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.	)	
	)	MOTION FOR
FEDERAL ELECTION COMMISSION,	)	SUMMARY JUDGMENT
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Defendant Federal Election Commission ("the Commission") hereby moves this Court for summary judgment. Pursuant to Local Civil Rules 7 and 56.1, a Memorandum of Points and Authorities, a Statement of Material Facts, and a proposed Order are submitted herewith.

The Motion is made on the grounds that the Supreme Court's rationale in finding constitutional section 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), in McConnell v. FEC, 540 U.S. 93 (2003), controls the as-applied challenge plaintiff Wisconsin Right to Life, Inc. ("WRTL") has brought here, as this Court correctly held in denying WRTL's request for a preliminary injunction in August 2004.

Wherefore, the Commission respectfully moves that this Court grant this Motion for Summary Judgment, as outlined above and in the memorandum which accompanies this Motion.

Respectfully submitted,

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March 28, 2005

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.	)	
	)	MEMORANDUM
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On August 17, 2004, this three-judge Court properly denied the request of Wisconsin Right to Life, Inc. ("WRTL"), for a preliminary injunction to enjoin application of section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002),[1] because the Supreme Court's rationale in finding that provision constitutional in McConnell v. FEC, 540 U.S. 93 (2003), forecloses the kind of as-applied challenge that WRTL has brought here. WRTL's complaint seeking permanent relief raises the same key legal issue that its motion for a preliminary injunction raised, and the Court should grant the Commission summary judgment based on the same reasoning it employed when it denied WRTL's motion for a preliminary injunction.

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[1] BCRA prohibits corporations from using their general treasury funds to pay for communications — called "electioneering communications" — that refer to a candidate for federal office during certain periods prior to a federal election and that are "targeted to the relevant electorate." See BCRA § 203, codified at 2 U.S.C. 441b(b)(2) (regulating use of corporate treasury funds); BCRA § 201(a), codified in part at 2 U.S.C. 434(f)(3)(A)(i) (primary definition of "electioneering communication").

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR THE COMMISSION BECAUSE THE KIND OF AS-APPLIED CHALLENGE BROUGHT BY WRTL IS PRECLUDED BY McCONNELL

As the Commission has explained in two prior memoranda,[2] this case could have been dismissed without further briefing because the Court has already correctly resolved the purely legal issue that disposes of the case on the merits. Nevertheless, without waiting for the Court to rule on its prior request that the Court schedule summary judgment briefing, WRTL has now filed a 45-page memorandum in support of its motion for summary judgment ("WRTL Mem."). Aside from some extravagant rhetoric,[3] and a more candid reliance upon policy arguments to urge the Court to act as a legislature,[4] WRTL presents almost nothing new.

The Commission will not burden the Court with unnecessary repetition, but instead hereby incorporates by reference the pages in its prior substantive brief that provide background information and explain why McConnell forecloses WRTL's as-applied challenge. Defendant Federal Election Commission's Opposition to Plaintiff's Motion for a Preliminary Injunction (Aug. 9, 2004) ("FEC Opp."), at 1-34. Below, we briefly summarize our primary arguments and respond to a few other issues raised by WRTL's summary judgment memorandum.

As this Court explained in its Memorandum Opinion and Order of August 17, 2004 ("Mem. Op.") at 4, the "reasoning of the McConnell Court leaves no room for the kind of 'as

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2 FEC's Supplemental Memorandum Addressing the Dismissal of This Case (Aug. 27, 2004); FEC's Memorandum Addressing the Dismissal of Plaintiff's Amended Complaint (Oct. 15, 2004).

3 See, e.g., WRTL Mem. at 2 ("There is no true self government if for over twenty percent of the year the sovereign cannot influence its representatives in the most effective ways possible. Only if Congress ceased all legislative activity during that period would the constitutional problem be diminished.").

