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.	)	
	)	REPLY MEMORANDUM
	)	IN SUPPORT OF MOTION
	)	FOR SUMMARY JUDGMENT
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN MCCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The opposition brief filed by Plaintiff Wisconsin Right to Life, Inc. ("WRTL") fails to recognize that the Supreme Court in McConnell v. FEC, 540 U.S. 93 (2003), made clear that the Constitution permits Congress to regulate corporate-financed electoral advertising that also includes issue discussion. Contrary to WRTL's claim, the Supreme Court has not already determined that a category of "genuine issue ads," including grassroots lobbying ads, is constitutionally exempt from the "electioneering communication" financing restrictions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. 434(f)(3), 441b.

McConnell and prior Supreme Court precedent establish that election-related advertising is not a separate category that is easily distinguished from advocacy of issues or legislation, and that the inclusion of issue advocacy in an election-related advertisement does not immunize it from regulation under the campaign finance laws. Indeed, McConnell pointedly noted that in the future corporations like WRTL could finance even "genuine issue ads during [the electioneering communication periods] 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, a statement that would have no meaning if all "genuine issue ads" were to be constitutionally exempt, as WRTL argues.

Despite devoting the first half of its opposition brief to an effort to refute select details of the Commission's factual showing, WRTL does not dispute the central pillars of that factual showing: that WRTL's ads were financed in large part by business corporations and large donations from individuals, that it aggressively opposed Senator Feingold's 2004 re-election as it had his previous candidacies, that it endorsed his 2004 opponents, that its ads associated Feingold with a negative issue that WRTL itself had done much to publicize during his campaign, or even that its ads would have had a negative effect on Feingold's campaign if

broadcast during the electioneering communication periods. The WRTL ads plainly send multiple messages, and the record indicates that they had at least three purposes: influencing Senator Feingold's re-election, opposing judicial filibusters, and providing a vehicle to challenge BCRA.

In short, the facts of this case illustrate why Congress chose to require corporations to finance their electioneering communications from a separate segregated fund, and why McConnell has upheld that requirement. The broad and ill-defined exemption sought by WRTL for such election-related advertising would undermine the objective bright-line standard in the statute that McConnell has already found to satisfy strict scrutiny and serve First Amendment goals.

II. BCRA'S ELECTIONEERING COMMUNICATION FINANCING PROVISIONS ARE CONSTITUTIONAL AS APPLIED TO WRTL'S ADVERTISEMENTS

A. THE SUPREME COURT'S OPINIONS IN MCCONNELL AND WRTL DO NOT DICTATE THE RESULT SOUGHT BY WRTL

WRTL's claim that the Supreme Court, in McConnell, established a constitutional exception for genuine issue ads (WRTL Opp. 19-20), leaving only the definitional details for this Court to consider, misreads McConnell and is plainly contrary to the Supreme Court's decision in WRTL v. FEC, 546 U.S. ___, 126 S. Ct 1016 (2006) (per curiam). We show below that McConnell does not create a constitutional exemption for any category of communications that satisfies the definition of "electioneering communication." The Supreme Court's brief remand decision in WRTL, far from affirming that any constitutional exemption already existed, stated only that McConnell did "not purport to resolve future as-applied challenges" and directed this Court to "consider," not necessarily to accept, "the merits of WRTL's as-applied challenge in the first instance." WRTL, 126 S. Ct. at 1018.

B. WHEN MCCONNELL UPHELD BCRA'S REGULATION OF ELECTIONEERING COMMUNICATIONS ON ITS FACE, IT DID NOT LIMIT ITS HOLDING TO THOSE ADS THAT ARE THE FUNCTIONAL EQUIVALENT OF EXPRESS ADVOCACY

WRTL's argument (Opp. 20) that McConnell held that the electioneering communication provision is constitutional only as applied to ads that are shown to be the functional equivalent of express advocacy conflates the Court's response to one argument with its fundamental holding. The McConnell Court observed that the plaintiffs there had conceded that "the Government has a compelling interest in regulating" express advocacy, but they argued that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." 540 U.S. at 205-06. The Court stated that this specific "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal elections are the functional equivalent of express advocacy," and that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during these periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206.

WRTL takes this response to an argument of the McConnell plaintiffs out of context to argue (Opp. 20, 26) that the Court's holding was that the electioneering communication provision is constitutional only to the extent that regulated ads are shown to be the functional equivalent of express advocacy, and that a category of "genuine issue ads" is constitutionally exempt. But the Court said nothing of the sort.[1] After concluding that "the vast majority of ads

[1] McConnell rejected the argument that Buckley v. Valeo, 424 U.S. 1 (1976), had drawn a "constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." 540 U.S. at 190. Rather, the Court explained that the "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law," and was developed only to avoid problems of vagueness and overbreadth in the original statutory language. Id. An opinion explaining that the definition of express advocacy does not itself serve a substantive constitutional purpose cannot reasonably be interpreted as holding that the substantive validity of the electioneering communication provision depends on how closely it adheres to the "express advocacy" definition.

