UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	OPPOSITION TO MOTION
	)	FOR TEMPORARY
	)	RESTRAINING ORDER AND
FEDERAL ELECTION COMMISSION,	)	PRELIMINARY INJUNCTION
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN MCCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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August 31, 2006

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Plaintiff Wisconsin Right to Life, Inc. ("WRTL"), seeks a temporary restraining order ("TRO") and preliminary injunction against enforcement of a provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 91-92 (2002), even though this Court denied an almost identical request two years ago. WRTL intends to use money from its general corporate treasury to broadcast a radio advertisement (the "CCPA Ad") in Wisconsin during the 60-day period before the November election that identifies by name Wisconsin's two United States Senators, one of whom, Senator Kohl, is a candidate for re-election. BCRA prohibits corporations from using their general treasury funds to pay for such communications — called "electioneering communications" — that refer to a candidate for federal office during those periods prior to a federal election. BCRA § 203, codified at 2 U.S.C. 441b(b)(2). As explained below, WRTL cannot meet its heavy burden of demonstrating why the Court should alter the status quo and preliminarily enjoin the Federal Election Commission ("FEC" or "Commission") from enforcing BCRA § 203 as applied to WRTL's new ad. Moreover, WRTL's motion is not properly grounded in its complaint or this Court's jurisdiction on remand from the Supreme Court, and WRTL has not sought to amend its complaint and should not be allowed to do so at this late date.

If the Court reaches the merits, WRTL's motion fails to establish any of the four factors needed to justify preliminary injunctive relief. In particular, nothing has changed during the past two years that would warrant the Court reaching a different conclusion as to three of the four factors, especially WRTL's complete failure to demonstrate imminent and irreparable harm. As in 2004, WRTL has failed to demonstrate why its PAC is an inadequate vehicle for funding the proposed ad or why it would be irreparably harmed by using non-broadcast media to

communicate its message, as it has historically done during non-election periods. WRTL's eleventh-hour, second request for emergency, temporary relief should be denied.

BACKGROUND

On July 28, 2004, WRTL filed suit seeking declaratory and injunctive relief, alleging that BCRA's prohibition on the use of corporate treasury funds for electioneering communications is unconstitutional as applied to the financing of three particular broadcast advertisements. WRTL "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions ... during the period between August 15, 2004 and November 2, 2004." Wisconsin Right to Life, Inc. v. FEC, 2004 WL 3622736, at *1 (D.D.C. 2004) ("WRTL I"). WRTL's three ads show examples of people waiting or being delayed and claim that "a group of Senators" are filibustering, or "blocking qualified [judicial] nominees from a simple 'yes' or 'no' vote." Am. Ver. Complt. Exhs. A-C. The ads attribute the filibusters to "politics at work," argue that the filibusters have caused "gridlock" and created a "state of emergency" in the courts, and then urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." Id.

On August 17, 2004, this Court found that WRTL had not satisfied any of the standards for a preliminary injunction. After finding that WRTL had not established a likelihood of success on the merits, the Court held that WRTL had "not demonstrated that it will suffer irreparable harm in the absence of a preliminary injunction." WRTL I, 2004 WL 3622736, at *4. The Court also found that an injunction against the Commission's "performance of its statutory duty constitutes a substantial injury to the Commission," id., and that WRTL had "not established that the public interest would be furthered by the injunction," id. at *5. The Court later dismissed WRTL's complaint, holding, "for the reasons set forth in [the preliminary

injunction] opinion," that WRTL's as-applied challenge was "foreclosed by the Supreme Court's decision in McConnell [v. FEC, 540 U.S. 93 (2003)]." Mem. Op. (May 9, 2005).

On appeal of the final judgment, the Supreme Court held that McConnell "did not purport to resolve future as-applied challenges" to BCRA's primary definition of "electioneering communication." WRTL v. FEC, 126 S.Ct. 1016, 1018 (2006) (per curiam). The Court found it unclear whether this Court's statement that WRTL's advertisements "may fit the very type of activity McConnell found Congress had a compelling interest in regulating" was intended to be an alternative ground for the dismissal of the case, so it vacated the judgment and remanded for this Court "to consider the merits of WRTL's as-applied challenge in the first instance." WRTL, 126 S.Ct. at 1018.

Following the remand, at the Court's request the parties filed memoranda addressing the continuing justiciability of this matter. See Scheduling Order, April 17, 2006. The Commission argued that WRTL's claims about unspecified future advocacy are not ripe and should be dismissed. See FEC's Memorandum Addressing Questions Posed in the Court's April 17, 2006, Scheduling Order (May 1, 2006), at 7-13 (hereinafter "Jurisdictional Mem."). The Court also established a schedule for expedited discovery and briefing. Discovery substantially concluded in June, although the FEC and Defendant-Intervenors had to move to compel further written discovery responses because WRTL had refused to respond to discovery requests about its advocacy other than the 2004 ads attached to its complaint. See Motion to Compel Production of Documents, Requests to Admit, and Responses to Interrogatories (filed June 16, 2006). The parties filed their summary judgment briefs from mid-June to mid-August 2006, and on August 18, 2006, this Court granted defendants' motion to compel in virtually all respects. Pursuant to the Court's order, WRTL provided further discovery responses on August 28, and the parties

may file supplemental memoranda addressing the new material by September 11. Oral argument is set for September 18, 2006. WRTL filed its motion for preliminary injunctive relief one week after the defendants filed their reply briefs on the merits.

ARGUMENT

WRTL has not shown that it is entitled to the extraordinary relief it seeks. Almost three years ago, the Supreme Court upheld the constitutionality of BCRA § 203 against the claim that the electioneering communication provision on its face is either overbroad or underinclusive, and concluded that it survives strict scrutiny. McConnell, 540 U.S. at 204-209. The Commission's recent summary judgment briefs explain why the exemption WRTL seeks from BCRA § 203 is not constitutionally required, and we will not repeat those arguments in detail here. Although those arguments explain part of the reason why WRTL is not likely to succeed on the merits of its current motion, our focus in this memorandum will be on the other factors relevant to WRTL's request for emergency relief, especially WRTL's burden of showing irreparable harm. This Court need not even reach these issues, however, because WRTL's motion is not properly part of this case.

I. WRTL'S MOTION IS NOT PROPERLY BEFORE THIS COURT

WRTL's motion is not properly grounded in its complaint and threatens to alter the Court's orderly resolution of this case, which is on remand with specific instructions from the Supreme Court and must be expedited under BCRA § 403(a)(4). Although WRTL's complaint provided this Court with three particular ads that WRTL intended to broadcast, the CCPA Ad described in its current motion is nowhere mentioned in the complaint. However, "a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." Devose v. Herrington,

42 F.3d 470, 471 (8th Cir. 1994) (citation omitted) (denying preliminary injunction related to new allegations of constitutional infringement that were different from the constitutional violations described in the complaint). Accord Alabama v. United States Army Corps of Engineers, 424 F.3d 1117, 1134 (11th Cir. 2005), cert. denied, 126 S. Ct. 2862 (2006). Indeed, the Court is now preparing to rule on the parties' motions for summary judgment regarding the original three ads: after expedited but thorough discovery and full briefing, oral argument is set for September 18, 2006. WRTL resisted discovery about any of its advocacy apart from the 2004 ads that were the basis of its complaint in this case, and the defendants have had no opportunity to discover facts relevant to WRTL's instant motion.

