Nos. 06-969 & 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee,

and

SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN,

Appellant-Intervenors,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

On Appeal From the United States District Court For The District of Columbia

BRIEF FOR *AMICI CURIAE* THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, COMMON CAUSE, INC., THE GREENLINING INSTITUTE AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in more than 850 communities in every state and has more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 300,000 members and supporters nationwide. Common Cause has been concerned with the growing problem of soft money in the federal political process, and has publicly advocated for appropriate regulation in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

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[1] The Department of Justice and Wisconsin Right to Life, Inc. have consented to the filing of this brief in letters which accompany this filing. The Appellant-Intervenors have filed a general written consent to the filing of *amicus* briefs with the Court. No person or entity other than the *Amici Curiae*, their members, or counsel made any monetary contribution to the preparation or submission of this brief. No present counsel for any party authored this brief in whole or in part. Counsel for *Amici*, however, was listed among counsel for the Intervenor-Appellants in early proceedings before the district court.

The Greenlining Institute is a non-partisan, non-profit organization that works to improve the quality of life for low-income and minority communities throughout the United States. The institute was founded in 1993 and emerged from the Greenlining Coalition, considered the oldest coalition of African-American, Asian-American/Pacific-Islander, and Latino community leaders organized around a common purpose. The Greenlining Institute's major mission is to create an antidote to redlining practices which have had adverse consequences in the ability of low-income and minority communities to obtain financial services and products.

The National Association of State PIRGs ("U.S. PIRG") represents state Public Interest Research Groups ("PIRGs") at the federal level, including in the federal courts. U.S. PIRG and many state PIRGs have long been interested in campaign finance issues and the resolution of this case will assist them in their advocacy for effective and comprehensive campaign finance reforms.

All amici joined in filing an amicus brief in this Court in the first round of litigation, *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam), and several of them have filed amicus briefs in this Court in other constitutional campaign finance cases, including *McConnell* v. *FEC*, 540 U.S. 93 (2003).

SUMMARY OF ARGUMENT

Largely in response to mounting sham issue advocacy in federal elections, all of which evaded reasonable restrictions on corporate and labor spending as well as long-standing disclosure requirements, Congress passed and the President signed the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). One of

its central provisions, Title II, barred corporations and unions from funding so-called "electioneering communications" out of their general treasuries and required disclosure of "electioneering communications" funded from other sources. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court upheld these electioneering provisions on their face except insofar as they involved certain "ideological nonprofits" meeting the strict conditions this Court had outlined earlier in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986).

Wisconsin Right to Life, Inc. ("WRTL") now seeks to create an as-applied exception large enough to swallow up Title II itself. Although it couches its challenge to these same provisions as limited to their application to vaguely defined "grassroots lobbying," the exception WRTL seeks would not only exempt many ads, like the sham issue ads considered in *McConnell* itself, designed to influence federal elections and likely having that effect, but also ads nearly identical to those run by federal candidates themselves in past elections. The "grassroots lobbying" test created by the district court, as well as the test WRTL itself promoted below, would open the door to corporations and unions funding the "functional equivalent of express advocacy" from their general treasuries, a practice which this Court found Congress could bar in *McConnell*. 540 U.S. at 206. Although WRTL claims that these ads intend only to encourage voters to lobby their representatives on legislation, none of these ads directly gives voters the rudimentary information they would need to place a phone call or write a letter or email to their representatives. Their aim is candidate, not legislative, advocacy.

ARGUMENT

I. SINCE WRTL'S THREE ADS ARE THE "FUNCTIONAL EQUIVALENT OF EXPRESS ADVOCACY," THEY SHOULD RECEIVE NO CONSTITUTIONAL EXEMPTION.

In *McConnell*, this Court held that BCRA's "electioneering communications" provisions could constitutionally apply to ads that "are the functional equivalent of express advocacy." *Ibid*. This was a simple inquiry, turning completely on whether "the ads are intended to influence the voters and have that effect." *Ibid*.