4 See, e.g., WRTL Mem. at 33 ("And to the extent there is a scintilla of perceived support/opposition to a candidate [in grassroots lobbying], a remote possibility necessitated by the people's sovereign right to participate in representative government, the people with full disclosure as to the messenger can make the ultimate judgment."); see generally id. at 29-34.

applied' challenge WRTL propounds before" this Court. The Supreme Court did not uphold BCRA § 203 only as applied to communications that are the "functional equivalent of express advocacy" (WRTL Mem. at 24, 36). Rather, the Court recognized that § 203's financing restrictions could apply to some "genuine issue ads," but held nonetheless that the definition of "electioneering communication" is constitutional in all its applications because its requirements do not impose unconstitutional burdens. McConnell, 540 U.S. at 205-06.

The Supreme Court explicitly addressed the full scope of its holding three times. First, it noted that Congress included two definitions of "electioneering communication": a primary definition, at issue here, and a "backup" definition to serve if the primary one were held unconstitutional. BCRA § 201(a). Because the Court upheld the constitutionality of "all applications of the primary definition," it "accordingly ha[d] no occasion to discuss the backup definition." 540 U.S. at 190 n.73 (emphasis added).

Later in its opinion, the Supreme Court summarized its treatment of BCRA § 203. The Court had, it stated, upheld "stringent restrictions on all election-time advertising that refers to a candidate because such advertising will often convey [a] message of support or opposition." McConnell, 540 U.S. at 239 (emphases in original). The Court thus explained the intentional breadth of its holding: that it is constitutional for Congress to apply BCRA's financing regulations to "all" electioneering communications "because such advertising will often" communicate support or opposition to a candidate, even though some may not.

Finally, when it explained why the electioneering communication provision is not overbroad, the Court explicitly held that BCRA's financing restrictions are constitutional even as applied to "genuine issue ads":

> The precise percentage of issue ads [in the past] that clearly identified a candidate and were aired during those relatively brief

> preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. [Citations omitted.] Nevertheless, the vast majority of ads clearly had such a purpose. [Citations omitted.] Moreover, 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.

McConnell, 540 U.S. at 206 (emphasis added). Far from suggesting that some genuine issue ads would be entitled to constitutional exemption from BCRA in future cases, the Court made it quite clear that "in the future" — i.e., after its decision — even "genuine issue ads" would either have to be financed by corporations and unions "from a segregated fund" or else "avoid[] any specific reference to federal candidates." Id. (emphasis added). The Court thus held that BCRA's requirement that corporations use their PAC funds or slightly alter the text of their broadcast ads does not create an unconstitutional burden on their ability to advocate positions on issues. See id. at 203 (PAC option is "constitutionally sufficient").

Moreover, the Court explicitly referred to the possibility of as-applied challenges in connection with other provisions at issue in McConnell, but opened no such door regarding the definition of electioneering communication. The Court mentioned the availability of as-applied challenges in at least three distinct contexts in upholding portions of BCRA Title I against facial attack, in at least one context in upholding part of BCRA Title V, and once regarding the disclosure requirements of Title II. See 540 U.S. at 157 n.52, 159, 173, 199, 244. As this Court explained, McConnell's "deliberate upholding of 'all applications' [of the primary definition of "electioneering communication"] stands in informative contrast to its explicit acknowledgment that other parts of the statute which it upheld against facial challenge might be subject to 'as applied' challenges in the future." Mem. Opin. at 5.

In response to the clear reasoning and holding of McConnell, WRTL distorts the plain language of the decision; argues that the majority opinion's real rationale is to be found in a separate concurrence written by Justice Stevens more than a decade earlier in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); and relies upon the views of two judges (Judge Leon in the McConnell three-judge district court and Justice Kennedy), whose conclusions were rejected by the McConnell majority. WRTL's interpretation of McConnell is inconsistent with the dispositive language and holdings of the decision and would undermine both the decision and BCRA itself.[5]

As the quotations above from McConnell show, the Court never "conceded that the ban reaches protected speech that Congress may not regulate" (WRTL Mem. at 14), nor did the Court "acknowledge[] that some issue ads ... may not constitutionally be regulated" by Congress (id. at 15; emphasis in original). These assertions rely largely upon a footnote (540 U.S. at 206 n.88) that in no way sanctions as-applied challenges, much less the 16-factor test that WRTL asks the Court to enact in lieu of BCRA's bright-line definition.[6] Rather, when the Court in that footnote "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," it was broadly emphasizing that its jurisprudence