In its decision in this case, the Supreme Court noted that WRTL filed this action "seeking a judgment declaring BCRA unconstitutional as applied to several broadcast advertisements that it intended to run during the 2004 election," and an injunction "barring the FEC from enforcing BCRA against those advertisements." WRTL, 126 S.Ct. at 1017 (emphases added). The Court described WRTL's claim as alleging that BCRA could not be "constitutionally applied to its particular communications" because they were "'grassroots lobbying advertisements.'" Id. (emphasis added).

The Supreme Court explained that it was remanding the case because of its uncertainty about whether this Court's dismissal of the case rested on an alternative rationale. The Supreme Court was uncertain whether, in addition to this Court's legal conclusion that all as-applied challenges were foreclosed by McConnell, this Court also dismissed the case because it concluded that WRTL's 2004 advertisements fit "'the very type of activity McConnell found Congress had a compelling interest in regulating.'" WRTL, 126 S.Ct. at 1018 (quoting 2004 WL 3622736, at *3). Because of this uncertainty about whether there existed a second, independent

basis for this Court's decision, the Supreme Court "remand[ed] the case for the District Court to consider the merits of WRTL's as-applied challenge in the first instance." Id. As this discussion makes clear, the remand is focused on the particular facts concerning WRTL's proposed 2004 advertisements. Indeed, the Supreme Court's opinion does not contain a word about any general as-applied challenge beyond the particular advertisements WRTL wanted to run in 2004.

WRTL has not moved to amend its complaint, and it would be too late for WRTL to try to do so now. WRTL's new facts and request for relief do not simply seek to add facts "which really are a part of the original case," Miller v. Air Line Pilots Assoc. Int'l, 2000 WL 362042 (D.D.C. March 30, 2000) (citations omitted), but are rather an attempt to transform the case from a complaint about three particular ads in 2004 to a new case about an ad WRTL intends to run in 2006 addressing a different issue and naming a different federal candidate in a different election. Despite the liberality with which Fed.R.Civ.P. 15 is to be administered, leave to amend a complaint should be denied when there is undue prejudice to the opposing parties, and permitting an amendment that would encompass WRTL's motion would severely prejudice the defendants by suddenly expanding the case to include new and different advertisements after completion of discovery limited to WRTL's 2004 advocacy and briefing on summary judgment. See generally Foman v. Davis, 371 U.S. 178, 182 (1962); Richardson v. United States, 193 F.3d 545, 548-49 (D.C. Cir. 1999); 6 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1487 (2d ed. 1990) ("Perhaps the most important factor listed by the Court [in Foman] and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading."). Because WRTL could have easily followed the normal rules of civil procedure by filing a new complaint, justice would not be served by permitting WRTL to

disregard these rules and unilaterally alter the focus of the case after discovery and briefing have been completed.[1]

Finally, WRTL has not asked for any permanent relief regarding its new ad, so it is unclear what WRTL means when it seeks "preliminary" relief in its motion: preliminary to what? Perhaps WRTL believes that its broad and amorphous request for a permanent injunction concerning all future "grass roots lobbying" would encompass the new ad, but that interpretation would allow WRTL to bring a continual stream of motions about new ads with new fact patterns as long as this case is pending before the Court. In any event, we have already explained why WRTL's claim regarding future advocacy should be dismissed as unripe. See FEC Jurisdictional Mem. at 7-13; see also infra Section III. Once that non-justiciable claim is dismissed, there is no other permanent relief sought in WRTL's complaint to which the current motion could conceivably be considered "preliminary."

For all of these reasons, the Court should deny WRTL's motion as outside the Court's jurisdiction.

[1] If WRTL had properly filed its motion as part of a new lawsuit, perhaps that action would be assigned to this panel as a "related case" under LCvR 40.5. It is not clear, however, whether the local rule on related cases overrides the statutory authority of the Chief Judge of the Court of Appeals to select two of the judges on a three-judge district court. 28 U.S.C. 2284; BCRA § 403(a)(1). In any event, the important point is that adjudicating WRTL's new claim as a separate case would eliminate the unfair prejudice the defendants now face defending themselves in the existing lawsuit while being sandbagged with new, untested allegations on the eve of a decision on the full merits of the original claims.

II. WRTL CANNOT CARRY ITS HEAVY BURDEN OF SHOWING THAT IT IS ENTITLED TO A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

A. The Requirements for a Temporary Restraining Order and Preliminary Injunction

The standard for evaluating a motion for a temporary restraining order is the same as for a preliminary injunction. Morgan Stanley DW Inc. v. Rothe, 150 F.Supp.2d 67, 72 (D.D.C. 2001); Vencor Nursing Ctrs., L.P. v. Shalala, 63 F. Supp. 2d 1, 7 (D.D.C. 1999).[2] See also National Head Start Ass'n v. Dept. of Health & Human Servs., 297 F.Supp.2d 242, 246-47 (D.D.C. 2004). The party seeking a preliminary injunction bears a heavy burden to establish that it is entitled to such relief. To prevail, it must demonstrate (1) a "substantial likelihood of success on the merits"; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). "A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004), citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).

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[2] The distinguishing features of a TRO are the plaintiff's ability to request one without notice to the adverse party and the TRO's short, ten-day duration. Since WRTL has not sought an ex parte ruling and seeks an order that would be effective for more than ten days, it appears that WRTL is really seeking a preliminary injunction. By requesting a TRO, however, WRTL made it impossible as a practical matter for the Commission to obtain even preliminary discovery to explore the purpose and context of the CCPA Ad before filing this response. Compare Christian Civic League of Maine, Inc. v. FEC, 433 F.Supp.2d 81 (D.D.C. 2006) (Commission had 14 days to respond to motion for preliminary injunction and obtained limited discovery in that time; see docket entries 4, 10, 11, & 17 in case number 1:06-cv-00614-LFO).

In this case, WRTL must shoulder a particularly heavy burden. First, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). However, WRTL is attempting to change the status quo by seeking an exemption from BCRA's requirement that corporations either finance an electioneering communication through a separate segregated fund or avoid clearly identifying a candidate in its broadcast advocacy.

Second, as we explain in our summary judgment brief, the Supreme Court recently upheld the constitutionality of BCRA § 203 on its face. See FEC's Memorandum in Support of Its Motion for Summary Judgment (July 14, 2006) ("FEC SJ Br.") 12-13. Although WRTL is challenging the constitutionality of the provision as applied to its new ad, the McConnell decision greatly strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). That presumption "'is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of … [the government] in balancing hardships.'" Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (quoting Walters, 468 U.S. at 1324; bracketed words added). In McConnell, Chief Justice Rehnquist relied on that very presumption in denying an application to vacate the stay of judgment entered by the three-judge court that had held portions of BCRA unconstitutional. McConnell, 02A989, 02A990, Slip Op. at 1 (May 23, 2003) (attached as FEC Exh. A). More recently, Chief Justice Rehnquist denied WRTL's request for an injunction pending appeal barring enforcement of the Act regarding the three political advertisements described in its complaint, explaining, "An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held that Act

facially constitutional." WRTL v. FEC, 542 U.S. 1305, 1306 (2004) (citing McConnell, 540 U.S. at 189-210).

B. This Court's Earlier Denial of a Preliminary Injunction Precludes WRTL from Relitigating Whether It Can Meet Three of the Four Requirements for the Emergency Relief It Seeks

When this Court denied WRTL's first request for a preliminary injunction, its decision resolved three of the four preliminary injunction factors again at issue here. WRTL I, 2004 WL 3622736, at *4-5. The law of the case doctrine thus makes it unnecessary for the Court to reexamine its holdings on irreparable harm, harm to the Commission, and benefit to the public interest. These holdings were not subject to Supreme Court review when this case was before that Court because the decision on review was this Court's ruling on the merits, not its denial of WRTL's request for a preliminary injunction.[3] The Supreme Court's brief decision on review of the final judgment did not disturb in any way this Court's assessment of the three preliminary injunction factors listed above. In light of the weight of these factors in the Commission's favor, the Court need not even reach the likelihood of WRTL's success on the merits of its new claim in order to deny its motion.