At the time of the 2004 election, Senate filibustering of judicial nominees was a key issue in the Wisconsin Senate race, as well as a national, partisan campaign issue. All three Wisconsin Republican Senate candidates had made it a key issue in their primary races, as had the state Republican Party, which listed this issue as one of four reasons to defeat Senator Feingold. See Def. FEC's Exhs. Submitted in Supp. Of Its Opp'n to Pl.'s Mot. For a Prelim. Inj., Exh. 15 at 2, *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260 (D.D.C.) (3-judge court). Further, WRTL itself and its affiliated PAC made the judicial filibuster a campaign issue, citing it both as a reason they had endorsed the three Republican opponents of Senator Feingold and as a reason that one of their "top election priorities" was "to send Feingold packing!" See *id*. Exh. 4 (WRTL PAC); Exh. 20 (WRTL). WRTL's PAC said that "the defeat of Feingold must be uppermost in the minds of the Wisconsin right to life community in the 2004 elections." See *id*. Exh. 4 at 2. And the PAC chair stated, "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." See *ibid*.

These statements were entirely consistent with WRTL's past electoral positions. Through its PAC, it has made

significant independent expenditures to defeat Senator Feingold, as has the National Right to Life PAC. In fact, WRTL PAC's FEC reports itemizing its independent expenditures in the 1992 and 1998 congressional elections list 100 percent of its independent expenditures as opposing Senator Feingold. See *id*. Exhs. 8 & 9.

WRTL also heavily publicized Senator Feingold's support of the judicial filibuster and issued several press releases criticizing him for his vote. In this context, the fact that its proposed electioneering communication ads did not *themselves* specifically state Senator Feingold's position on the issue matters little, since WRTL had already used other means to publicly disseminate Senator Feingold's position, as did his three Republican opponents and the Republican state party, all of whom had attacked Senator Feingold repeatedly for his position. Thus, when WRTL's electioneering communication ads referred to Senator Feingold in the context of criticizing "a group of Senators" for conducting an ongoing filibuster that is "not fair" and "causing gridlock," it was implausible to maintain that this criticism would not attach to Senator Feingold and affect his Senate race.

In this context, WRTL's representation that its proposed electioneering communication ads to Wisconsin voters in the immediate preelection period would have had *only* a grassroots lobbying purpose strains credulity past the breaking point. The facts that the topic of these ads—the Senate filibuster of judicial nominees—is one that both the Republican Senate candidates and WRTL identified as a key campaign issue and that the ads gave their listeners no direct information about how to contact any candidates undermine WRTL's claim that these electioneering communications amount to no more than grassroots lobbying. They did not urge listeners to vote any particular way or even mention the up-coming candidate election because they did not need to. The listeners would have understood that much and could

have been counted on to place each ad within its obvious context and understand its point—to vote for or against particular candidates.

As this Court recognized in *McConnell*, an ad's indirect direction is direction nonetheless and makes the ad "the functional equivalent of express advocacy." 540 U.S. at 206. Considered in their actual context, WRTL's three ads meet *McConnell*'s test: they were intended to influence the election and likely would have had that effect. For that reason alone, this Court should reverse the district court. There is no need for it here to design a test for any "closer" cases.

II. THE DISTRICT COURT'S FOUR-CORNERS, FIVE-FACTORS APPROACH CREATES A "MAGIC FEATURES" TEST, WHICH, LIKE THE "MAGIC WORDS" TEST THIS COURT REPUDIATED IN *McCONNELL*, PERMITS CORPORATIONS TO FUND FROM THEIR GENERAL TREASURIES ADS INTENDED TO INFLUENCE FEDERAL ELECTIONS AND HAVING THAT EFFECT.

In exempting WRTL's three ads from BCRA's source and disclosure limitations, the district court carved out a very broad category of "grassroots lobbying." It described its test as follows:

> this Court will limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do

> anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate. In addition, as to the televised ad, the Court will also look to the images displayed in concert with the language to evaluate whether they otherwise accomplish the prohibited result.

Appellant-Intervenors' J.S. App. 18a. Like the "magic words" test repudiated by this Court in *McConnell*, however, the district court's test resolutely ignores an ad's context, focusing instead exclusively on its bare words and images. Also like the discredited "magic words" test, the district court's test ignores an ad's actual intent and effect, which this Court in *McConnell* identified as the essential constitutional concerns—the keys to distinguishing ads whose funding can be regulated from those whose cannot. There is only one real difference between the approach this Court rejected in *McConnell* and that adopted by the district court—that between eight "magic words," *Buckley* v. *Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam), and five "magic features." So long as an ad (1) references a live legislative issue, (2) avoids attributing a position to a named candidate, (3) urges the viewer to do no more than contact the candidate about the referenced issue, (4) avoids promoting, attacking, supporting, or opposing the named candidate, and (5) avoids reference to the election, candidacy, or political party of the candidate, corporations can fund it from their general treasury funds without disclosure. Indeed, since the district court did not say that an ad had to exhibit all five of these features—just that it would "limit its consideration" to them—the district court

might well exempt from disclosure and source requirements ads containing only some of these features.[2]