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[5] It is not clear at this point exactly which advertisements of WRTL it is asking the Court to consider in the as-applied challenge. The three ads that were the subject of WRTL's original complaint can now be broadcast without regard to BCRA § 203 until the next federal election is imminent, and WRTL provides no evidence that it is currently running those ads or has specific plans to do so. More generally, neither WRTL's Amended Complaint nor its Statement of Material Facts provides evidence of any particular ads to be run in the future. Although WRTL lists a number of issues it finds important, it does not specify any particular time, place, issue, or candidate that it intends to mention in future broadcast communications. See Amended Complaint ¶ 16.

[6] WRTL's 16-factor legislative proposal (WRTL Mem. at 5) not only finds no support in McConnell, but is also contrived and unexplained. For example, are all 16 "factors" necessary for an ad to constitute grassroots lobbying, or would 14 suffice?

has recognized two general categories of speech, and that the interests that justify a statute regulating one type might not apply to a statute regulating the other. In that context, the Court distinguished First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), from McConnell. Both Bellotti and McIntyre found unconstitutional statutes that concerned restrictions on advocacy regarding ballot measures, without regard to any relation to candidate elections. The Court's conclusion was that "BCRA's fidelity to those imperatives [discussed in the footnote] sets it apart from the statute[s] in Bellotti" and McIntyre. 540 U.S. at 206 n.88. Thus, nothing in footnote 88 indicates that as-applied challenges are "[a]nother option" (WRTL Mem. at 17) besides using PAC funds or omitting explicit references to federal candidates.[7]

Finally, the broader rationale of both McConnell and BCRA § 203 would be subverted if, as WRTL urges this Court to do, the statute's clear definition of "electioneering communication" were subjected to case-by-case exceptions. A system in which the courts were asked to test whether individual "issue ads" somehow "functioned" like express advocacy would mark a return to just the sort of uncertainty that the Court found unacceptable in Buckley and that led the

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[7] WRTL's reliance on Judge Leon's opinion in McConnell and Justice Stevens' concurrence in Austin (WRTL Mem. at 27-29 & n.18) is misplaced. As Judge Leon himself recognized when he joined the three-judge court's decision, his original decision striking down the primary definition of "electioneering communication" was reversed by the Supreme Court in McConnell. Moreover, the majority opinion in McConnell, co-authored by Justices O'Connor and Stevens, does not refer to Justice Stevens' general comments on lobbying in his concurrence in Austin. Likewise, contrary to WRTL's reading (WRTL Mem. at 21-22, 29), the Court in McConnell was well aware of the kind of lobbying ads that WRTL claims are exempt from BCRA when the Court held that "all applications," 540 U.S. at 190 n.73, of the primary definition are constitutional. Justice Kennedy's dissent, id. at 334-35, specifically discussed § 203's application to a lobbying ad, and if the majority opinion had embraced Justice Kennedy's view that such "grassroots lobbying" ads should be exempt from the statutory requirements — as WRTL essentially argues it did — there would have been no need for Justice Kennedy to have dissented on this ground.

Court in McConnell to uphold the constitutionality of BCRA's bright-line definition of "electioneering communication." See 540 U.S. at 193-94; Hill v. Colorado, 530 U.S. 703, 729 (2000) ("A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself").[8]

II. THE COURT SHOULD DENY SUMMARY JUDGMENT FOR WRTL

Even if the Court were to deny the Commission summary judgment, WRTL's motion for summary judgment should be denied. No discovery has yet taken place in this case. Thus, if the legal issues the parties have briefed are not dispositive, the Commission should be permitted to take discovery of, inter alia, the following topics that would elucidate the alleged burden BCRA § 203 has placed on WRTL: the history of WRTL's use of broadcast advertising, the nature and timing of the decision to initiate the anti-filibuster broadcast ads, the ways in which WRTL communicated with the public before the broadcast campaign it has described in its complaint, fundraising by WRTL's PAC, the sources of the funds in WRTL's corporate treasury, and the history of WRTL's and WRTL PAC's opposition to Senator Feingold.