[during the electioneering communication periods] clearly had such a purpose" of influencing elections, and explaining that "in the future" the statute would provide corporations with several options for "finance[ing] genuine issue ads during those timeframes," the Court stated it would reject the overbreadth argument "[e]ven if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech," 540 U.S. at 206-07 (emphasis added).

The pointed use of this hypothetical language plainly indicates that the Court did not actually assume that the statute, with its multiple communication options, would inhibit public issue discussion by corporations and unions, as WRTL argues it did. And the Court certainly cannot be understood to have held, as WRTL claims, that the statute is unconstitutional as applied to a class of advertisements it did not assume would even be inhibited by application of the statute. Instead, the Court noted that "unusually important interests underlie the regulation of corporations' campaign-related speech" and found that "BCRA's fidelity to those imperatives sets it apart" from statutes found wanting in prior cases. McConnell, 540 U.S. at 206-07 n.88.

C. McConnell Held That The Electioneering Communication Restrictions Serve compelling Governmental Interests, And WRTL Must Show Why The Statutory Options The Supreme Court Identified For Airing Corporate "Genuine Issue Ads" Are Constitutionally Inadequate In This Case

WRTL repeatedly asserts (see Opp. 21-36) that the burden is on the defendants to show that the "electioneering communication" restrictions satisfy strict scrutiny. However, McConnell has already determined that these restrictions are properly drawn to serve compelling governmental interests. See 540 U.S. at 205-07 & n.88; FEC Br. 11-13. The McConnell Court also held that the electioneering communication provision is neither overbroad nor underinclusive, indicating that it is narrowly tailored. The Commission has demonstrated that WRTL's ads represent the kind of "electioneering communication" that BCRA was intended to address. See FEC Br. 26-32. The burden, then, is actually on WRTL to demonstrate why the

facts of this case make the statutory options recognized in McConnell as enabling corporations to air electioneering communications constitutionally inadequate here.

WRTL seems to suggest (e.g., Opp. 22-23) that all genuine issue ads must be constitutionally exempt from BCRA's coverage. But if all genuine issue ads were exempt, there would be no need for corporations ever to employ the options discussed by the Court for running "genuine issue ads," 540 U.S. at 206. Thus, it is clear that McConnell envisioned that corporations wishing to broadcast "genuine issue ads" during the narrow electioneering communication periods — to say nothing of corporations that wish to run ads whose purposes are both lobbying and electoral, as in this case — would be expected to use these options permitted by statute, at least in the absence of a compelling fact-specific showing of unconstitutional burden.

In fact, McConnell effectively established a framework for future as-applied challenges when it indicated that the electioneering communication provision would not impose unjustified burdens on the "genuine issue advocacy" of corporations because it allows them to broadcast issue-related advertising 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 absent a demonstration that these statutory options are constitutionally inadequate as applied to its advertisements, by offering persuasive evidence showing that there are particular constitutionally unacceptable burdens that these options would place on WRTL. This is not easy to do, since McConnell also stated that it "has been this Court's unanimous view" that the separate segregated fund option has provided a "constitutionally sufficient opportunity to engage in express advocacy." 540 U.S. at 203. Moreover, as we explained (Br. 15), and WRTL does not dispute, any grassroots lobbying exception that might exclude a substantial amount of

"electioneering communications" from the statute's coverage would contradict McConnell's central holding that the statutory definition of that term is not overbroad.

WRTL has failed to show that BCRA imposes such a burden on its ads. It offers only conclusory assertions (Opp. 23-24, 36) that it was too difficult to raise PAC funds in the supposedly short time it had to do so and that lobbying ads are most effective when they identify office holders. But the facts indicate that WRTL failed to make any significant effort to repeat its past PAC fundraising success.[2] Indeed, WRTL never even considered paying for its filibuster ads with PAC funds. FEC Exh. 3, WRTL Dep. (Lyons) at 124-25. WRTL had months to prepare to finance the ads from its PAC, but simply chose not to do so. Moreover, other organizations broadcast filibuster-related ads that did not identify office holders, undermining WRTL's claim that this could not reasonably be done. See FEC Br. 11, 14-15, 22-25; FEC Facts ¶¶ 112-21; FEC Exh. 64.