The law of the case doctrine dictates that the Court should not reconsider issues already decided earlier in the litigation. Morgan v. Barry, 785 F. Supp. 187, 191 (D.D.C. 1992). When a court decides a rule of law, "that decision should continue to govern the same issues in subsequent stages in the same case." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-816 (1988). Although a court's preliminary consideration of the merits in the context of a preliminary injunction does not require application of the law of the case doctrine to a

[3] WRTL failed to file a timely appeal to the Supreme Court from the order denying a preliminary injunction.

subsequent proceeding for final judgment on the merits,[4] that is not the situation presented here. In this case, application of the law of the case doctrine is appropriate because both the initial decision by this Court and the subsequent decision now sought by WRTL are in the same preliminary injunction context. Cf. This That and the Other Gift & Tobacco, Inc. v. Cobb County, Georgia, 439 F.3d 1275 (11th Cir. 2006) (legal holding in earlier opinion deciding preliminary injunction was binding in later stage of same case).

As we explain infra pp. 12-26, this Court's prior analyses of irreparable harm, harm to the Commission, and benefit to the public interest apply equally here. WRTL offers no changes in the facts or law that would warrant reconsideration of these holdings. The law of the case doctrine is designed to promote judicial efficiency and to avoid reconsideration of matters already decided during the course of a single continuing lawsuit, and those interests are served by applying the doctrine here. See Morgan v. Barry, 785 F. Supp. at 191.[5] Although the law of the case doctrine would not preclude a new review of WRTL's likelihood of success on the

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[4] See United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 198-199 (1950); Camenisch, 451 U.S. at 395 ("findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

[5] Even if WRTL had initiated a new case against the Commission and filed its motion for a preliminary injunction as part of that separate action, it would be similarly barred by the doctrine of collateral estoppel from relitigating the same three preliminary injunction factors. The doctrine of collateral estoppel dictates that once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of the issue in a suit between the same parties. Consolidated Edison v. Bodman, 449 F.3d 1254, 1257-58 (D.C. Cir. 2006); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Indeed, "findings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again.… Preclusion would seem to be particularly appropriate in a second action seeking the same injunctive relief." Hawksbill Sea Turtle v. Federal Emergency Mgmt. Agency, 126 F.3d 461, 474 (3d Cir. 1997). See also, e.g., Lyon Ford, Inc. v. Ford Mktg. Corp., 337 F. Supp. 691, 695 (E.D.N.Y. 1971) (applying collateral estoppel to deny an injunction when no new facts were shown from a prior case denying an injunction).

merits — because some of the facts and circumstances about the CCPA Ad are different from WRTL's 2004 advertisements — the outcome of that review would not change the result. Given the lopsided weight in the Commission's favor of the factors that have already been decided, the Court can rely upon its prior decision as law of the case to deny WRTL's second request for a preliminary injunction.

C. WRTL Fails To Demonstrate Irreparable Injury

WRTL fails to meet its burden of demonstrating that it will suffer irreparable harm in the absence of a temporary restraining order or preliminary injunction. To show irreparable injury, "[a] litigant must do more than merely allege the violation of First Amendment rights." Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987). See also NTEU v. United States, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991). It must also "show that [t]he injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal citation and quotation marks omitted). This harm "must be both certain and great," and "actual and not theoretical." Id.

Moreover, if the requested relief "would alter, not preserve, the status quo … [a plaintiff] must meet a higher standard than [if] the injunction [plaintiff] sought were merely prohibitory." Veitch v. Danzig, 135 F.Supp.2d 32, 35 (D.D.C. 2001). WRTL seeks to alter the relative position of the parties by preventing the Commission from enforcing a statutory provision that the Supreme Court has upheld on its face. See McConnell, 02A989, 02A990, Slip Op. at 1 (May 23, 2003) (FEC Exh. A); Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301 (1993) (Rehnquist, J., in chambers) (refusing to enjoin enforcement of the Cable Television Consumer Protection and Competition Act of 1992, despite First Amendment claim: "By seeking an

injunction, applicants request that I issue an order altering the legal status quo") (emphasis in original).

Because WRTL has made "no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." Hicks v. Bush, 397 F.Supp.2d 36, 40 (D.D.C. 2005) (citing CityFed Financial Corp., 58 F.3d at 747); see also Wisconsin Gas, 758 F.2d at 674 ("analysis of [irreparable harm] disposes of these motions").

1. This Court Has Already Held That the Circumstances WRTL Describes Do Not Demonstrate Irreparable Harm

In its opinion of August 17, 2004, the Court explained (2004 WL 3622736, at *4):

> [T]he actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues. At least for purposes of a preliminary injunction, the present showing appears to be that plaintiff is not precluded from forwarding its message, or even from exposing the public to the particular advertisements at issue. As we understand it, the BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs). [FN1] In McConnell, the Supreme Court noted that though "corporations ... may not use their general treasury funds to finance electioneering communications, ... they remain free to organize and administer segregated funds, or PACs, for that purpose." Id.[, 540 U.S. at 204]. The Court went on to reason that "'the PAC option allows corporate political participation without the temptation to use corporate funds for political influence....'" Id. (quoting Federal Election Commission v. Beaumont, 539 U.S. 146 (2003)).
>
> > FN1. WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper or magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using electronic communications, such as e-mailing and internet posting; and placing telephone calls.

These conclusions are as true today as they were in 2004, and WRTL has not even suggested any reason for reconsidering them. For this reason alone, WRTL's motion should be denied.

a. The PAC Option. In McConnell, the Supreme Court explained, "Because corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view … [BCRA § 203] as a 'complete ban' on expression rather than a regulation." McConnell, 540 U.S. at 204 (quoting Beaumont, 539 U.S. at 162, and Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658 (1990)). "'The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.'" Id. (quoting Beaumont, 539 U.S. at 163). The Court concluded that the compelling governmental interests that support requiring corporations to finance express advocacy communications from a PAC apply equally to their financing of electioneering communications. Id. at 206. WRTL thus bears the extraordinary burden of showing that it would suffer irreparable harm by employing an option identified by the Supreme Court as proper for this very situation.

As we explain in our summary judgment brief (SJ Br. 21-24) regarding WRTL in particular, the PAC option remains a viable alternative. The corporation has previously been able to raise approximately $150,000 for its PAC in one election cycle (FEC Fact ¶ 112), although in recent years it appears to have abandoned serious fundraising for its PAC from its 52,000 members (id. ¶¶ 111-17). Indeed, in her third affidavit filed with WRTL's current motion, Executive Director Barbara Lyons admits (¶ 42) that "WRTL has devoted all of its fundraising in 2006 to raising funds for its general treasury." That choice is WRTL's to make, but it squarely places the cause for the amount of money in WRTL's PAC on WRTL, not BCRA. Moreover, unlike the situation in 2004 regarding WRTL's three anti-filibuster ads and its proposed advertising budget of approximately $100,000 during the electioneering communication period (Fact ¶ 122), WRTL currently plans to spend only $11,150 to broadcast

the CCPA Ad (WRTL Ex. E), and Lyons alleges (¶ 42) that WRTL's PAC currently has $5,500. That small shortfall could be made up by only a few donors who are members of WRTL if WRTL chose to solicit contributions to its PAC. See Christian Civic League of Maine, Inc. v. FEC, 433 F.Supp.2d 81, 89 (D.D.C. 2006) (finding no irreparable harm from denial of preliminary injunction because, inter alia, plaintiff could "enroll its individual donor in the political action committee and have him or her direct the donation through that committee rather than into its general corporate funds"). WRTL is making a special effort to raise funds for the CCPA Ad by sending a fundraising email that will go at least in part to non-members (Lyons Aff. ¶¶ 25, 42 & Exh. F), but WRTL does not even assert that it would be unable, if it tried, to raise $11,000 for its PAC from its 52,000 members.