In addition to violating this Court's instruction that any exemption has to rest on an ad's intent and likely effect, the district court's test poses at least four particular problems. First, any test for "grassroots lobbying" should require that the ad urge the viewer to actually lobby an elected official. The district court's does not. Although the district court's test would not exempt an ad that "exhorts the listener to do anything *more* than contact the candidate about the issue," Appellant-Intervenors' J.S. App. 18a (emphasis added), it nowhere requires an ad to even do just that—exhort the listener to contact the candidate. This is a significant omission.[3] An ad could satisfy this part of the test by not exhorting the viewer to do anything at all. Indeed, many

[2] It is difficult to describe the district court's inquiry as even a "test." The district court gestured broadly at the five features but did not say which ones were more or less important, how many were needed, or whether they could be balanced against each other. This alone will create great confusion in future cases if this Court approves the district court's test. In the remainder of this brief, *Amici* will argue *as if* the district court would insist that all five features be present for an ad to be considered exempt "grassroots lobbying." That, of course, is the narrowest possible interpretation of the district court's test but one nevertheless broad enough to eviscerate BCRA's "electioneering communications" provisions. To the extent the district court would not insist that all five features be present, the exemption and its dangers are larger still and the test would allow corporations to fund from their general treasuries even more advertising intended to influence federal elections and having that effect.

[3] Even if in an effort to better align the test with the materials it seeks to identify this Court cured this particular omission, a corporation could easily continue to fund such ads as before by including a pro-forma request that the viewer contact the candidate—much as advertisers did under the now-discredited "magic words" test. Even if cured, in other words, this feature of the test would have little practical bite.

powerful ads run by candidates themselves do not exhort the voters to do anything. See, e.g., *infra* 15-23. They do not need to because the voter understands their implicit call. By limiting inquiry to the "four corners" of the ad, however, the district court's "magic features" test assumes that voters are dysfunctional, unsocialized audiences that understand an ad's language and images only in a vacuum.

Second, the test nowhere requires that the ad give the viewer the information the viewer would need to actually lobby a candidate. The district court's test would exempt ads, like WRTL's, that urge viewers to contact candidates but fail to tell them how they can do so. Surely, though, any genuine grassroots lobbying ad would let the viewer know how to lobby by displaying for a sufficient amount of time the candidate's contact information, even if it is just a simple phone number or email address. WRTL's three ads do not, thereby revealing that their true intent was not to have viewers contact Senator Feingold about a possible filibuster but rather to change the way the viewer judged Senator Feingold generally in the hope that that viewer would later vote. The district court's "contact" factor, then, requires neither that the ad urge any lobbying at all nor that the ad give the viewer the rudimentary information she would need to lobby on her own. Surely any ad that genuinely intended to encourage grassroots lobbying on an issue and wanted to have any such effect would at a minimum urge contact and provide this simple information.

Third, the district court's exception is not narrowly tailored for its own putative aim. Nearly all genuine and effective grassroots lobbying will be directed to a representative's constituency, not elsewhere. An organization interested in changing the views of a member of the New York City Council, for example, is unlikely to advertise in Idaho for people to call the councilmember and make their views known. Such advertising would be wasted because the

New York councilmember would likely be unmoved by contact from outside her district, let alone from outside her city, state, and even region. BCRA's "electioneering communications" provisions reflect this simple insight by covering only specific communications "targeted to the relevant electorate." 2 U.S.C. 434(f)(3)(A)(i)(III) & (c) (Supp. 2004). The district court's exception, however, would characterize as "grassroots lobbying" an ad broadcast nationwide in a presidential election where the issue was before a state or local body. Thus, so long as an ad somewhere mentioned an issue facing the executive branch of Texas government—it would not even have to make clear that the issue was pending there—and displayed none of the other "magic features" it could be run nationwide during an election in which the governor of Texas was a presidential candidate. The ad's failure to target the candidate's constituency undercuts any argument that its real intent concerns grassroots lobbying. Yet, the district court's test would treat such an ad as if it were the real thing.