WRTL claims (Opp. 23-24) that this argument is an attempt to "relitigate" the holdings in McConnell and Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), regarding the requirement that corporations finance election-related communications with their PACs. However, the Commission has never suggested that the use of a PAC represents no burden at all,

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[2] WRTL made a special effort in 2004 to raise funds for the ads by hiring an outside fundraiser, but WRTL had that fundraiser raise funds for its general treasury rather than its PAC. FEC Br. 23; FEC Exh. 3, WRTL Dep. (Lyons) at 140-45, 153-54, 161-62. In fact, there is some evidence that WRTL shifted fundraising efforts from its PAC to its corporate treasury for the filibuster campaign. WRTL's PAC had planned to raise $58,000 through telemarketing in 2004, but the PAC did not follow its 2004 fundraising plan after January; in the same year, WRTL raised money from its members through telemarketing for the filibuster ads, but deposited the funds into its general treasury rather than its PAC. See FEC Fact 118; FEC Exh. 3, WRTL Dep. (Lyons) at 112-15, 141; FEC Exh. 67 (filibuster campaign fundraising scripts for calls to "Regular Donor[s]" for "General Fund"); FEC Exh. 68 at p. 7 (WRTL's 2004 plan for fundraising appeals not followed after January). This fundraising shift undercuts WRTL's claim that it would have been unable to raise funds through its PAC for the filibuster campaign had it tried.

and it is WRTL that ignores the fact that these cases and others plainly support the Commission's actual position: that requiring the use of a PAC for electioneering communications does not create an unconstitutional burden on WRTL. See FEC Br. 12-13, 23-24.

In McConnell, the Court noted that it had "repeatedly sustained legislation aimed at '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.'" 540 U.S. at 205 (quoting Austin, 494 U.S. at 660). Austin upheld the corporate PAC requirement for independent election-related communications that contain express advocacy because the requirement "ensures that expenditures reflect actual public support for the political ideas espoused by corporations," and in particular, that the acceptance of funds from for-profit corporations cannot enable a non-profit corporation to "serve as a conduit for corporate political spending." 494 U.S. at 660, 664. McConnell agreed that 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.'" 540 U.S. at 204 (quoting FEC v. Beaumont, 539 U.S. 146, 163 (2003)). McConnell explained that the PAC option "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy," 540 U.S. at 203 (emphasis added), and it upheld the electioneering financing restrictions in part because they permit corporations to finance even "genuine issue ads" from their PACs during the narrow electioneering communication windows, id. at 206.

Not only has WRTL failed to show why it is entitled to be treated differently from other corporations for whom the Court has repeatedly found the PAC option to be constitutionally sufficient, but the facts of this case provide a striking illustration of why McConnell upheld Congress's judgment on this score. The record shows — and WRTL does not dispute — that

WRTL chose to finance its 2004 anti-filibuster advertisements largely with donations from "major donors" that WRTL admits its PAC would have been "prohibited" from receiving. WRTL Opp. 6. In fact, WRTL raised more than $315,000 from corporations in 2004, including very large donations from business corporations that were solicited specifically to finance the ads in this case. See FEC Br. 10-11; FEC Exh. 3, WRTL Dep. (Lyons) at 143-51; FEC Exh. 60. Thus, WRTL's actions in financing its ads raise the very specter of undue corporate and major donor influence on the political process that Congress sought to eliminate in BCRA, and that McConnell and Austin recognized as a compelling justification for requiring corporations to use PACs to finance electioneering advertisements.

D. WRTL Cannot Immunize Its Election-Related Advertising From Regulation Simply By Including Issue Discussion

WRTL ignores the Commission's showing (Br. 18-21) that most electoral advertisements also contain discussion of issues. See Buckley, 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application"). As the Commission demonstrated (Br. 18-19), the Supreme Court has long recognized that a communication that contains otherwise regulable election-related advocacy is not immunized from regulation by the mere presence of issue discussion. See FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 243, 249-50 (1986) (finding that a newsletter constituted express advocacy even though its advocacy was in the context of abortion-related issue discussion). Unrebutted expert testimony in this case confirmed the Buckley Court's conclusion that political ads commonly include a mix of issue advocacy and electoral advocacy. See FEC Br. 19-20; FEC Exh. 1, Franklin Rept. at 23-38; FEC Exh. 2, Bailey Decl. ¶¶ 9-14, 23-29.

In an analogous context, the Supreme Court has held that commercial speech is not entitled to the same constitutional protection as noncommercial speech simply because it

includes discussion of important noncommercial issues. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983). "'Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.' The interest in preventing commercial harms justifies more intensive regulation of commercial speech even when they are intermingled in the same publications." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 n.21 (1993) (quoting Bolger, 463 U.S. at 68). By the same token, MCFL and Buckley indicate that corporations like WTRL may not immunize their election-related advertising "from government regulation simply by including references" to legislative issues. Bolger, 463 U.S. at 68.