WRTL also complains (Lyons Aff. ¶ 43) that the PAC option is burdensome because it "would compel WRTL to file a PAC report stating that the expenditure for the CCPA Ad was either for or against the reelection of Sen. Kohl," but that is incorrect. It is true that when political committees report independent expenditures (which include express advocacy) they must disclose the name of the federal candidate "supported or opposed by [the] expenditure." See FEC Exh. B. However, when political committees report their disbursements — which include ads falling within the definition of "electioneering communication" — they need not disclose whether a named federal candidate is supported or opposed. See FEC Exh. C.[6] And if WRTL truly objects to any "political" connotations associated with the mandatory disclaimer in electioneering communications, it is free to say anything it wants in its ads to clarify its position.

[6] When persons that are not political committees report electioneering communications, the applicable regulation and form only require that the names of "[a]ll clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates" be disclosed. 11 C.F.R. 104.20(c)(5); see FEC Exh. D (FEC Form 9).

See FEC v. Public Citizen, 268 F.3d 1283, 1290 n.10 (11th Cir. 2001). Finally, WRTL's new objection to the statutory disclosure requirements is at odds with paragraph 35 of its own Amended Verified Complaint, which states:

> 35. WRTL intends to comply with all record keeping and reporting requirements for its electioneering communications as set out in the Federal Election Campaign Act ("FECA") and FEC regulations, 2 U.S.C. § 434(f); 11 C.F.R. § 104.20, providing accurate disclosure information as to the source and disbursement of funds at the levels at which Congress asserted a disclosure interest.

b. Non-broadcast Media. As this Court noted in WRTL I regarding the corporation's anti-filibuster ads, "WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message … during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media." 2004 WL 3622736, at *3. The same pattern exists regarding WRTL's current publicity campaign, thus undermining WRTL's claim that it will suffer irreparable First Amendment harm if it cannot use its corporate treasury funds to pay for radio advertising in the two months before the general election. Indeed, WRTL has been urging support of this legislation in other media for at least one and a half years, according to the documents WRTL has provided to the Court. For example, WRTL sent out an electronic "ALERT" on February 17, 2005, urging people to contact Senator Kohl to encourage him to support the Child Custody Protection Act (WRTL Ex. C at 1-2). At approximately the same time, in its Winter 2005 edition of its newsletter "Life Without Limits," WRTL identified the CCPA as a legislative priority and urged readers to contact Senators Kohl and Feingold in support (WRTL Ex. C at 22). The Spring 2005 edition of the same newsletter identified the CCPA as a "key right-to-life proposal[] that [is] likely to be acted upon in the 109th Congress" (id. at 19). According to a later WRTL press release of July 6, 2006 (id. at 3-5), the CCPA was one of the two "most important pro-life votes thus far in the 2005-06 congressional session" and

a vote on it "could occur any time after July 10." WRTL published additional "Urgent Alert[s]" in July and August 2006, exhorting people to contact Senator Kohl to encourage him to vote for the CCPA (id. at 6-10) and, after his favorable vote, to encourage him to help move the legislation forward (id. at 11-14). In sum, Barbara Lyons characterizes (¶ 20) these documents as "materials that WRTL has published in support of the Act's passage," but WRTL does not present any evidence that it ever even considered running radio ads about this legislation — until the statutory electioneering communication period began.[7]

2. WRTL Would Not Be Irreparably Harmed by Omitting Senator Kohl's Name from the CCPA Ad

When the Supreme Court upheld BCRA § 203, it found that the constitutional inquiry did not turn on the "precise percentage of [past] issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose." McConnell, 540 U.S. at 206. The Court stated that "the vast majority of ads" run during the 30- and 60-day intervals before federal primary and general elections "clearly had such a purpose." Id. The Court found it decisive, however, that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." Id.

As we explain in our summary judgment brief (SJ Br. 24-25), there are many ways for WRTL to encourage people to contact their Senators without clearly identifying them in the text

[7] The "Action Request" from the National Right to Life Committee that supposedly sparked WRTL's desire to run radio ads lists five "steps you can take to help get strong parental notification legislation" enacted (WRTL Ex. B at 4), but none of those steps includes the use of broadcast media. Presumably in response to the same Action Request, for example, Arkansas Right to Life has placed an "Action Alert" on its website. See http://www.artl.org/action_alert.html.

of the broadcast ad itself. These include directing the audience to the Senate's own extensive website (www.senate.gov), whose home page's upper right corner has a search box stating "Find Your Senators"; urging the audience to "call the Senate at 202-224-3121 and tell them to send the CCPA to conference"; or directing the audience to WRTL's own website "for more information about how to make your voice heard in Washington." Indeed, WRTL's own written and electronic communications about the CCPA have included references to its own website with information about how to contact Senator Kohl. See WRTL Ex. C at 2. WRTL's newsletter, "Life Without Limits," has also directed readers to the "Legislation Information Center" of its website, which people can use to "find out who your House member is and for contact information." Id. at 19; see also id. at 22 (website information about state senators and assembly representatives). In any event, after McConnell the relevant question is not whether it may sometimes be useful to clearly identify a targeted office holder in a lobbying ad, but whether other options are so ineffective as to be unconstitutionally and irreparably burdensome.

3. A TRO or Preliminary Injunction Would Not Redress Any Irreparable Harm to WRTL

The nature of WRTL's alleged irreparable harm is not entirely clear. In its brief at page 7, WRTL appears to argue that without emergency relief it will be deprived of a "timely moment to speak and petition." See also WRTL Br. 11 ("if WRTL … loses forever this unique opportunity for grass roots lobbying"). But the relief it seeks is to enjoin the FEC from enforcing the electioneering communication provision, which has no direct impact on WRTL's ability to speak. Never in its history has the Commission tried to enforce a prior restraint on anyone's speech, and WRTL alleges nothing to the contrary. WRTL's motion appears, then, to be based upon fear that the Commission might begin an enforcement proceeding against WRTL if it should finance the CCPA Ad in violation of BCRA § 203. For the reasons discussed below,

however, the mere institution of an administrative enforcement proceeding is simply not irreparable harm. Moreover, if WRTL is alleging a First Amendment chill that will discourage it from speaking unless this Court can grant it permanent immunity for its corporate spending during the next two months regardless of the outcome of the case on the merits, preliminary injunctions do not provide such permanent relief.

a. The Institution of An Administrative Enforcement Proceeding Is Not Irreparable Harm

Any burden associated with responding to a possible future FEC enforcement proceeding cannot constitute irreparable harm. As the Supreme Court has explained:

> [The plaintiff] argues that the expense and disruption of defending itself in protracted adjudicatory proceedings constitutes irreparable harm. As indicated above, we do not doubt that the burden of defending this proceeding will be substantial. But "the expense and annoyance of litigation is 'part of the social burden of living under government.'" Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938). As we recently reiterated: "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980). See also Sears Roebuck & Co. v. NLRB, 473 F.2d 91, 93 (D.C. Cir. 1972).