Finally, the fourth factor in the district court's "magic features" test—that the ad not "promot[e], attack[], support[], or oppos[e] the named candidate" ("PASO")—cannot be straight-forwardly applied to anything other than ads funded by organizations with a major purpose of influencing federal elections. The district court lifted its PASO factor from 2 U.S.C. 431(20)(A)(iii) (2004), part of the definition of "federal election activity." In *McConnell*, this Court upheld this PASO standard against vagueness challenge as applied to spending by state political parties. 540 U.S. at 170 n. 64. This Court has never upheld it, however, as applied to individuals and organizations without such a major purpose and has, in fact, from the time of *Buckley* applied a different, much stricter vagueness standard to regulations affecting their activities.

In *Buckley*, for example, this Court considered whether an amendment to the Federal Election Campaign Act ("FECA") requiring disclosure of certain "expenditures," defined as the use of money "for the purpose of influencing" the election of candidates for federal office, was unconstitutionally vague. 424 U.S. at 76-82. This Court held that the statutory term "expenditure" posed no vagueness problems as applied to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate * * * [because their spending is,] by definition, campaign related." *Id*. at 79. With respect to others without such a major purpose, however, this Court viewed the statutory term very differently. To avoid constitutional vagueness concerns, it "construe[d] the ter[m] to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80 (footnote omitted). A standard permissible for major-purpose actors, it found, was just too vague to be applied to others. The Court then tightened the term up with respect to other funders of advertising by pointing to another part of its opinion where it had already construed the phrase "advocating the election or defeat of a candidate" to avoid similar vagueness concerns. *Id*. at 42-44. There it had made clear how direct these express terms of advocacy had to be: "This construction would restrict [the provision's] application * * * to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 n.52.

The PASO factor of the district court's test is, however, even vaguer than the phrase "advocating the election or defeat of candidate" from *Buckley*, which gave birth to the "magic words" test. Each of this factor's individual terms—"promotes, attacks, supports, or opposes the named candidate," Appellant-Intervernors' J.S. App. 18a—is at least as vague as the phrase from *Buckley* and collectively they so

compound generality that the overall PASO term can possesses little firm meaning at all *when applied to organizations with no major purpose of influencing federal elections*. As this Court noted in *Buckley*, such a vague test "compels the speaker to hedge and trim." 424 U.S. at 43 (quoting *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945)). That the vagueness occurs in a judicially-created exception to a facially valid regulatory scheme makes no difference. A speaker would still be unsure on which side of the muddied line his communication would fall and what would be its consequences. Ironically, the district court has created a possibly unconstitutionally vague exception to a definition of "electioneering communications" that this Court itself recognized as crafted—indeed, successfully crafted—to avoid vagueness concerns. *McConnell*, 540 U.S. at 194. The district court will not be able to apply the PASO factor to advertisements funded by non-major purpose organizations, like unions and ordinary business corporations, without tightening it up in some serious fashion.

The district court could later, of course, avoid these vagueness concerns the same way this Court did in *Buckley*. It could reinterpret "promotes, attacks, supports, or opposes" to require "magic words." (Indeed, it may have no other choice. The other apparent alternative, a sharp, "legislative" scheme, like BCRA's careful four-part definition of "electioneering communications," would seem to be unavailable to it. It is, after all, for Congress to legislate, not the courts.) Taking this course would certainly give the "grassroots lobbying" exemption sharper definition. A speaker could better predict when his communications would find safe harbor. It would, however, resurrect "magic words"—a doctrine this Court repudiated in *McConnell* precisely because it failed to distinguish between election advocacy and other speech—in the guise of a constitutional exemption. This failed doctrine would rise again, now nesting happily within the all-embracing "magic features" test

whenever that test came to be applied to a non-major purpose entity.

The effect of the district court's test if tightened up this way can be seen in the type of ads it would allow corporations to fund directly from their general treasuries without disclosure. In the last federal general election, for example, one issue arising completely within the 60-day window of the electioneering communications provisions was the Mark Foley scandal. On September 28, 2006, ABC News reported that in 2005 Congressman Foley had sent email messages to a former Congressional page, asking for, among other things, a photo and certain personal information. Rhonda Schwartz and Maddy Sauer, *Sixteen-Year-Old Who Worked as Capitol Hill Page Concerned About E-mail Exchange with Congressman*, http://blogs.abcnews.com/theblotter/2006/09/sixteenyearold_.html (last visited Feb. 20, 2007). A day later Congressman Foley resigned after ABC News read sexually explicit instant messages that he had allegedly sent to another former page. Brian Ross and Maddy Sauer, *Foley Resigns Over Sexually Explicit Messages to Minors*, http://blogs.abcnews.com/ theblotter/2006/09/foley_resigns_o.html (last visited Feb. 20, 2007). In the following days, additional pages alleged inappropriate conduct dating back several years.

