Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## FEDERAL ELECTION COMMISSION *v.* WISCONSIN RIGHT TO LIFE, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 06–969. Argued April 25, 2007—Decided June 25, 2007*

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), makes it a federal crime for a corporation to use its general treasury funds to pay for any "electioneering communication," 2 U. S. C. §441b(b)(2), which BCRA defines as any broadcast that refers to a candidate for federal office and is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where that candidate is running, §434(f)(3)(A). In *McConnell* v. *Federal Election Comm'n,* 540 U. S. 93, this Court upheld §203 against a First Amendment facial challenge even though the section encompassed not only campaign speech, or "express advocacy" promoting a candidate's election or defeat, but also "issue advocacy," or speech about public issues more generally, that also mentions such a candidate. The Court concluded there was no overbreadth concern to the extent the speech in question was the "functional equivalent" of express advocacy. *Id.*, at 204–205, 206.

On July 26, 2004, appellee Wisconsin Right to Life, Inc. (WRTL), began broadcasting advertisements declaring that a group of Senators was filibustering to delay and block federal judicial nominees and telling voters to contact Wisconsin Senators Feingold and Kohl to urge them to oppose the filibuster. WRTL planned to run the ads throughout August 2004 and finance them with its general treasury funds. Recognizing, however, that as of August 15, 30 days before the Wisconsin primary, the ads would be illegal "electioneering communication[s]" under BCRA §203, but believing that it nonetheless

*Together with No. 06–970, *McCain, United States Senator, et al.* v. *Wisconsin Right to Life, Inc.,* also on appeal from the same court.

had a First Amendment right to broadcast them, WRTL filed suit against the Federal Election Commission (FEC), seeking declaratory and injunctive relief and alleging that §203's prohibition was unconstitutional as applied to the three ads in question, as well as any materially similar ads WRTL might run in the future. Just before the BCRA blackout, the three-judge District Court denied a preliminary injunction, concluding that *McConnell*'s reasoning that §203 was not facially overbroad left no room for such "as-applied" challenges. WRTL did not run its ads during the blackout period, and the court subsequently dismissed the complaint. This Court vacated that judgment, holding that *McConnell* "did not purport to resolve future as-applied challenges" to §203. *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n* (*WRTL I*), 546 U. S. 410, 412. On remand, the District Court granted WRTL summary judgment, holding §203 unconstitutional as applied to the three ads. The court first found that adjudication was not barred by mootness because the controversy was capable of repetition, yet evading review. On the merits, it concluded that the ads were genuine issue ads, *not* express advocacy or its "functional equivalent" under *McConnell,* and held that no compelling interest justified BCRA's regulation of such ads.

*Held:* The judgment is affirmed.

466 F. Supp. 2d 195, affirmed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the Court has jurisdiction to decide these cases. The FEC argues that the cases are moot because the 2004 election has passed and WRTL neither asserts a continuing interest in running its ads nor identifies any reason to believe that a significant dispute over Senate filibusters of judicial nominees will occur in the foreseeable future. These cases, however, fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review. That exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again," *Spencer* v. *Kemna*, 523 U. S. 1, 17. Both circumstances are present here. First, it would be unreasonable to expect that WRTL could have obtained complete judicial review of its claims in time to air its ads during the BCRA blackout periods. Indeed, *two* BCRA blackout periods have passed during the pendency of this action. Second, there exists a reasonable expectation that the same "controversy" involving the same party will recur: WRTL has credibly claimed that it plans to run materially similar targeted ads during future blackout periods, and there is no reason to believe that the FEC will refrain from prosecuting future BCRA violations. Pp. 7–10.

THE CHIEF JUSTICE, joined by JUSTICE ALITO, concluded that BCRA §203 is unconstitutional as applied to the ads at issue in these cases. Pp. 10–29.

1. The speech at issue is not the "functional equivalent" of express campaign speech. Pp. 10–22.

(a) Appellants are wrong in arguing that WRTL has the burden of demonstrating that §203 is unconstitutional. Because §203 burdens political speech, it is subject to strict scrutiny, see, *e.g., McConnell*, *supra,* at 205, under which the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling governmental interest and is narrowly tailored to achieve that interest, see *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786. Given that *McConnell*, *supra,* at 206, already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent, the FEC's burden is not onerous insofar as these ads fit this description. Pp. 10–11.

(b) Contrary to the FEC's contention, *McConnell,* 540 U. S., at 205–206, did not establish an intent-and-effect test for determining if a particular ad is the functional equivalent of express advocacy. Indeed, *McConnell* did not adopt any test for future as-applied challenges, but simply grounded its analysis in the evidentiary record, which included two key studies that separated ads based on whether they were intended to, or had the effect of, supporting candidates for federal office. *Id.,* at 308–309. More importantly, *Buckley* v. *Valeo*, 424 U. S. 1, 14, 43–44, rejected an intent-and-effect test for distinguishing between discussions of issues and candidates, and *McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject. Pp. 11–15.

(c) Because WRTL's ads may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, they are not the functional equivalent of express advocacy, and therefore fall outside *McConnell*'s scope. To safeguard freedom of speech on public issues, the proper standard for an as-applied challenge to BCRA §203 must be objective, focusing on the communication's substance rather than on amorphous considerations of intent and effect. See *Buckley, supra*, at 43–44. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia* v. *Hicks*, 539 U. S. 113, 119. And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 547. In short, it must give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270.

In light of these considerations, a court should find that an ad is 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. WRTL's three ads are plainly not the functional equivalent of express advocacy under this test. First, their content is consistent with that of a genuine issue ad: They focus and take a position on a legislative issue and exhort the public to adopt that position and to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: They do not mention an election, candidacy, political party, or challenger; and they take no position on a candidate's character, qualifications, or fitness for office. Pp. 15–22.