Granting a constitutional exemption for any ad that may be said to include a discussion of legislative or executive issues would render the electioneering communication provision largely meaningless. Moreover, the content factors WRTL has suggested the Court might use to construct a constitutionally exempt category fail to protect the statute's compelling interests. For example, although WRTL may have avoided the use of provocative language in the ads it crafted to form the basis of this legal challenge, it has identified no workable standard for distinguishing among advertisements based on the level or intensity of issue-based criticism they contain. Even a standard that ostensibly allows no express discussion of an election or of an office holder's "fitness for office" would still allow WRTL to link candidates to policies that WRTL criticizes with harsh rhetoric. Consider, for example, two hypothetical ads:

> Last year, Senator Smith voted against raising the federal minimum wage because it would inhibit corporate growth. Keeping wages low may please big business. But it condemns working families and their children to an endless cycle of poverty, ill health, and desperation. A proposal to raise the minimum wage is again before Congress. Call Senator Smith and tell her to support a living wage for American families this time, and ensure that no child dies of hunger in this nation.
>
> Last year Senator Jones voted for a resolution for the prompt withdrawal of American troops from Iraq. This cowardly proposal would have undermined

> America's security and encouraged terrorists who want to destroy our freedom and our way of life. Call Senator Jones and tell her to support our troops this time by voting against a proposal to withdraw from Iraq before the mission of protecting America is accomplished.

The first example effectively accuses Senator Smith of "condemn[ing] working families and their children to an endless cycle of poverty, ill health, and desperation," while the second characterizes the resolution for which Senator Jones voted as "cowardly." There can be no doubt that both ads are designed not merely to discuss an issue, but also to portray a Senator in a negative light. Veteran political consultant Douglas Bailey confirmed (FEC Br. 20; FEC Exh. 2, Bailey Decl. ¶¶ 24-29) that political consultants could easily design ads that would have electoral effect but would fall within the expansive sort of exemption WRTL advocates. See also McConnell, 540 U.S. at 126.

E. THE CONSTITUTIONAL EXEMPTION THAT WRTL SEEKS FOR ITS ELECTION-RELATED ADVERTISEMENTS WOULD UNDERMINE BCRA'S BRIGHT-LINE STANDARD AND THE FIRST AMENDMENT BENEFITS IT PROVIDES

The Commission has explained (Br. 32-38) how granting WRTL's as-applied challenge would subvert the objective, bright-line rule that Congress created in BCRA and the Supreme Court relied upon in McConnell. The Court upheld the electioneering communication provisions precisely because the electioneering communication's bright-line requirements were not vague. Contrary to plaintiff's assertions (Opp. 25-26), the Commission has not argued that no as-applied challenge to the electioneering communication provision can ever succeed, nor that the interest in a bright-line rule trumps all other concerns. Instead, the Commission has shown that an as-applied challenge should not be successful where it is not grounded in a clear, objective standard that avoids the uncertainty that leads to the chilling of speech, and also avoids ongoing litigation involving detailed judicial evaluation of the content of each new advertisement that a corporation or union wishes to broadcast with treasury funds. See FEC Br. 38. WRTL suggests (Opp. 26) that "prophylactic bright-line rules" can never survive strict scrutiny, but that is exactly what

happened in McConnell, which upheld the electioneering communication restrictions because the "vast majority" of the ads that met the statute's objective criteria had an electioneering purpose. 540 U.S. at 206; see id. at 239. Accord FEC v. National Right to Work Comm. ("NRWC"), 459 U.S. 197, 209-10 (1982) (refusing to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared").[3]

WRTL fails to refute the Commission's showing (Br. 33-35) that 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). Instead, WRTL offers a series of proposed elements for a constitutional exemption, many of them subjective in nature and unclear in operation, that are fraught with the uncertainty and potential chilling effect that Congress carefully avoided in crafting BCRA's electioneering communications provisions. Implementation of WRTL's proposals would necessarily lead to a constant stream of expedited as-applied challenges before three judge district courts, with direct appeal to the Supreme Court, involving judicial evaluation of the precise wording of specific advertising. The Supreme Court has made clear, in key campaign finance and other speech-related cases, that the clarity of bright-line rules that avoid difficult case-by-case factual analysis can be critical both to the proper functioning of prophylactic statutes and to the protection of free speech. See FEC Br. 35-38.[4]

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[3] See also Buckley, 424 U.S. at 29-30, 53 n.59 (upholding universal application of the $1,000 individual contribution limit even though the Court assumed most large contributors do not seek improper influence, and rejecting an exception for immediate family members even though the risk of such influence is "somewhat diminished"); California Medical Ass'n v. FEC, 453 U.S. 182, 198-99 (1981) (contributions to a political committee are subject to FECA restrictions even if earmarked for administrative support, rather than for influencing elections); Hill, 530 U.S. at 729; Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995).

[4] WRTL claims (Opp. 26 n.20) that "narrow tailoring excludes prophylaxis," but the NRWC decision quoted in the text shows that is not so. The main case upon which plaintiff relies for this assertion involved a state law that required professional charitable fundraisers to disclose to prospective donors the percentage of gross donations collected in the past year that the fundraiser had turned over to charities. See Riley v. National Fed'n of the Blind, 487 U.S.