The scandal, coming shortly before the election, provoked deep and widespread criticism of the Republican House leadership for failing to protect vulnerable minors and for allegedly covering up Representative Foley's conduct for some time. On October 3, 2006, the lead editorial of The Washington Times called on House Speaker Dennis Hastert to resign. *Resign, Mr. Speaker*, http://www.washtimes.com/op-ed/20061002-102008-9058r.htm (last visited Feb. 20, 2007). To many, Representative Foley's disgrace and the House leadership's failure to adequately address it greatly contributed to the results of the November House elections.

The district court's test, if modified to avoid the vagueness concerns that attend non-major purpose groups, would have allowed corporations to fund from their general treasuries powerful ads featuring Foley intended to influence the outcome of House elections—all without disclosure. A business corporation could have run an ad stating that the House of Representatives failed to protect the youth that American families entrusted to it and had covered up a possible crime to protect one of its own members—all the time running powerful visual images suggesting sexual exploitation of vulnerable teenagers by those in power. The ad could have ended by prominently featuring a picture of Mark Foley, universally reviled at the time, and transitioning to a picture of the local incumbent member of the House, identified by name as the Congressperson for the district. It could have capped the visuals with the words "Stop Congressional Sexual Exploitation of America's Young" rolling in red across the screen.

A corporation would presumably have intended such an ad to directly influence the election rather than Congress's supervision of its pages—an issue far beyond ordinary corporate concern. And the ad, if done properly, would certainly have had that effect. Yet, the district court would consider the ad protected "grassroots lobbying." The ad would have (1) referenced a live issue in Congress, (2) avoided attributing any position to the individually named candidate, (3) not urged the viewer to do anything more than contact the candidate about the issue (indeed, it would not have urged any contact at all), (4) not on its face promoted, attacked, supported, or opposed the named candidate in a way vagueness concerns pertaining to non-major purpose groups would require, and (5) not referred to any election or candidacy or identified the candidate's political party. The ad would have possessed every one of the "magic features" the district court requires. In the name of the First Amendment, a

corporation could have run such an ad from its general treasury funds without any disclosure.

III. THE DISTRICT COURT'S "MAGIC FEATURES" TEST WOULD EVEN CLASSIFY MANY EXISTING CANDIDATE ADS, WHICH ARE CERTAINLY INTENDED TO INFLUENCE THE ELECTION AND LIKELY HAVE THAT EFFECT, AS EXEMPT "GRASSROOTS LOBBYING."

The district court's test would misclassify as "grassroots lobbying" many ads clearly intended to influence federal elections and having that effect, namely, ads nearly identical to those run by the candidates themselves but funded by non-major purpose entities. Many candidate ads in recent presidential elections and some of the most powerful candidate ads since the creation of television would with little or no modification satisfy the district court's "magic features" test as modified to avoid the vagueness concerns attending its application to non-major purpose groups. Consider *Victory*, a 30-second television ad run by the Bush campaign in the 2004 election. It sought to tie the United States military operations in Iraq, one of the most prominent legislative and executive issues of the time, to themes of freedom and democracy-building by focusing on that year's summer Olympics, an event many Americans followed.

Voice Over:
In 1972...there were 40 democracies in the world.

Today...120.

Freedom is spreading through-out the world like a sunrise.

And this Olympics... there will be two more free nations… And two fewer terrorist regimes.

With strength, resolve and courage, democracy will triumph over terror.

And, hope will defeat hatred.

Victory (*08/13/2004, Bush*), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=178 (streaming

video)(left-click on swimming photo)(last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=178 (transcript)(left-click on swimming photo; then left-click on "transcript")(last visited Feb. 20, 2007).