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[8] Even if the Court were to abandon its prior reasoning and hold that WRTL's as-applied challenge is not precluded by McConnell, the Court should nevertheless grant summary judgment for the Commission. As previously explained (FEC Opp. at 27-34), BCRA § 203 does not place an unconstitutional burden on WRTL. In particular, WRTL's lengthy discussion (Mem. at 38-41) about whether its ads contain "express advocacy" is beside the point. In its prior decision, this Court explained (Mem. Op. at 6) that WRTL's "advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating," and the Commission had explained (FEC Opp. at 27-34) the advertisements' context and content to demonstrate that BCRA § 203 could be constitutionally applied to WRTL's ads, given their likely electoral effect. See also FEC's Statement of Material Facts As To Which There Is No Genuine Issue, ¶¶ 7-17. Those explanations did not, and need not, depend upon the presence of express advocacy in such advertisements.

CONCLUSION

For the foregoing reasons, this Court should deny WRTL's motion for summary judgment and enter summary judgment for the Commission.

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Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	STATEMENT OF
FEDERAL ELECTION COMMISSION,	)	MATERIAL FACTS
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56(c) and Local Civil Rule 7(h) (D.D.C.), defendant Federal Election Commission ("Commission" or "FEC") presents the following statement of material facts as to which there is no genuine issue and that entitle the Commission to judgment as a matter of law:

1. The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455, and other statutes.

2. Wisconsin Right to Life ("WRTL") describes itself as a nonprofit, nonstock Wisconsin corporation organized to protect "individual human life from the time of fertilization until natural death." Complaint ¶¶ 19, 21. The corporation also asserts that it is tax exempt under 501(c)(4) of the Internal Revenue Code. Id. at ¶ 19.

3. In August 2002, the Commission issued a notice of proposed rulemaking to implement the "electioneering communication" provisions of the Bipartisan Campaign

Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 91-92 (2002). See 67 Fed. Reg. 51131 (Aug. 7, 2002). The notice discussed, among other topics, whether the Commission should exempt certain types of communications from the definition of "electioneering communications." 67 Fed. Reg. 51136.

4. Although the August 2002 rulemaking notice had presented a number of possible exemptions for public comment, the Commission promulgated only two: one for State and local candidates and another for certain nonprofit organizations operating under 26 U.S.C. 501(c)(3). See 67 Fed. Reg. 65190, 65196 (Oct. 23, 2002).

5. WRTL did not participate in the Commission's 2002 electioneering communication rulemaking. It did not submit written comments or send a representative to testify at the hearing the Commission held. See FEC Exhibits Submitted in Support of it Opposition to Plaintiff's Motion for a Preliminary Injunction, filed August 9, 2004 ("PI Exh.") 1. In the more than two and a half years since that rulemaking began, WRTL has not petitioned the Commission to adopt any additional exemptions from the statutory regulation of electioneering communications.

6. WRTL has not asked the Commission for an advisory opinion pursuant to 2 U.S.C. 437f with respect to how it might broadcast advertisements that would serve the organization's alleged purposes but would not be considered "electioneering communications."

7. WRTL administers its own separate segregated fund, the Wisconsin Right to Life Political Action Committee ("PAC"). See PI Exh. 2 (Statement of Organization); 2 U.S.C. 431(4), 441a(a)(4), 441b(b)(2)(C). The fund is registered with the Commission as a multicandidate political committee under the FECA.

8. Although the yearly limit on individual contributions to such a political committee is $5,000, from January 2003 through June 2004 WRTL's PAC received contributions from no individual that totaled more than $1,000. PI Exh. 3.

9. WRTL's PAC actively opposed Russell Feingold's election to the Senate in 1992 and his re-election in 1998. PI Exh. 8-9. WRTL's PAC also made independent expenditures in Feingold's 2004 re-election campaign. PI Exh. 3.

10. In early March 2004, WRTL's PAC endorsed three candidates, each of whom was seeking the Republican nomination in the September 14, 2004, party primary to challenge Senator Russ Feingold in the November general election. PI Exh. 4-5 (WRTL/PAC announcements); see also PI Exh. 7 (3/4/2004 press release by Welch campaign stating that "Wisconsin Right to Life Endorses Bob Welch").