WRTL does not address the campaign finance cases cited by the Commission on this point. WRTL attempts to distinguish Hill and Florida Bar (Opp. 26 n.20) as "cases governing abortion and lawyer advertising" that supposedly involve less important rights than this case. However, WRTL ignores what is crucial about these decisions: that they involve prophylactic rules that restrict speech and, as the Commission explained (Br. 36-38), include reasoning that is directly applicable in this case. WRTL relies heavily (Opp. 25-26) upon MCFL, but that case held only that the desire for a bright-line rule alone was not sufficient to justify application of the corporate PAC requirement. MCFL found that the concerns underlying the regulation of corporate political activity were "simply absent" because distinct and readily determined features of the regulated corporation ensured that none of the compelling interests that FECA serves would be implicated at all. 479 U.S. at 263. The MCFL Court specified, however, that it would not "second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind," id. That is precisely what WRTL asks this Court to do. WRTL has argued that its ads are less election-related than some ads discussed in McConnell, but it offers no credible reason why the concerns underlying Congress's creation of the electioneering communication rules are "simply absent" when a corporation broadcasts ads that identify candidates with specific campaign issues shortly before an election. See McConnell, 540 U.S. at 126-127 ("little difference … 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'").

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781 (1988). The Court invalidated this statute because it would have provided limited benefits to the consumer while imposing significant burdens on fundraisers and the charities they represented, but the Court did not suggest that no prophylactic rule could satisfy strict scrutiny. Instead, it made clear (id. at 800-01) that "[b]road," "imprecise," and "unduly burdensome" rules like the one at issue were suspect. Such rules stand in stark contrast to the narrowly tailored, objective electioneering communication provision, but they share the defects of the vague exemption plaintiff seeks.

McConnell's analysis also forecloses WRTL's argument (Opp. 17, 27) that because many communications not regulated by BCRA could also affect federal elections, the bright line drawn by the electioneering communication provision is underinclusive. "As [the Supreme Court] noted in a unanimous opinion…, Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." McConnell, 540 U.S. at 117 (citations and internal quotation marks omitted). Thus, the Court summarily rejected a claim that the electioneering communication restrictions are underinclusive because they do not apply to non-broadcast advertisements, concluding that "[o]ne might just as well argue that the electioneering communication definition is underinclusive because it leaves advertising 61 days in advance of an election entirely unregulated. The record amply justifies Congress' line-drawing." Id. at 208.

F. WRTL Incorrectly Asserts That Purpose and Effect Are Completely Irrelevant and Fails to Controvert The Commission's Showing That WRTL's Ads Had An Electoral Purpose And Would Have Had An Electoral Effect If Broadcast During The Electioneering Communications Period

1. The Purpose and Effect of Advertisements Is Relevant to Evaluating the Constitutionality of the Statute

WRTL argues (Opp. 26-28) that this Court may not consider the purpose and effect of WRTL's ads in evaluating this constitutional challenge. McConnell plainly forecloses this argument. When the Court found that the "vast majority" of the ads covered by the electioneering communications provisions had an electioneering purpose, it examined the purpose and effect of those advertisements and relied upon contextual factors such as the timing of the ads' broadcast: "the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." 540 U.S. at 127. In several other instances, the Court's reasoning

emphasized the purpose and effect of these ads.[5] Thus, evidence presented by the Commission regarding the purpose and effect of the WRTL ads is certainly relevant to consideration of the constitutional application of the electioneering communication provision.

2. WRTL Does Not Controvert Any of the Material Facts Demonstrating Its Ads' Electoral Purpose and Effect

In its opening brief (at 26-31), the Commission detailed many facts indicating that one of WRTL's purposes in broadcasting the ads was to influence the 2004 Wisconsin Senate race. WRTL does not dispute several basic facts: (i) WRTL's ads associate Senator Feingold with an issue portrayed in a negative light; (ii) one of WRTL's two highest priorities in 2004 was to "send[] Feingold packing" or "retire Senator Feingold"; (iii) WRTL's PAC endorsed three of Senator Feingold's opponents; (iv) WRTL's PAC campaigned against Senator Feingold in part on the issue of his support for judicial filibusters, a contentious issue in the Senate campaign that year; (v) WRTL planned all along to run the ads at a time that was close to the election; (vi) WRTL sought to run the ads after the relevant legislative votes had occurred on judicial nominations and the Senate was in recess; and (vii) WRTL did not run any broadcast advertising on the filibuster issue before or after the election campaign season. See FEC Br. 3-9, 26-31. WRTL relies on its own agents' testimony that WRTL and its vendors did not discuss the ads' effect on Feingold's election. WRTL Opp. 3. However, the electoral purpose of the ads is

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[5] See id. at 128 ("the ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money"); at 193 ("And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election"); at 193 n.78 ("The notion that this advertisement was designed purely to discuss the issue of family values strains credulity"); at 206 ("The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect….").

amply and objectively demonstrated by the facts enumerated above even without an express admission that WRTL explicitly discussed the electoral effect of the ads with its vendors.

