sen. Torricelli) ("Why indeed should broadcasters not bear some of the responsibilities? Do they not have public licenses? Do they not have responsibility to air the news fairly, cover campaigns, to inform the public? . . . The spectrum has limited the number of television stations; hence, the FEC's requirements and Federal law."); 44 Cong. Rec. S979 (Feb. 25, 1998) (statement of Sen. Levin) ("Now, why radio and television? The answer is that the Supreme Court itself has held that, due to the fact that these media, radio and television, are regulated, are licensed, and that the spectrum is limited, you can regulate these media in ways in which you cannot regulate newspapers or the printed word. . . . ").

"freedom of expression by enhancing the ability of . . . the public to receive" information).[5]

Red Lion is not authority for suppressing speech. "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).[6]

Even assuming for the sake of argument the legitimacy of Congress's objectives in enacting Section 203, regulation must be narrowly tailored to satisfy a compelling government interest. *Buckley*, 424 U.S. at 25, 64. *McConnell* concluded in error that Section 203 should be sustained as an "incremental" reform. Such a conclusion is belied by the gap between the impact of the law and its ostensible objectives; it is grossly over- and under-inclusive.

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[5] We take no position here on the continued viability of the scarcity doctrine in other contexts. We note simply that it has been called into question. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (Thomas, J. concurring); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years."); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*.").

[6] This rationale is equally unavailing because BCRA's prohibitory ambit also applies to cable and satellite – media that this Court has never subjected to the scarcity rationale.

On the one hand, Section 203 is crafted so broadly that it applies to all for-profit companies, regardless of whether they are large or small, public or private.[7] Section 203 also applies to non-profit corporations, such as incorporated charities and social welfare organizations – organizations that manifestly do not possess "corrosive and immense wealth," even were they legitimate categories upon which to base prior restraints on First Amendment speech. Moreover, *McConnell* recognized that some percentage of ads swept up in the electioneering communications ban have no electoral purpose at all. 540 U.S. at 206. While some messages from corporations and unions will surely not be "corrosive" in any sense of the word, the law provides no way to distinguish such ads from all others, nor does it provide them with any exemption.

At the same time, by targeting only some forms of media, BCRA ensures that the prescription cannot cure the perceived ill. BCRA allows corporations and unions to purchase full-page ads in major newspapers, but forbids the same speakers from spending a tiny fraction of that cost for a television or radio advertisement in a small suburban market. Likewise, the same message that is forbidden on radio and television may be disseminated through electronic media, such as iPods and other MP3 players, the Internet and

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[7] As the Court observed in *Bellotti*, "Corporations, like individuals or groups, are not homogeneous. They range from great multinational enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family." 435 U.S. at 784 n.22.

cellphones.[8] This sort of arbitrary line-drawing is both discriminatory and ineffective. "[N]ot only will the same ads be seen and heard [via non-broadcast media], they will *still* be aired on the television and the radio; the only difference is that they will be sponsored by a smaller (and less diverse) class of privileged speakers. . . . [including] wealthy individuals, PACs or unincorporated associations." *McConnell*, 251 F. Supp. 2d 176, 371 (D.D.C. 2003) (Henderson, J., concurring in part and dissenting in part).

Narrow tailoring this is not. It is no more than a swipe at political speech with a poorly-designed tool. Predictably, the results are not only uneven, they are also constitutionally unsupportable. Such arbitrary line-drawing puts in doubt the rationale for the broadcast ban in the first place. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 783-800 (2002) (prohibiting judicial candidate from announcing views on political issues – but "only at certain times and in certain forms" – failed strict

[8] The 2008 Presidential campaign was a "seminal, transformative race" where the Internet and social media were harnessed to reach voters who have become accustomed to using new forms of media. "The platforms included YouTube, which did not exist in 2004, and the cell phone text messages that the campaign was sending out to supporters on [the day before the election] to remind them to vote." Adam Nagourney, *The '08 Campaign: Sea Change for Politics as We Know It*, N.Y. Times, Nov. 4, 2008 at A1. Likewise, the Pew study of the 2008 election found that "fully 30% of those who post political content online are under the age of 25, and more than half are younger than 35. Smith, *supra*. Political content creation is also tightly linked with the use of social media platforms such as online social networks, video sharing sites, blogs and status update services such as Twitter." Smith, *supra*.

scrutiny because it was "so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous"); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (striking down law that prohibited publication of names of rape victims by "instruments of mass communication" because law did not prohibit dissemination by other means).

At the heart of the First Amendment is the principle that each speaker has the right to choose the ideas deserving of expression and each listener the right to choose those ideas deserving of adherence. Our political system and cultural life rest on this foundation. *Turner*, 512 U.S. at 641. Section 203 of BCRA contravenes this essential right by criminalizing political speech based on the content of the message, the identity of the speaker and the choice of media to communicate the message. Additionally, the law sweeps in considerable speech that poses no threat to the law's ostensible objectives, while permitting the very same speech when it is communicated through favored forms of media or paid for by favored speakers. Accordingly, the Court should overrule that portion of *McConnell* upholding Section 203 of BCRA against a facial challenge.