11. For months prior to their March 2004 endorsement by WRTL's PAC, the three candidates had been attacking Senator Feingold for allegedly blocking or filibustering against some federal judicial nominees. See, e.g., PI Exh. 10-13 (press releases dated 9/4/2003, 11/12/2003, 11/14/2003, and 1/16/2004, by candidate Robert Welch).

12. One of the WRTL PAC's announcements of its endorsement of the Republican candidates in 2004 explained that "'[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees.... [T]he defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections.'" PI Exh. 4 (quoting PAC Chair Bonnie Pfaff).

13. On March 26, 2004, WRTL itself (not its PAC) issued a press release headed: "Feingold's, Kohl's and Kerry's Votes Against Unborn Victims Bill

Demonstrates [sic] an Utter Disrespect for Human Life! Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush...Send Feingold Packing!" PI Exh. 20.

14. The judicial nominee issue remained an important one in the Senate campaign in Wisconsin during the summer of 2004. See, e.g., PI Exh. 21-22. The Republican Party of Wisconsin also emphasized that issue in criticizing candidate Feingold. See PI Exh. 15 (Party's online poll asked "What is the #1 reason why Russ Feingold should be voted out of office in 2004?" and offers "His obstruction of President Bush's judicial nominees" as one of four possible answers; site visited 7/29/2004).

15. In its press releases and "e-alerts" to the public in the summer of 2004, WRTL itself voiced the same criticisms made by Feingold's Republican opponents and by WRTL's PAC. See PI Exh. 16, 18, 24-25.

16. On July 14, 2004, WRTL issued a news release entitled "Wisconsin Right to Life Urges Sens. Feingold, Kohl to Stop Filibustering Judicial Nominees and to Act With Fairness." PI Exh. 16. The news release quoted extensively from a letter the organization's Executive Director and Legislative Director had sent that day to Senators Kohl and Feingold. The letter stated in part: "We are writing on behalf of the entire Wisconsin Right to Life organization to express our grave concerns regarding your efforts to prevent an up or down vote on various qualified and well-qualified judicial nominees.... You have voted 16 out of 16 times to filibuster judicial candidates." Id.

17. Some of the communications that set out WRTL's view of Senator Feingold's record on judicial nominees and that criticize that record are found at a special web site WRTL has created. See http://www.befair.org/news_room.php. The three

advertisements that WRTL sought through this litigation to finance with money from its corporate treasury during the 2004 primary and general elections ask the listener or viewer to "visit" that web site. See Complaint, Exh. A-C.

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v.	)	
	)	STATEMENT OF
FEDERAL ELECTION COMMISSION,	)	GENUINE ISSUES
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF GENUINE ISSUES

Pursuant to Local Civil Rules ("LCvR") 7(h) and 56.1, defendant Federal Election Commission ("FEC" or "Commission") submits the following Statement of Genuine Issues and Objections to Plaintiff's Statement of Material Facts, filed March 14, 2005 ("Plaintiff's Statement"). This statement contains the Commission's responses and objections to the evidence adduced by plaintiff in support of its motion for summary judgment. These responses and objections are presented below in numbered paragraphs tracking the numbering scheme in Plaintiff's Statement.

1. No response.

2. No response.

3. 2 U.S.C. 441b(b)(2) speaks for itself. The Commission objects to this paragraph because it is a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). In any event, the Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil

enforcement of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455.

4-7. The Commission objects to these paragraphs because they present legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

8. No response.

9. No response.

10. The Commission objects to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC's Statement of Material Facts ("FEC Facts") 10-17. The Commission further objects to the use of the phrase "electioneering communication prohibition periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003). A time period in which the plaintiff can use its general treasury funds for advertising in print media, the Internet, billboards and other public signs, direct mail, and telephone banks, or fund its proposed broadcast advertising from its political action committee, is not a "prohibition period."

11. This paragraph describes a notice in the Federal Register, which speaks for itself. To the extent any factual allegation is presented, the Commission objects based on a lack of foundation because the declarant attesting to the Amended Verified Complaint cited in this paragraph lacks personal knowledge regarding the statement presented.