WRTL also does not dispute the telling facts about how it planned and timed its broadcast advertisements. WRTL made no effort to ensure that its advertising would occur before the relevant votes in Congress — the only time, according to WRTL's in-house grassroots lobbying coordinator, that grassroots lobbying ads are worth running. See FEC Br. 8; FEC Exh. 4, Armacost Dep. at 112. Instead, as early as May WRTL revealed to its advertising consultant that it was already planning to seek court intervention in order to run anti-filibuster advertising during the electioneering communication period. FEC Facts 47-51.[6] WRTL's long-planned advertising schedule shows that WRTL's ads had several purposes, including not only grassroots lobbying but also carefully focused electoral and litigation goals.[7]

WRTL now offers another explanation for the timing of its advertisements. Previously, WRTL argued that it chose to run its advertisements to coincide with the Senate schedule on votes to end filibusters of judicial nominees. See, e.g., Am. Ver. Complt. ¶¶ 38-39. Now WRTL

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[6] WRTL's contingency plan if it obtained a preliminary injunction from this Court was not only to run the anti-filibuster ads after August 14 but also to seek this Court's permission to run advertisements on the campaign finance issue referring only to Senator Feingold and not to Senator Kohl. FEC Exh. 76.

[7] WRTL argues at length that its subjective intent was not to affect the election, and that its ad campaign was not designed solely to test BCRA. However, the context surrounding the ads undermines the credibility of WRTL's claims that influencing Senator Feingold's election was not even among WRTL's goals. Moreover, although the initiation of this matter as a test case is not dispositive, to the extent that WRTL chose to name Senator Feingold in ads before his primary to provide a basis for a lawsuit, rather than because this was essential to any genuine lobbying strategy, the purported burden on its lobbying speech is suspect. The fact that WRTL's ad campaign appears to have been conceived and conducted outside the corporation's usual system of lobbying, that WRTL never even considered using its PAC or not identifying Senator Feingold, and that, contrary to WRTL's current claims, its executive director could not say for certain whether the idea to run the ads even originated with WRTL, reinforces this conclusion. See FEC Exh. 3, WRTL Dep. (Lyons) at 119-26; FEC Exh. 4, Armacost Dep. at 5-6, 105-10, 113, 115; FEC Br. 6-7.

also adopts the testimony of its advertising consultant that WRTL chose to run its advertisements in the run-up to the election simply because that was a time when the issue "was a topic of significant conversation" among the public. WRTL Opp. 7. But WRTL fails to present any evidence that the issue was actually at a crescendo in the public mind after the last 2004 filibuster vote in late July when the Senate went into its six-week recess — apart from the effort by WRTL, Senator Feingold's opponents, and the Wisconsin Republican Party to make it a campaign issue.

WRTL's new "public attention" argument represents a substantial expansion of its claim for entitlement to constitutional exemption from application of law that completely untethers it from the legislative calendar. Factually, this new rationale is also at odds with WRTL's own failure to run any broadcast advertising when the filibuster issue actually reached a crescendo after the election in the spring of 2005. At that time, other interest groups spent $8.5 million on broadcast advertising related to the filibuster votes that then took place as well as the Senate rule change that had been proposed if those filibusters were successful. FEC Mem. 8-9; FEC Exh. 7, Franklin Dep. at 26-27. WRTL's post hoc explanation (Opp. 8) that it would have been futile to try to persuade Senators Kohl and Feingold to support a rule change does not explain why it did not broadcast ads at that time, as it had in 2004, to seek to persuade them to abandon the filibusters that were the target of the rule change proposal.[8] WRTL also has presented no reason to believe that Senators Kohl and Feingold were any more likely to be persuaded to vote against the filibusters in 2004 than to vote for the rule change in 2005. In fact, once the election was over, WRTL did not air any broadcast advertisements on the filibuster issue until January, 2006

[8] WRTL did send an email to its supporters in March of 2005 asking them to contact Senators Kohl and Feingold about the filibuster votes, but only used broadcast advertising in the period before the election in 2004. See FEC Exh. 54 (March 16, 2005 email).

— ten days after the Supreme Court argument in which three justices questioned WRTL's failure to run any anti-filibuster advertising after the 2004 election. FEC Facts ¶ 136.

3. Unrebutted Expert Testimony Shows That WRTL's Advertisements Would Have Influenced the Senate Election

WRTL does not try to refute defendants' unrebutted expert testimony that WRTL's ads would have influenced the Senate race and, if deregulated, similar ads in the future would be expected to have a comparable effect. See FEC Br. 9-10; FEC Facts ¶¶ 90-103. Longtime political consultant Doug Bailey explained how WRTL's ads portray Senator Feingold in a negative light and how political consultants would easily exploit the exemption factors proposed by WRTL to craft ads to influence future candidate elections. FEC Exh. 2, Bailey Decl. ¶¶ 7-17, 24-29. Relying on his knowledge of Wisconsin politics in 2004 and political science literature, University of Wisconsin political scientist Charles Franklin concluded that WRTL's ads would likely have influenced the Senate race. FEC Facts ¶¶ 94-103. Professor Franklin explained that there is empirical support for Congress's determination that advertisements that mention federal candidates in the immediate pre-election period have a particularly substantial impact on elections. FEC Exh. 1, Franklin Rept. at 27-29, 37-38, 40. This expert testimony confirms this Court's preliminary conclusion that "WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating." WRTL v. FEC, 2004 WL 3622736, at *3 (D.D.C. 2004) (citing McConnell, 124 S. Ct. at 695 [540 U.S. at 205]).[9]