2. Because WRTL's ads are not express advocacy or its functional equivalent, and because appellants identify no interest sufficiently compelling to justify burdening WRTL's speech, BCRA §203 is unconstitutional as applied to the ads. The section can be constitutionally applied only if it is narrowly tailored to further a compelling interest. *E.g., McConnell, supra*, at 205. None of the interests that might justify regulating WRTL's ads are sufficiently compelling. Although the Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption" in election campaigns, *Buckley*, 424 U. S., at 45, it has invoked this interest as a reason for upholding *contribution* limits, *id.,* at 26–27, and suggested that it might also justify limits on electioneering *expenditures* posing the same dangers as large contributions, *id.,* at 45. *McConnell* arguably applied this interest to ads that were the "functional equivalent" of express advocacy. See 540 U. S., at 204–206. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Issue ads like WRTL's are not equivalent to contributions, and the corruption interest cannot justify regulating them. A second possible compelling interest lies in addressing "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." *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 660. *McConnell* held that this interest justifies regulating the "functional equivalent" of campaign speech, 540 U. S., at 205–206. This interest cannot be extended further to apply to genuine issue ads like WRTL's, see, *e.g., id.,* at 206, n. 88, because doing so would call into question this Court's holdings that the corporate identity of a speaker does not strip corporations of all free speech rights. *WRTL I* reinforced the validity of this point by holding §203 susceptible to as-applied challenges. 546 U. S., at 411–412. Pp. 23–28.

3. These cases present no occasion to revisit *McConnell*'s holding that a corporation's express advocacy of a candidate or his opponent shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban—the question here—the Court should give the benefit of the doubt to speech, not censorship. Pp. 28–29.

JUSTICE SCALIA, joined by JUSTICE KENNEDY and JUSTICE THOMAS, agreed that the Court has jurisdiction in these cases and concurred in the Court's judgment because he would overrule that part of *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, upholding §203(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA). Pp. 4–23.

1. The pertinent case law begins with *Buckley* v. *Valeo*, 424 U. S. 1, in which the Court held, *inter alia,* that a federal limitation on campaign expenditures not made in coordination with a candidate's campaign (contained in the Federal Election Campaign Act of 1971 (FECA)) was unconstitutional, *id.*, at 39–51. In light of vagueness concerns, the Court narrowly construed the independent-expenditure provision to cover only express advocacy of the election or defeat of a clearly identified candidate for federal office by use of such magic words "as 'vote for,' 'elect,' . . . 'vote against,' 'defeat,' 'reject.' " *Id.*, at 44, and n. 52. This narrowing construction excluded so-called "issue advocacy" referring to a clearly identified candidate's position on an issue, but not expressly advocating his election or defeat. Even as narrowly construed, however, the Court struck the provision down. *Id.*, at 45–46. Despite *Buckley,* some argued that independent expenditures *by corporations* should be treated differently. A post-*Buckley* case, *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776–777, struck down, on First Amendment grounds, a state statute prohibiting corporations from spending money in connection with a referendum. The Court strayed far from these principles, however, in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, upholding state restrictions on corporations' independent expenditures in support of, or in opposition to, candidates for state office, *id.*, at 654–655. *Austin* was wrongly decided, but at least it was limited to express advocacy. *Nonexpress* advocacy was presumed to remain protected under *Buckley* and *Bellotti,* even when engaged in by corporations, until *McConnell*. *McConnell* held, *inter alia,* that the compelling governmental interest supporting restrictions on corporate expenditures for express advocacy—*i.e., Austin*'s perceived "corrosive and distorting effects of immense aggregations of [corporate] wealth," 540 U. S., at 205—also justified extending those restrictions to ads run during the BCRA blackout period "to the extent . . . [they] are *the functional equivalent of express advocacy,*" *id.*, at 206 (emphasis added).

*McConnell* upheld BCRA §203(a) against a facial challenge. Subsequently, in *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 411–412, the Court held that *McConnell* did not foreclose as-applied challenges to §203. Pp. 4–10.

2. *McConnell*'s holding concerning §203 was wrong. The answer to whether WRTL meets the standard for prevailing in an as-applied challenge requires the Court to articulate the standard. The most obvious standard is *McConnell*'s, which asks whether an ad is the "functional equivalent of express advocacy," 540 U. S., at 206. The fundamental and inescapable problem with this test, with the principal opinion's susceptible-of-no-other-reasonable-interpretation standard, and with other similar tests is that each is impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights at issue. *Buckley* itself compelled the conclusion that such tests fall short when it narrowed the statutory language there at issue to cover only advertising that used the magic words of express advocacy. 424 U. S., at 43–44. The only plausible explanation for *Buckley*'s "highly strained" reading of FECA, *McConnell*, *supra*, at 280, is that the Court there eschewed narrowing constructions that would have been more faithful to FECA's text and more effective at capturing campaign speech *because those tests were all too vague*. If *Buckley* foreclosed such vagueness in a statutory test, it also must foreclose such vagueness in an as-applied test. Yet any clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by §203 that §203 would be rendered substantially overbroad. Thus, *McConnell* (which presupposed the availability of as-applied challenges) was mistaken. Pp. 10–18.

3. *Stare decisis* would not prevent the Court from overruling *McConnell*'s §203 holding. This Court's "considered practice" is not to apply that principle "as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543, and it has not hesitated to overrule a decision offensive to the First Amendment that was decided just a few years earlier, see *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642. Pp. 19–22.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III and IV, in which ALITO, J., joined. ALITO, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.