Absent the "stand-by-your ad" and source disclosures, which federal law mandates for candidate-run advertisements, see 2 U.S.C. 441(d)(1) (Supp. 2004), this ad displays all the "magic features" the district court requires. First, it references the Iraq war, a live issue before both the legislative and executive branches.[4] Indeed, few, if any, issues were more prominent at the time. Second, it avoids attributing a position on the war to George W. Bush, the featured candidate. (Of course, it does not need to. The audience could not have failed to know the President's position.) Third, it does not "exhort[] the [viewer] to do anything other than contact the candidate about [the war.]" Appellant-Intervenors' J.S. App. 18a. Indeed, it does not exhort the viewer to do anything at all, presumably because such contact is not the ad's ambition. Fourth, within its "four corners" the ad does not "promote[], attack[], support[], or oppose[]" President Bush. By associating the President with "[F]reedom," "sunrise," "strength," "democracy," "courage," "triumph over terror," a "hope [that] will defeat hatred," and

[4] Although the district court's test, like the one WRTL proposes, speaks of legislative issues, there is no reason why "grassroots lobbying" cannot concern issues before the executive branch of government. In canvassing candidate ads from past presidential elections in this section of their brief, *Amici* will assume that such an executive "grassroots lobbying" exemption would apply during the relevant time periods preceding federal elections in which a sitting president was running for office. If that is wrong, however, *Amici*'s examples would still show how much candidate advertising in general could be exempted under the district court's test when funded by non-major purpose groups.

"[m]oving America [f]orward," not to mention the formal grace and beauty of women's Olympic butterfly swimming, the designers of the ad intended to influence voters in his favor but the ad nowhere directly or expressly "promotes" or "supports" him as it might have to when applied to non-major purpose groups. It does not need to. As this Court noted in *McConnell*, such heavy-handedness would be unnecessary and could backfire. 540 U.S. at 193 & n.77. "All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their [sic] throat." *Id*. at 193 n.77 (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 305 (D.D.C. 2003)(opinion of Henderson, J.)(quoting declaration of Douglas L. Bailey, founder, Bailey, Deardourff & Assoc. 1-2, App. 24, ¶3)). Fifth, nothing in the ad refers to the upcoming election, President Bush's candidacy for re-election, or his party affiliation. It simply does not need to. The audience could be counted on to know all that. In short, the district court's test would classify this prominent candidate ad, when run by a non-major purpose entity, as exempt "grassroots lobbying" and allow corporations to run it out of their general treasury funds without any disclosure.

Another ad, *Bear*, from the 1984 presidential contest makes this point even more clearly. One of the most memorable in the campaign, it sought to defuse attacks that President Reagan had unnecessarily escalated military spending. In the ad, a bear, representing the Soviet Union, roams the woods eventually to face a human. The announcer asks whether the bear is threatening and "isn't it smart to be as strong as the bear?"

ANNOUNCER:
There is a bear in the woods.

For some people the bear is easy to see. Others don't see it at all.

Some people say the bear is tame.

Others say it's vicious and dangerous.

Since no one can really be sure who's right, isn't it smart to be as strong as the bear? If there is a bear?

Bear (Reagan), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (left-click on bear photo) (streaming video) (last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/election/index.ph

p?nav_action=election&nav_subaction=overview&campaign_id=173 (left-click on bear photo; then left-click on "transcript")(transcript) (last visited Feb. 20, 2007).

This ad too displays all the "magic features" that the district court would have to require of a non-major purpose group. First, unless the district court's four-corners requirement is so vigorous that it would identify the ad's concern as human defense against attack by bears, the ad references a live issue—national defense and, in particular, the proper degree of military preparedness against the Soviet Union. Second, it does not attribute any position on these issues to President Reagan. (It does not need to.) Third, it does not even urge the viewer to contact President Reagan, let alone do anything more than that. Fourth, except possibly for the words "Prepared for Peace," within its four corners the ad does not promote, attack, support, or oppose President Reagan. Although it is unlikely, if only because of vagueness concerns, that these three words alone could deny the ad "grassroots lobbying" status if run by a non-major purpose group, if they did they could simply be dropped with little ill effect. The ad would still be powerful and its intent and effect—to influence voters to favor President Reagan—would be clear.

Prouder, Stronger, Better, known to many as President Reagan's "Morning in America" ad, was one of the most powerful television ads of any election. It still resonates with many and has, in fact, even given its name to the Reagan years. See, e.g., Ben Yagoda, *My Heart Belongs To 'Mother'*, N.Y. Times, May 14, 2006, § 4, at 14 (identifying time period as "morning-in-America Reagan years"). Its imagery of people going to work, moving into their new homes, marrying, and living under lowered inflation all effectively conveyed an upbeat image of American life. One minor deletion and possibly one minor addition, however, would

bring this memorable candidate ad under the district court's "grassroots lobbying" exemption.

ANNOUNCER:
It's morning again in America. Today more men and women will go to work than ever before in our country's history.