B. WRTL's As-Applied Standard Impermissibly Chills Political Speech.

In *WRTL*, the Court announced an as-applied test, which allows corporations and unions to communicate over the airwaves about issues, as distinguished from elections. 551 U.S. at 452. Under

this test, the electioneering communications ban applies if speech is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 451. Justice Alito cautioned that if the implementation of this test impermissibly chills political speech, the Court's ruling in *McConnell* on the facial challenge to Section 203 may need to be reconsidered. *Id.* at 482.

Any doubts about the potential chilling effect of the Court's as-applied test were confirmed by the sixteen pages of implementing rules and explanation published in the Federal Register by the Federal Election Commission. The regulations are complex and subjective, requiring subtle judgments that may have to be made in the course of a 24-hour-a-day news cycle when "rapid response" is increasingly the norm. *See*, *e.g.*, Posting of Kate Linthicum to Los Angeles Times Top of the Ticket, http://latimesblogs.latimes.com/washington/2008/08/mccain-obama-ho.html (Aug. 24, 2008). More significantly, making the wrong decision can trigger a civil or criminal investigation and expose the speaker to fines and jail. Reason dictates that under these circumstances, speakers who wish to engage in political discourse will shy away from anything close to the line or simply choose a type of media that is not subject to the Section 203 ban. Furthermore, broadcasters are left unable to offer effective guidance to prospective speakers in order to prevent their media from being used in a manner that the law treats as a federal crime.

The FEC rules begin by creating a "safe harbor" for communications that (1) do not mention

any election, candidacy, political party, or voting by the public; (2) do not take a position on any candidate's character or qualifications; and (3) focus on an issue and urge the candidate to take a position on it or urge the public to contact the candidate about that issue. 11 C.F.R. § 114.15(b) (2007). The creation of a safe harbor is a sensible approach to protect core First Amendment speech, but this harbor is not safe at all; it is rife with interpretive issues, and far different from the ample shelter envisioned by the Court.

For example, how does a speaker determine when an ad does not "take a position on the candidate's qualifications for office?" The challenge this presents to the speaker was foreshadowed by the Court in *WRTL*, where the justices themselves disagreed about whether an ad that *McConnell* regarded as the paradigmatic electioneering communication would be protected under the as-applied test. Notably, the dissent in *WRTL* concluded that the as-applied test would permit corporate or labor funding of an ad that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 551 U.S. at 498 n.7. The principal opinion, however, pointedly distinguished this kind of ad from a genuine issue ad, implying that the "Jane Doe" ad might still be subject to Section 203's prohibition. *Id.* at 2667 n.6. With such differing views on the Court about an ad of this sort, it is entirely predictable that a covered speaker will have difficulty finding the line.

Anticipating that many ads will not satisfy every element of its safe harbor, the FEC articulated the factors that it will "consider," such as whether the communication has "any indicia of express advocacy" . . . 'to determine whether, on balance, a communication' meets the Court's as-applied test." 11 C.F.R. § 114.15(c) (2007). One factor is whether the communication "[i]ncludes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party." § 114.15(c)(2)(iii). Another factor requires determining whether the communication "focuses on a public policy issue." These are precarious judgments for anyone to make, let alone an organization acting on pain of criminal penalties, fines, and investigations. § 114.15(c)(2)(i).

As the Court observed in *WRTL*, such an "open-ended rough-and-tumble of factors" is sure to invite complex argument. *WRTL*, 551 U.S. at 451. Moreover, the FEC has acknowledged that an ad might have no indicia of express advocacy and still be subject to the electioneering communications ban, intimidating speakers who would otherwise exercise their First Amendment rights. *See* Explanation and Justification to Electioneering Communications Rules, 72 Fed. Reg. 72899, 72905 (December 26, 2007).

The First Amendment "demands a greater degree of specificity than in other contexts," lest speech be deterred by the speaker's uncertainty about what is permitted and reluctance to come too

close to the line. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). If a test lacks sufficient specificity, speakers will "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citations and quotations omitted). This is especially true if the statute imposes criminal sanctions. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Free speech may not be so inhibited.

In the end, it is hardly surprising that the as-applied test articulated by this Court, and as implemented by the Federal Election Commission, chills constitutionally protected speech. As the Court noted in *McConnell*, "the distinction between 'issue' and express advocacy seemed neat in theory, [but] the two categories of advertisements have proved functionally identical in important respects." 540 U.S. at 126. In the words of one witness in the *McConnell* litigation, "What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* at n.16 (internal quotation marks omitted).

Such an uncertain line between the constitutionally protected and the felonious "offers no security for free discussion," and thus "compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Under Section 203, a speaker must choose a mode of communication based on a maze of acceptable and prohibited paths, rather than a straightforward assessment of the best means of reaching and persuading the desired audience. The

as-applied test is thus insufficient and Section 203 should be held invalid on its face.

CONCLUSION

For the reasons stated above, the Court should overrule the portion of *McConnell* which upheld the facial validity of Section 203 of BCRA.

Respectfully submitted,

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