WRTL's motion (see "Irreparable Harm" section at 10-11) says nothing at all about any special way in which it would be harmed if the Commission were to open an investigative proceeding, and application of the cases cited above establishes that there is no irreparable harm for WRTL associated with such a proceeding.[8] Indeed, Congress carefully designed the Act's

[8] The Lyons Affidavit (¶ 40; emphasis added) conclusorily asserts, "If WRTL is not able to do its grass roots lobbying now, in the most effective way possible, it will be irreparably harmed by the loss of this unique opportunity." But Ms. Lyons makes absolutely no attempt to explain how the prospect of responding to an administrative complaint filed with the Commission makes WRTL unable to broadcast its advertisement.

enforcement procedures "to ensure fairness … to respondents …." See Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996). As Congress presumably was aware, under the Act's elaborate enforcement procedures — which include multiple opportunities for a respondent to file briefs and permit only a court to impose a remedy on a respondent unwilling to agree to one — "complaints filed shortly before elections … might not be investigated and prosecuted until after the event." Id. (recounting statutory enforcement procedures at 558-559).[9] Accordingly, the likelihood that WRTL would suffer anything beyond the conducting of an investigative proceeding during the life of a TRO or preliminary injunction is remote. Even if an administrative proceeding during that time then concluded with the institution of an enforcement suit against WRTL, it would then have a full opportunity to present its constitutional argument de novo to a federal court before it could be subject to any penalties for its conduct. See 2 U.S.C. 437g(a)(4)-(6). Thus, the mere possibility of administrative proceedings does not represent irreparable harm that can properly be the subject of preliminary injunctive relief.

b. A TRO or Preliminary Injunction Temporarily Barring Enforcement of BCRA Would Not Permanently Immunize Unlawful Actions Taken During the Pendency of the Preliminary Relief

At its core, WRTL's allegation of harm is simply that it is afraid to finance its radio ad with corporate funds because it fears being found liable for violating BCRA. But that "[s]elf-censorship" (WRTL Br. 11) is not genuinely tied to the burdens of the Commission's enforcement procedures that WRTL asks this Court to enjoin (see section (a) above), but to fear

[9] The Commission's enforcement procedures are subject to a strong confidentiality provision, 2 U.S.C. 437g(a)(12), so the Commission cannot comment publicly on whether it has a received an administrative complaint. According to WRTL's own motion, however, WRTL's plans to run the CCPA Ad were not publicly known until the instant motion was filed last Friday, August 25, 2006.

of final adjudicated liability. The temporary emergency relief WRTL seeks here, however, provides no real protection against that eventuality, and it would therefore not redress the subjective fear WRTL alleges.

Even if this Court were to enter the TRO or preliminary injunction sought by WRTL, if in subsequent proceedings BCRA § 203 were found by this Court or the Supreme Court to be constitutional as applied to WRTL's ad — or if the preliminary injunction itself were reversed on appeal — WRTL could be subject to a civil enforcement action by the Commission under the retroactivity doctrine. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 532 (1991); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97-98 (1993). Under that doctrine, if upon further review a court determines that a legislative enactment was in fact constitutional, it is applied as if it was always in effect. "[A]n opinion announcing a rule of federal law ... 'appl[ies] retroactively to the litigants then before the Court.' " Harper, 509 U.S. at 97-98 (quoting Beam, 501 U.S. at 539 (opinion of Souter, J.)).

Moreover, "when th[e] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Harper, 509 U.S. at 97. As Justice Scalia has put it, the decision of an Article III court announces the law "as though [it] were 'finding' it — discerning what the law is, rather than decreeing what it is … changed to, or what it will tomorrow be." Beam, 501 U.S. at 549 (Scalia, J., joined by Marshall, J., and Blackmun, J., concurring) (emphasis omitted). Thus, in this case, if WRTL's constitutional challenge ultimately fails on the merits, entry of a TRO or preliminary injunction would not remove the prospect of a civil

enforcement action by the Commission that WRTL alleges will deter it from using corporate funds to pay for its broadcast advertisements.

More specifically, because a TRO or preliminary injunction is by its very nature a temporary remedy meant to preserve the status quo, it does not create a permanent or appeal-proof blanket of immunity for actions taken during the period in which it is in effect. "Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution. More fundamentally, federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." Edgar v. MITE Corp., 457 U.S. 624, 648-49 (1982) (Stevens, J. concurring).[10] See also Suster v. Marshall, 149 F.3d 523, 527 (6th Cir. 1998) ("If this Court were to determine that the district court erred in issuing the preliminary injunction, then the legal interests and positions of Plaintiffs … would be compromised as they have received no assurances that grievances will not be pursued") (citing Justice Stevens' concurrence in MITE); Donaldson v. United States Dep't of Labor, 930 F.2d 339, 346 (4th Cir. 1991) (parties' action during the period of the preliminary injunction "was taken under the manifest legal and practical risk that their underlying claim might ultimately fail on the merits, thereby exposing them to whatever remedy, other than the preventive one they had forestalled, might then be available") (footnote omitted).[11]

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[10] Although Justice Stevens' concurrence was not joined by any other Justice, only Justices Marshall and Brennan, in dissent, expressed the view that the "injunction would have barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during [the] period" the preliminary injunction was in effect. Id. at 656.

[11] In addition, a preliminary injunction against enforcement by the Commission in this case would do nothing to prevent the Attorney General of the United States from exercising his independent authority to bring a criminal prosecution for knowing and willful violations of the Act. United States v. Int'l Union of Operating Eng'rs, Local 701, 638 F.2d 1161, 1163-68 (9th Cir. 1979); United States v. Tonry, 433 F.Supp. 620, 622 (E.D. La. 1977); see 2 U.S.C. 437g(d)

4. The Precedent that WRTL Relies Upon in Support of Its Claim of Irreparable Harm Is Inapposite

WRTL devotes a little more than a page of its brief (at 10-11) to the central question of irreparable harm, and it relies upon cases that do not support its position. First, the instant case is entirely different from Elrod v. Burns, 427 U.S. 347 (1976). In that case the Supreme Court held that employee dismissal based on political party patronage was an unconstitutional infringement on employees' First Amendment Rights. Id. at 372. But that holding rested on the specific finding that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." Id. at 373. Here, however, WRTL has not alleged any governmental action against it of any kind, let alone the kind of imminent or actual threats that were present in Elrod. The D.C. Circuit has clearly explained that Elrod did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or in fact being impaired. NTEU, 927 F.2d at 1254-55; Wagner, 836 F.2d at 576-77 n.76. See also Christian Knights of the Ku Klux Klan Invisible Empire v. District of Columbia, 919 F.2d 148, 149-150 (D.C. Cir. 1990) (rejecting preliminary injunction sought by Ku Klux Klan to require local government to issue a parade permit for a planned march longer than the one for which it had received a permit, finding Elrod not controlling on irreparable harm because the shorter parade allowed in the permit was

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(criminal penalties for violating FECA); 2 U.S.C 437g(b)(1) ("The Commission shall have exclusive jurisdiction with respect to civil enforcement [of the Act.]") (emphasis added). Because WRTL has only sought a preliminary injunction restraining the Commission, and the Attorney General is not even a party before this Court, the injunction that WRTL seeks would be ineffective in preventing law enforcement proceedings against WRTL even during the limited time a preliminary injunction would be in effect.

not a total denial of First Amendment rights); WRTL I, 2004 WL 3622736, at *4 (rejecting WRTL's reliance on Elrod).[12]