Rather than providing any evidence of its own about the impact of its ads, WRTL attempts to undermine the uncontroverted conclusions of defendants' experts by mischaracterizing isolated responses to questions during their depositions. In particular, WRTL

[9] WRTL's primary response (Opp. 3) to this unrebutted showing about the likely impact of its ads is to argue about its own subjective intent. As we explain supra p. 15 n.7, however, the evidence establishes that its ads were designed at least in part to influence the 2004 Senate election.

wrongly suggests (Opp. 17) that these experts were advocating legal "test[s]" to be applied by courts to determine whether the Constitution permits regulation of particular communications. In fact, these witnesses made no statements of that kind. They were presented as experts on election campaigns, Wisconsin politics and political advertising, not on constitutional law, and they testified to facts and opinions within their expertise about the practical impact of advertising on elections and how election-influencing advertisements could be fashioned even in compliance with the amorphous exemption rules advocated by plaintiff.

WRTL also mischaracterizes the testimony of defendants' experts in other ways. For example, Professor Franklin did not "admit[], in other words, that grassroots lobbying exists as a discernible form of communication apart from electioneering." WRTL Opp. 14 (emphasis added). He agreed that the concept of grassroots lobbying may include certain elements posed to him by WRTL's counsel, but testified that "I would not say that [those elements] being present necessarily mean that an effort is clearly only a grassroots lobbying effort," and explained that advertising containing grassroots lobbying rhetoric often has an electioneering purpose as well. FEC Exh. 7, Franklin Dep. at 36-38, 101-103. Professor Franklin did not testify that "the effect of a communication does not depend on its content, its mode, or even the intent of its creator," as WRTL claims (Opp. 16), but testified that the degree of an advertisement's effect on elections is determined by a host of factors including "ad content" and the amount of ad "exposure" that voters have. FEC Exh. 7, Franklin Dep. at 76-77.[10] Finally, WRTL asserts that Professor Franklin was somehow "'guided' in his research in a way that compromised objectivity" (Opp.

[10] WRTL mischaracterizes the record in McConnell by asserting that Mr. Bailey's testimony is at odds with that of an expert there who found six ads to be "genuine issue advocacy" (WRTL Opp. 12). In fact, Mr. Bailey characterized those six ads as campaign ads and the expert in McConnell testified that five of the six ads were "clearly intended to support or oppose the election of a candidate." Defendants' Statement of Genuine Issues ¶ 154 (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 748 (D.D.C. 2003)).

14), a claim at odds with detailed deposition testimony on his actual drafting process. FEC Exh. 7, Franklin Dep. at 10-15, 86-91. The fact that he was asked to address the most important issues in this case about the effect of WRTL's ads and the exemption it proposed — without opining on "grassroots lobbying generally" (WRTL Opp. 13) — does nothing to undermine his credibility or his unrefuted conclusions.

III. CONCLUSION

In sum, WRTL has failed to show that the constitutional exemption it seeks is consistent with Supreme Court precedent or supported by the factual record. WRTL's factual assertions are contravened by the record evidence, its legal arguments would turn the Supreme Court's reasoning on its head, and the ruling it seeks would undermine the already established compelling governmental interests served by BCRA. Accordingly, for the reasons set forth above and in the Commission's opening brief, the Court should grant the Commission's motion for summary judgment and dismiss this case with prejudice.

Respectfully submitted,

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August 18, 2006

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.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	STATEMENT OF
	)	GENUINE ISSUES
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN McCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S AND INTERVENOR-DEFENDANTS' SUPPLEMENTAL STATEMENT OF GENUINE ISSUES

Pursuant to Local Civil Rules ("LCvR") 7(h) and 56.1, defendant Federal Election Commission ("FEC" or "Commission") and Intervenor-Defendants Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan (collectively "Defendants") submit the following Supplemental Statement of Genuine Issues. This statement contains the Defendants' responses and objections to Plaintiff's August 4, 2006, Statement of Undisputed Material Facts in Support of Its Opposition to Motion for Summary Judgment of Defendant FEC and Intervenor-Defendant's Motion for Summary Judgment or, in the Alternative, Judgment on the Record ("Plaintiff's Statement"). These responses and objections are presented below in numbered paragraphs tracking the numbering scheme in Plaintiff's Statement.