With interest rates at about half the record highs of 1980, nearly two thousand families today will buy new homes, more than at any time in the past four years.

This afternoon 6,500 young men and women will be married

and with inflation at less than half of what it was just four years ago, they can look forward with confidence to the future.

It's morning again in America and under the leadership of President Reagan our country is prouder and stronger and better.

Why would we ever want to return to where we were less than four short years ago?

Prouder, Stronger, Better (Reagan), at http://livingroom candidate.movingimage.us/election/index.php?nav_action= election&nav_subaction=overview&campaign_id=173 (streaming video)(last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/election/index.php?nav_action=election&nav_subaction=overview&campaign_id=173 (transcript)(left-click on "transcript")(last visited Feb. 20, 2007).

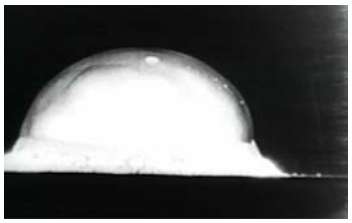
The ad clearly displays three of the district court's five "magic features." It does not attribute a position on any pending issue to President Reagan; it does not ask viewers to contact him, let alone go beyond that; and it avoids mentioning the election, President Reagan's candidacy, or his political affiliation. The phrase "under the leadership of President Reagan our country is prouder and stronger and better" may, even under the district court's four-corners approach, come uncomfortably close to promotion or support. If so, that could be easily fixed. Dropping the six words "under the leadership of President Reagan," which represent approximately three seconds of the 60-second ad, would avoid any danger of promotion. The only other question is whether the ad references a pending issue. Although it is littered with references to the standard, ever-present concerns of federal economic policy—employment, interest rates,

inflation, and homeownership—not to mention marriage and the family, the focus of much federal social policy, the district court might believe that the ad does not reference with sufficient specificity any pending or near-future issue before the executive branch. If that were the case, the fix again would be simple. A corporation wanting to fund the ad out of its general treasury funds could simply include mention of a more concrete pending issue among these more general ones. No problem here. Within the 60-day "electioneering communications" period of that election, a government shutdown was threatened, see Martin Tolchin, *White House Approval Sought On a Compromise Spending Plan*, N.Y. Times, Oct. 10, 1984, at A1, and the generousness of Social Security was a hot issue, see Francis X. Clines, *Reagan Promises No Benefit Cuts For Any Retirees*, N.Y. Times, Oct. 10, 1984, at A1. Such minor modification would have allowed a corporation to run with funds from its general treasury perhaps the most effective and certainly the most memorable candidate ad from the 1980s.

Slight revision would have allowed corporations to similarly fund the most famous example of negative candidate-sponsored advertising: the 1964 Johnson campaign's "Daisy" ad. In this ad, the Johnson campaign powerfully suggested that a Goldwater presidency would lead the country to nuclear destruction. It was so effective that the campaign paid to run it only once. News commentary during the rest of the campaign gave it sufficient life of its own. The ad begins with a little girl counting, as best she can, from one to ten while plucking petals from a daisy. When she gets almost to ten, an ominous male voice replaces hers, counting backwards in a countdown to the ignition of a nuclear bomb. President Johnson's voice, echoing a poem of W.H. Auden, then gives voters the choice: "To make a world in which all of God's children can live, or to go into the darkness."

SMALL CHILD [with flower]: One, two, three, four, five, seven, six, six, eight, nine, nine ....

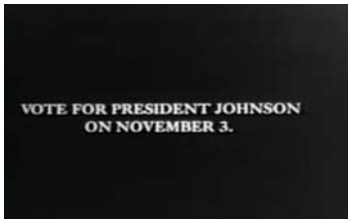
MAN: Ten, nine, eight, seven, six, five, four, three, two, one, zero.



[Sounds of exploding bomb.]

JOHNSON: These are the stakes: To make a world in which all of God's children can live, or to go into the darkness.

We must either love each other, or we must die.



ANNOUNCER: Vote for President Johnson on November 3rd. The stakes are too high for you to stay home.

Peace Little Girl (Daisy) (1964, Johnson), http://livingroom candidate.movingimage.us/style/index.php?nav_action=style

&nav_subaction=110 (streaming video) (last visited Feb. 20, 2007), http://livingroomcandidate.movingimage.us/style/index.php?nav_action=style&nav_subaction=110 (transcript) (left-click on "transcript")(last visited Feb. 20, 2007).