WRTL's reliance upon Virginia v. American Bookseller's Ass'n Inc., 484 U.S. 383, 393 (1988), is also meritless, because the quotation upon which it relies was part of the Court's discussion of standing, not irreparable harm in the context of a request for a TRO or preliminary injunction. That case involved a facial challenge to a statute, and the Supreme Court found that if the plaintiffs' "interpretation of the statute [were] correct, [they would] have to take significant and costly compliance measures or risk criminal prosecution." Id. at 392. The Court found that kind of alleged infringement was sufficient to allege an injury in fact under Article III, but the case had nothing to do with the showing of irreparable harm necessary to obtain a preliminary injunction.[13]

D. This Court Has Already Held That The Relief WRTL Requests Would Harm The Commission and Not Be in the Public Interest

In WRTL I, this Court found that WRTL could not meet its burden on the third and fourth elements of the preliminary injunction test (2004 WL 3622726, at *4-5), and nothing has changed in the past two years to undermine the binding effect of that ruling. It is still the case

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[12] See also, e.g., Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir. 1989) ("assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits"); Time Warner Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 924 (2d Cir. 1997) ("[It is often] more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights"); Piscottano v. Murphy, 317 F.Supp.2d 97, 102 (D. Conn. 2004).

[13] WRTL also relies (Br. 10-11) upon Elam Construction, Inc. v. Regional Transp. Dist., 129 F.3d 1343, 1347 (10th Cir. 1997), but the legal provision at issue in that case barred a government transportation district from entering into contracts with persons who had donated more than $100 to certain campaigns. The plaintiffs' alleged harm, therefore, was not simply a generalized fear that law enforcement proceedings might someday be started against them.

that McConnell upheld BCRA § 203 on its face, that "an injunction against the performance of the [Commission's] statutory duty constitutes a substantial injury to the Commission" (id. at *4), and that the "Supreme Court has already determined that the provisions of the BCRA serve compelling government interests" (id. at *5, citing McConnell, 540 U.S. at 204-06).

Contrary to WRTL's argument (at 12), the Supreme Court's decision in WRTL does not alter the presumption that the electioneering communication provision is constitutional as applied to WRTL's newest ad. That decision explained that McConnell did not purport to resolve all future as-applied challenges to BCRA's primary definition of "electioneering communication," but it did not suggest one way or another whether any particular as-applied challenge might be successful, or suggest that as-applied challenges involving purported lobbying ads were more or less likely to succeed than challenges involving any other kind of ads. The Supreme Court remanded the case because it found it unclear whether the statement that WRTL's original advertisements may have been the very type of activity that McConnell found to be properly regulated was intended to be an alternative ground for the dismissal of the case, so it directed this Court "to consider the merits of WRTL's as-applied challenge in the first instance." WRTL, 126 S.Ct. at 1018 (emphasis added). Nothing in that brief decision addressed or undermined the reasoning in McConnell, 540 U.S. at 206, or lessened the presumption that the Commission and the public would be harmed if BCRA § 203 cannot be enforced.

Indeed, when the three-judge court in Christian Civic League denied a preliminary injunction against enforcing the "electioneering communication" provision to another group represented by the same counsel in this case, the court did not suggest that the Supreme Court's decision in WRTL had undermined this Court's holding on the third and fourth elements of the preliminary injunction standard. Rather, that court, ruling just a few months ago, relied upon and

quoted extensively from this Court's August 2004 decision when it held that an injunction would cause substantial injury to the Commission and would not further the public interest. Christian Civic League, 433 F.Supp.2d at 90.

As explained supra pp. 9-10, the presumption of constitutionality that attaches to every Act of Congress is not only considered when evaluating the success on the merits factor, but is an equity to be considered in the Commission's favor when balancing hardships to the parties and when considering the public interest. Chief Justice Rehnquist applied these same principles to the provisions of BCRA at issue here when he denied a motion to enjoin enforcement of these provisions pending a decision by the Supreme Court in McConnell, and when he denied an injunction pending appeal in this case. See WRTL, 542 U.S. at 1305-06. Even though the three-judge district court in McConnell had already entered judgment finding these provisions unconstitutional in part, Chief Justice Rehnquist concluded:

> Applicants have filed an application to vacate the stay entered by the District Court. After consulting with other members of the Court, I shall deny the application to vacate the stay entered by the District Court. An act of Congress is presumed to be constitutional, see Bowen v. Kendrick, 483 U.S. 1304 (1987), and the Bipartisan Campaign Reform Act should remain in effect until the disposition of this case by the Supreme Court.

McConnell, 02A989, 02A990, Slip Op. at 1 (FEC Exh. A). Accordingly, both the public and the Commission have an overriding interest in having the statute enforced as it was written by Congress, and WRTL cannot justify a preliminary injunction that would harm that interest.

E. WRTL Has Failed to Show That It Is Substantially Likely to Succeed on the Merits

WRTL has failed to show that it will be any more likely to succeed on the merits of its new claim than it was when it sought a preliminary injunction regarding its 2004 ads.[14] As we

[14] Also, as we explain supra pp. 4-7, because no pleading in this case seeks any permanent

explain in our summary judgment briefs, McConnell envisioned that BCRA could constitutionally be applied to what WRTL calls "grass roots lobbying" ads, and the Court stressed that the PAC and alternative wording options it described were to be used even for "genuine issue ads." See FEC SJ Br. 11-16; FEC's Reply in Support of Its Motion for Summary Judgment (Aug. 18, 2006) ("FEC SJ Reply Br.") 4-8. Moreover, WRTL still has supplied no objective standard for a constitutional exemption that would not undermine BCRA's bright-line rule. See FEC SJ Br. 32-38; SJ Reply Br. 10-13. Factually, WRTL's new ad would likely have electoral effects if run during the electioneering communication period, and WRTL has failed to demonstrate why it is likely that BCRA § 203 cannot constitutionally be applied to this ad.

1. McConnell Envisioned That the Communication Options It Described Would Be Constitutionally Adequate for the Kind of Advertisements WRTL Calls "Grass Roots Lobbying," and the Exemption WRTL Seeks Would Subvert BCRA's Bright-Line Rule

As we have explained (FEC SJ Br. 11-13; SJ Reply Br. 4-8), McConnell clearly recognized that some "genuine issue ads" would be regulated by BCRA § 203, but the Court explained that "in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. This statement would have no meaning if all "genuine issue ads" were entitled to a constitutional exemption, as WRTL suggests. Indeed, the record in McConnell was replete with advertisements that purported merely to lobby about an issue rather than advocate an electoral result. See, e.g., McConnell v. FEC, 251 F.Supp.2d 176, 574-79 (D.D.C. 2003) (Kollar-Kotelly, J.). Nevertheless, the Court

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relief regarding the CCPA Ad, there really are no "merits" properly before the Court on which WRTL might show that it will succeed.

upheld BCRA § 203 and recognized that it imposes only a modest burden on speakers who wish to broadcast advertisements to discuss issues of public concern but do not intend to influence federal elections, including ads with the kind of mixed messages that WRTL describes as "grass roots lobbying."

The Commission has explained (SJ Br. 16-18) that the Constitution requires no general grass roots lobbying exemption from BCRA § 203. McConnell emphasized that it was upholding the electioneering communication provision, not because electoral advocacy is entitled to less protection than discussion of policy or legislation, but because of the compelling interest in preserving the integrity of the electoral process. See 540 U.S. at 205 (citation omitted). Any restrictions that BCRA imposes on the financing of advertisements addressing issues are simply the incidental byproduct of Congress's efforts to prevent corporate treasury funds from being used to influence federal candidate elections. Thus, as we have explained (SJ Br. 18-21; SJ Reply Br. 8-10), WRTL cannot shield its electioneering communications from regulation simply by including a "lobbying" message in them.