243. No response.

244. Defendants object that the paragraph is unintelligible. Although the quotations of the witness are accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

245. No response.

246. Although the quotations of the witness are accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

247. Defendants object that the plaintiff's use of the word "ignored" mischaracterizes the witness's testimony. In fact, a large section of Professor Franklin's report is devoted to the costs and impact of advertising on the judicial filibuster in the spring of 2005. See Franklin Rep. 29-33. Furthermore, although the quotation of the witness in the second sentence is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

248. Defendants object that the paragraph's characterization of "grassroots lobbying" is vague and undefined. Although the quotations of the witness are accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. In particular, defendants object to the word "only" in the last sentence. Professor Franklin's testimony was not limited to the electoral effect of ads like WRTL's.

249. Defendants object that the paragraph mischaracterizes the record and the testimony of Professor Franklin. In the cited passage, Professor Franklin does not suggest that grassroots lobbying is a "discernible subset" of issue ads; rather, Professor Franklin states that the distinction between the two types of ads he is discussing is "vague," that those three elements being present does not "necessarily mean that an effort is clearly only a grassroots lobbying effort," and that advertising containing grassroots lobbying rhetoric often has an electioneering purpose as well. Exh. 7, Franklin Dep. 33, 36-38, 101-103. The Defendants also object that the paragraph's characterization of "grassroots lobbying" is vague and undefined, and to the characterization of ads that may be termed "grass roots lobbying" ads or "issue ads" as lacking electoral focus, which is controverted in the record. The record, including the testimony of Professor Franklin, shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 - 103. Moreover, the Defendants object that although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

250. Defendants object that the paragraph's characterization of "grassroots lobbying" is vague and undefined and that it mischaracterizes the testimony of the witness in suggesting that he testified that all such advertising has "an electioneering purpose." Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

251. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

252. Defendants object that the paragraph mischaracterizes the record and the testimony of the witness. Professor Franklin did not testify that all advertising of any kind would have an electioneering effect, nor did he testify that without empirical research it is difficult to say how much effect different categories of communications, including grassroots, issue, or electioneering advertising, would have. In fact, Professor Franklin explained in the cited passage that without empirical research, it would be difficult to determine the effects on elections of communications across different modes of communication (e.g., phone calls, newspaper advertising, direct mail, internet, etc.), rather than across different categories of communications, as plaintiff suggests. See FEC Exh. 7, Franklin Dep. at 64:5 – 65:1.

253. Defendants object that the paragraph mischaracterizes the record and the testimony of the witness. Professor Franklin did not testify that the "effect of subsequent advertising is directly affected by earlier advertising" in the cited passage. Rather, he testified that earlier advertising creates a different baseline or starting point for what public opinion is on the candidate that is the subject of the advertising and that later advertising moves public opinion from that baseline. See FEC Exh. 7, Franklin Dep. at 94:22 – 98:6. The earlier advertisements, however, "are no longer continuing to have an effect." FEC Exh. 7, Franklin Dep. at 96:3.

254. Defendants object that the paragraph mischaracterizes the record and the testimony of the witness. In the cited passage, Professor Franklin explains that the

judicial nominations issue was "raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a reason to defeat Sen. Feingold." Exh. 1, Franklin Rep. 9.

255. Defendants object to the paragraph's implication that Professor Franklin testified that the only relevant issue in the spring of 2005 was the "nuclear option." The record reflects that the debate at this time was primarily about the larger issue of judicial filibusters. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

256. Defendants object that the paragraph mischaracterizes the record and the testimony of Douglas Bailey. Immediately after the cited passage, Mr. Bailey explains that WRTL's ad titled "Waiting" was a campaign ad "in terms of its timing, its content and it's obvious intent." Exh. 8, Bailey Dep. 44:19-20 & exh. 5. Therefore, although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. The defendants further object that that the term "public lobbying" is vague and ambiguous.

257. No response except Defendants note that it is clear in context from several pages of Mr. Bailey's testimony that those are not the only factors that led Bailey to conclude that the advertisement was a campaign ad. See FEC Exh. 8, Bailey Dep. at 43:7 - 47:3.

258. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

259. Defendants object that the paragraph mischaracterizes the record and the testimony of Douglas Bailey. Nowhere in the cited passage does Mr. Bailey state that WRTL's "Waiting" ad is a more effective campaign ad than the Yellowtail ad because the latter refers specifically to the character and integrity of the referenced candidate. Although the disparate quotations of the witness are accurately reproduced, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony

260. Defendants object to the paragraph to the extent it suggests that the three ads at issue in this case had only a legislative focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103.

261. Defendants object that the paragraph's characterization of "grassroots lobbying" is vague and undefined.

262. Defendants object to the paragraph to the extent it suggests that the three ads at issue in this case had only a legislative focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103.

263. Defendants object that the paragraph mischaracterizes the testimony of the witness. Ms. Lyons testified later in her deposition that the idea to run the three 2004 WRTL ads probably came from within WRTL, but that it was possible the idea originated elsewhere. See Exh. 3, WRTL Dep. (Lyons) at 121-24. Although the quotation of the testimony is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

Respectfully submitted,

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