Two minor changes, neither of which would diminish the power of the ad, would allow a corporation to run it from general treasury funds without any disclosure if the race occurred today. First, someone other than Johnson himself would have to intone the words associated with the fourth and fifth frames. Using Johnson's own voice would make the ads a prohibited "coordinated communication." See 11 C.F.R. 109.21. Second, the words "for President Johnson" would have to be dropped from both the imagery and the voiceover. As express advocacy they would clearly satisfy the PASO factor no matter how the district court ended up construing it to avoid the vagueness concerns attending its application to non-major purpose entities. If a corporation made these two slight changes, neither of which would reduce the ad's effectiveness, the ad would possess all five of the district court's "magic features."

IV. WRTL'S SUGGESTED TEST FOR "GRASSROOTS LOBBYING" WOULD EXEMPT NEARLY ALL ELECTIONEERING COMMUNICATIONS THAT AVOID EXPRESS ADVOCACY.

WRTL has itself not formally proposed a test to identify grassroots lobbying communications. In the district court, however, it approvingly cited the Internal Revenue Service's ("IRS") definition and suggested that that approach should apply here. Mem. in Supp. of Pl.'s Summ. J. Mot. at 22-23, *Wisconsin Right to Life, Inc.* v. *FEC*, No. CV04 1260DBS RWR RJL (D.D.C. Dec. 21 2006). The IRS provides that

> [a g]rass roots lobbying communication is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof and has three required elements: [It] (A) [r]efers to specific legislation * * *, (B) [r]eflects a view on such legislation, and (C) [e]ncourages the recipient of the communication to take some action with respect to such legislation * * * .

26 C.F.R. 56.4911-2(b)(2)(i)-(ii). As WRTL noted in the district court, "grassroots lobbying" is contrasted to "political intervention," which is more heavily regulated. "Political intervention" is defined as an "exempt function," which

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. 527(e)(2). Adopting just the IRS's definition of grassroots lobbying, as WRTL's seemed to suggest below, would pose several problems.

First, it would not even fit the facts of this case. Although WRTL repeatedly argues that its ads are intended to influence public opinion on "legislation," they do not do so under the IRS's definition. All three ads take a position on filibustering of judicial nominees. Under the IRS framework, this constitutes restricted "political intervention" since it "attempt[s] to influence the selection * * * or appointment of any individual to any Federal * * * office * * * ." *Id*. The

ads, moreover, do not meet a single one of the definition's requirements for grassroots lobbying. They neither "refe[r] to specific legislation," "reflec[t] a view on such legislation," nor "encourage[e] the recipient of the communication to take some action with respect to such legislation" as the IRS defines it. 26 C.F.R. 56.4911-2(b)(2)(i)-(ii). Filibustering of nominees simply does not concern "legislation" as defined. See *id*. 56.4911-2(d)(1) (defining "legislation"). And, even if it did, WRTL's failure to include any contact information in the ads themselves would independently disqualify them. See *id*. 56.4911-2(b)(2)(iii)(B) (requiring that communication "[s]tate the address, telephone number or similar information of a legislator"). In other words, even the capacious test WRTL suggested below would offer its own ads no protection.

More importantly, the IRS test would exempt from coverage many electioneering communications that are "the functional equivalent of express advocacy," whose funding this Court has found Congress can regulate. *McConnell*, 540 U.S. at 206. Several of the ads Senator McConnell cited as protected issue advocacy in his leading brief in *McConnell*, for example, meet the IRS test. Still more troubling, the one ad this Court cited in *McConnell* as a clear example of sham issue advocacy would pass it as well with one minor emendation. In *McConnell*, this Court noted that although ads avoiding express words of advocacy "do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id*. at 193. In a footnote, it then gave a strong example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> "Who is Bill Yellowtail? He preaches family values but took a swing at his wife.

> And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order … but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

Id. at 193-94 n.78 (internal citations omitted). Even though this Court found the notion that this ad discusses mere issues "strains credulity," the ad itself would be protected as "grassroots lobbying" under the IRS's test if only a reference to specific "family values" legislation and Bill Yellowtail's phone number were added. In that case, it would meet all three parts of the IRS test. It would (1) "refe[r] to specific legislation", (2) "reflec[t] a view on such legislation," and (3) "encourage[e] the recipient of the communication to take some action with respect to such legislation." In other words, the definition WRTL itself proposed below could exempt even the most egregious ads in *McConnell* as "grassroots lobbying."

CONCLUSION

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

Respectfully submitted,

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