In light of McConnell's holding that corporations have the option under BCRA of publicizing their views on issues either without "any specific reference to federal candidates," or by "paying for the ad from a segregated fund," 540 U.S. at 206, WRTL's as-applied challenge cannot succeed without showing that these options are unconstitutional as applied to its ads. It must offer persuasive evidence as to the particular burdens, if any, that the statutory options would place on WRTL. See FEC SJ Br. 21-26; SJ Reply Br. 4-8. As we have explained supra pp. 13-18, however, WRTL has not done so with regard to the new CCPA Ad. Indeed, WRTL admits that it has voluntarily chosen to cease even trying to raise funds for its PAC (Lyons Aff.

¶ 42), and it offers nothing beyond conclusory assertions (id. ¶ 45) to support its claim that it needs to identify Senator Kohl in its ad.

Finally, as we have explained (SJ Br. 32-38; SJ Reply Br. 10-13), recognition of the ill-defined constitutional exception that WRTL advocates would substantially undermine Congress's effort to develop an objective bright-line rule for identifying the election-related advertisements that may not be financed with corporate and union treasury funds. "A bright-line prophylactic rule may be the best way…, by offering clear guidance and avoiding subjectivity, to protect speech itself." Hill v. Colorado, 530 U.S. 703, 729 (2000). BCRA §§ 201 & 203 were designed to give speakers clear guidance and thus avoid the uncertainty that could cause potentially unconstitutional chilling, a quality that was critical to the Court's upholding of the restriction against the First Amendment challenge. See McConnell, 540 U.S. at 194. However, plaintiff's approach would reintroduce the indeterminacy that Congress and the Supreme Court have sought to dispel. WRTL argues (Br. 11) that its proposed CCPA Ad is "not express advocacy nor its functional equivalent" and points (id. 9-10) to several fact-specific aspects of its ad, but fails to explain whether it views all of these factors as necessary, or how or whether the factors should be weighed against each other. WRTL's approach would thus engender a stream of complex and fact-bound judicial inquiries centered on analysis of the meaning and intent of the content of specific ads. This would multiply litigation, blur the bright lines drawn by Congress, and markedly subvert Congress's compelling interest in avoiding "the vagueness concerns that drove [the Court's] analysis in Buckley [v. Valeo, 424 U.S. 1 (1976)]." McConnell, 540 U.S. at 194.

2. WRTL's New Advertisement Is An Election-Related Communication

Although the record available to the Commission in responding to WRTL's motion is limited, it suggests that WRTL's new candidate-specific, anti-abortion ad would likely have electoral effects if run in the two months before election day. The CCPA Ad does not simply urge listeners to ask Senator Kohl to support the Child Custody Protection Act. Instead, it frames the issue aggressively, telling "parents" to "[l]isten up" because "your daughter can be taken across state lines for a major surgical procedure without your knowledge or consent." It then praises Senator Kohl for his prior action: "Fortunately, Senator Kohl voted for the rights of parents." The ad then urges listeners to "call Senators Kohl and Feingold at 202-224-3121 and urge them to stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions." On its face, the ad script expresses agreement with Senator Kohl's vote on the CCPA, and WRTL's executive director described it as being "favorable" to Kohl in an August 25 press release about this motion. See "Wisconsin Right to Life: Files Request with Federal Court to Allow Radio Ad Barred by McCain-Feingold," available at www.wispolitics.com/index.iml?Article=70111 (visited Aug. 30, 2006).

Indeed, the CCPA Ad follows the classic "call and tell" formula that McConnell found was a hallmark of the ads it held Congress could constitutionally regulate. See 540 U.S. at 126-27. In particular, by explicitly describing Senator Kohl's past vote as "[f]ortunate[]," it might increase his favorability among certain voters. Although the specific effects of the ad might be complex and varied, it could have the following kinds of influence: (1) those without strong views on abortion might simply come away with a favorable impression of Senator Kohl;

(2) pro-life voters might soften their opposition to him;[15] and (3) pro-choice voters might be less motivated to vote for him. Depending upon whether these categories of viewers believe Senator Kohl is doing anything to hold up further action on the bill, the ad's influence could be positive or negative for that reason as well.[16] See Lyons Aff. ¶¶ 36-37.

In McConnell, the Court explained that "[l]ittle difference existed … between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-27. The CCPA Ad follows this pattern: It praises Senator Kohl's record on a particular issue as "fortunate[]" before exhorting listeners to call him and tell him to support that issue further. In support of its "Jane Doe" finding, the Supreme Court cited factual findings made by all three district court judges as to the centrality of the "call and tell" statements in recent election-related ads. See McConnell, 540 U.S. at 127 n.17, citing, inter alia, 251 F.Supp.2d at 304 (Henderson, J.) (Chamber of Commerce and AFL-CIO agreed that the ultimate way to "tell" an elected official to do something is by voting); at 534 (Kollar-Kotelly, J.) (political consultant Raymond Strother testified that the public does not differentiate between ads whose only difference is whether they end with a request to "vote" against a candidate or one to "tell" the candidate to do something); at 876-79 (Leon, J.) (pre-election broadcast ads asking

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[15] Senator Kohl has a generally pro-choice voting record. See http://www.ontheissues.org/Social/Herbert_Kohl_Abortion.htm (describing six recent votes). The organization NARAL Pro-Choice America has given Kohl a "Pro-Choice Score: 75%." See http://www.prochoiceamerica.org/choice-action-center/in-congress/congressional-record-on-choice/herbkohl.html.

[16] WRTL's past opposition to Senator Kohl, see WRTL Br. 5, is not dispositive. Although the subjective intent of a corporate advertiser, as well as its past support of or opposition to a candidate named in an ad, may be relevant in an as-applied challenge, an advertisement like the CCPA Ad is sufficiently election-related to be constitutionally regulable under BCRA § 203 regardless of those factors. In any event, WRTL is clearly not seeking a constitutional exemption applicable only when it runs an ad in favor of a candidate it has previously opposed.

people to call and tell candidates something are generally designed to, and do, influence elections).

Recently, another three-judge court found that a similar ad was "functionally equivalent to the sham issue advertisements identified in McConnell." Christian Civic League, 433 F.Supp.2d at 88. In that case, the court concluded that a proposed pre-election radio ad that "characterize[d] Senator Snowe's past stance on the Marriage Protection Amendment as "[u]nfortunate[ ]" constituted "the sort of veiled attack that the Supreme Court has warned may improperly influence an election." Id. at 89. Even though Senator Snowe was unopposed in her upcoming primary election, the court explained that "the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection." Id. WRTL's CCPA Ad would essentially change the word "[u]nfortunately" to "[f]ortunately" before asking listeners to contact a named Senate candidate and urge legislative action. Instead of communicating a negative message, it communicates a positive one, but its electoral influence is likely to be equivalent.

As we have explained (SJ Br. 27-28), both this Court and the Supreme Court have recognized that the overall electoral context in which communications are made can be relevant in evaluating the validity of BCRA's financing restrictions, and pre-election ads asking voters to contact candidates about policy decisions can play a role in electoral choices. See also SJ Br. 9-10; FEC Facts ¶¶ 93-97. The record in this case amply demonstrates that abortion-related issues may play a significant role in a United States Senate campaign in Wisconsin. Indeed, abortion is an issue in Senator Kohl's race. Two of four radio ads posted on the campaign

website of Kohl's Republican opponent, Robert Lorge, tout Lorge's position as "100% pro-life with no exceptions, no compromises, and no apologies." See Lorge Radio ads, available at http://www.law2win.com/LorgeTrack2.wma, http://www.law2win.com/LorgeTrack3.wma. In a third radio ad posted on the site, Lorge tells listeners that he is the only candidate qualified to replace Kohl on the Judiciary Committee "so that we can get pro-life, pro-family federal judges appointed for a change." Id., available at http://www.law2win.com/LorgeTrack4.wma. Lorge has been endorsed by at least one other pro-life group. See Lorge for Senate, http://www.lorgeforsenate.com (visited Aug. 29, 2006) (candidate endorsed by Pro-Life Wisconsin).

WRTL hints (Br. 5) that its proposed ad is unlikely to have an electoral effect because Senator Kohl is "effectively unopposed" in the Democratic primary, but the fact that he has no opponent on the ballot in the upcoming primary is irrelevant to the constitutional analysis. Nothing in McConnell suggests that an ad's intention to "influence the voters' decisions," 540 U.S. at 206, or the "conclusion that [certain] ads were specifically intended to affect election results," id. at 127, turns on whether such intentions or influence are outcome-determinative. See Christian Civic League, 433 F.Supp.2d at 89. In fact, it is often difficult to determine whether a candidate is entirely unopposed before an election is held, since a write-in campaign can be mounted at any time. See WRTL I, 2004 WL 3622736, at *2 (noting, fewer than 30 days before primary election, that "Sen. Russell Feingold [is] currently the sole Democrat contender for the Senate seat" (emphasis added)). In any event, the "electioneering communication" period for the general election, in which Senate Kohl will be opposed, begins on September 8. Moreover, WRTL does not rely upon Senator Kohl's "effectively unopposed" status in the primary as a necessary criterion for the exemption it

seeks; rather, WRTL appears to seek an exemption applicable to future elections regardless of how hotly contested they may be.

Finally, the facts suggest that at least part of WRTL's motivation for wanting to broadcast the CCPA Ad is to improve its prospects in this lawsuit. WRTL suggests (Br. 2-3; Lyons Aff. ¶¶ 7-20) that the CCPA issue has arisen suddenly and unexpectedly this year, but in fact, variations of this scenario — in which a version of this bill passes the House of Representatives but is ultimately blocked by Senate Democrats — have occurred regularly since the 1990s.[17] Moreover, WRTL's alleged intention to run an ad in favor of Senator Kohl, despite its previous opposition to him, is also a curious development, which the Commission has not had an opportunity to explore in discovery. The proposed ad buy of $11,150 — about twice the cash that WRTL's PAC has on hand — that is suddenly thought necessary, after WRTL has consistently relied upon non-broadcast media, also suggests a strong motivation connected to this litigation. Although there is nothing wrong with test cases, to the extent that WRTL's real motivation in proposing to run the ad is to provide a vehicle for litigation, any burden associated with the options identified in McConnell for corporations who wish to communicate during the electioneering communication time

[17] See WRTL Press Release, Aug. 25, 2006, available at www.wispolitics.com/index.iml?Article=70111 ("Prior to this year, many attempts to pass this legislation have been stalled in the Senate."); National Committee for a Human Life Amendment Legislative Report, Child Custody Protection Act, available at http://www.nchla.org/legissectiondisplay.asp?ID=528 (legislation was passed by House but "stalled in the Senate" in 1998, 1999, and 2002; House and Senate held hearings but took no action in 2004). It has been suggested that the CCPA bill was scheduled for a vote this year as a matter of election-year strategy. See 152 Cong. Rec. S8161 (July 25, 2006) (statement of Sen. Murray) (describing the CCPA bill as an "election year gimmick"); "Leaving Pregnant Teens in the Lurch," Nancy Keenan, President, NARAL Pro-Choice America, July 25, 2006, available at http://www.alternet.org/rights/39413 (author explains her belief that the "real reason CCPA is on the Senate floor" is because of Senator Frist's interest in mobilizing his conservative base before the November elections).

windows is not a true burden on WRTL's lobbying speech, which is the foundation of its alleged First Amendment harm.

III. THE NEW FACTS ABOUT THE CCPA AD PROVIDE NO BASIS FOR FINDING THAT WRTL'S GENERAL CLAIMS ABOUT HYPOTHETICAL "GRASS ROOTS LOBBYING" ARE RIPE

As the Commission explained in the second part of its Jurisdictional Memorandum filed on May 1, 2006 (see supra pp. 3, 7), WRTL's claims regarding a broad and undefined class of hypothetical communications beyond the specific 2004 advertisements are not ripe. "By refusing to hear disputes which are not yet ripe, federal courts avoid becoming entangled in 'abstract disagreements,' enhance judicial economy, and ensure that a record adequate to support an informed decision exists when the case is heard." Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1976), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977)). When WRTL's underlying complaint in this case asked for pre-enforcement review of BCRA's application to undefined hypothetical advertisements that WRTL might some day want to air (see Am. Ver. Complt. ¶ 16), it improperly invited the Court to address just such an "abstract disagreement," and to resolve a constitutional issue without any record whatsoever of any particular future advertisements.

As in Renne v. Geary, 501 U.S. 312 (1991), in this case the Court has no concrete factual record as to what candidates WRTL may wish to identify in future broadcast ads, what the text of such ads might be, what legislative issues they might discuss, where or when the ads might run, or the nature of the electoral environment in which the ads might air. Without such concrete information, the Court should dismiss WRTL's as-applied claims concerning hypothetical grass roots lobbying in the future and not attempt to create a quasi-legislative exemption for an ill-

defined class of advertisements untethered to specific facts. The last minute submission of one additional fact pattern regarding the CCPA Ad brings nothing of any significance that would ripen WRTL's request that the Court opine generally about BCRA's application to theoretical advertisements that could conceivably occur in unknown contexts in the future.

In its motion (at 8-9), WRTL alludes to the jurisdictional questions pending before this Court, but it does not overtly argue that the creation of the CCPA Ad does anything to ripen its broad claim about future, unspecified grass roots lobbying generally. WRTL does argue, however, that the CCPA Ad suggests that the original controversy concerning the 2004 advertisements is capable of repetition and thus saved from mootness. As we explained in our Jurisdictional Memorandum (at 3-5), it is a close question whether WRTL's as-applied challenge regarding its 2004 advertisements falls within the "capable of repetition, yet evading review" exception to the mootness doctrine, and it is entirely unclear, in the absence of discovery, whether the CCPA Ad presents precisely the same controversy, as the doctrine requires. See PETA v. Gittens, 396 F.3d 416, 422-23 (D.C. Cir. 2005). In any event, the important point here, which WRTL ignores, is that the "capable of repetition" exception, even if applicable, only serves to give the Court continuing jurisdiction over the original three advertisements from 2004. That is, the CCPA Ad may be evidence that the events of 2004 may be capable of repetition, but it cannot ripen WRTL's broad claim about hypothetical grass roots lobbying. Likewise, the relevance of the CCPA Ad to the "capable of repetition" question cannot be used as an excuse to bootstrap the new controversy about the CCPA Ad into the merits of this case. As we have explained supra pp. 3-7, the relief WRTL seeks concerning the CCPA Ad is not properly grounded in WRTL's complaint or the Supreme Court's instructions on remand. This provides an additional reason for the Court to exercise its discretion to deny the motion for a preliminary

injunction, as an improper back door attempt to broaden the merits of this case after the close of discovery and briefing.

CONCLUSION

For the foregoing reasons, WRTL's motion for a temporary restraining order and preliminary injunction should be denied.

Respectfully submitted,

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August 31, 2006