12. To the extent this paragraph relies upon the Amended Verified Complaint, the Commission objects based on a lack of foundation because the declarant attesting to the amended verified complaint cited in this paragraph lacks personal knowledge regarding the statement presented. The Commission further objects because the citation to the Congressional Record as to the July 20, 2004 Senate cloture vote does not support the statement that "the filibuster continues."

13-15. The Commission objects on the grounds that these paragraphs rely on inadmissible hearsay, rather than record evidence. See Waterhouse, 124 F. Supp. 2d at 4 (alleged facts for which no record citation is provided are deficient). To the extent these paragraphs rely upon the Amended Verified Complaint, the Commission objects based on a lack of foundation, because the declarant attesting to the Amended Verified Complaint cited in this paragraph lacks personal knowledge regarding the statements presented.

16. The Commission objects on the grounds that this paragraph is unintelligible because it is not clear what time frame is referenced, and because the second sentence appears to allege that plaintiff's ads "were electioneering communications" because they were "not within the electioneering communication" periods. The Commission further objects to the use of the phrase "electioneering communication blackout periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003). The Commission objects to the characterization of the "purpose" of these ads as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17. The Commission

objects to this paragraph because it contains legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

17. The Commission objects to the assertions that the "timing of the Senate filibusters and votes" was driving the plaintiff's decision making and that the timing of the advertising campaign was "beyond WRTL's control," because these statements are controverted in the record. The record shows that the Senate filibuster of judicial nominees was a longstanding issue for WRTL and suggests that the timing of WRTL's broadcast advertising was driven by electoral concerns. See FEC Facts 10-17. The Commission further objects to the use of the phrase "blackout periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

18. The Commission objects to this paragraph because it contains statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

19-28. The Commission objects to these paragraphs because they contain statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). To the extent these

paragraphs describe statutes and regulations, those provisions speak for themselves. The Commission objects to plaintiff's description of its speculative and contingent future plans as to the November 2004 election, an election that in any event has now occurred.

29. The Commission objects to this paragraph because it contains statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

30-31. The Commission objects to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). To the extent these paragraphs describe statutes and regulations, those provisions speak for themselves. The Commission objects to plaintiff's description of its speculative and contingent future plans, to the extent that it is offered as purported evidence of how plaintiff actually will act in the future.

32. This paragraph describes the plaintiff's Amended Verified Complaint, a document that speaks for itself and is not a "material fact" within the meaning of LCvR 7(h). The Commission objects to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17.

33. The Commission objects because the record controverts plaintiff's

purported fact that its advertising expressed an opinion on "pending Senate legislative activity" that was "imminently up for a vote[.]" Plaintiff has provided no record evidence to support this assertion. See Waterhouse, 124 F. Supp. 2d at 4 (alleged facts for which no record citation is provided are deficient). The Commission objects to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17.

34. The Commission objects to this paragraph because it contains statements not within the personal knowledge of the cited declarant. The Commission objects because the record controverts plaintiff's purported fact that its advertising expressed an opinion on "imminent" legislative issues "with which two incumbent Senators were dealing and would have to shortly deal with [sic] further." Plaintiff has provided no record evidence to support this assertion. See Waterhouse, 124 F. Supp. 2d at 4 (alleged facts for which no record citation is provided are deficient).

35-37. The Commission objects to the characterizations of the WRTL ads as purely legislative ads with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17.

38. The Commission objects to this paragraph as immaterial to any claim before the Court.

39. The Commission objects to this purported fact as vague and ambiguous.

40-41. The Commission objects to these paragraphs because they contain

statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

42-43. The Commission objects to these facts as immaterial to plaintiff's cause of action. Furthermore, these purported facts are controverted by the text of the ads, see Plaintiff's Exhibits ("Pl. Exh.") A-C, which implicitly convey the candidates' "record and position on the issue" and comment on a federal candidate.

44. The Commission objects to this fact as immaterial to plaintiff's cause of action.

45. The Commission objects to this paragraph because it contains a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

46. The Commission objects to the non-expert opinion testimony presented in this paragraph. The Commission further objects that the cited declarant lacks the requisite foundation to make the claim from personal knowledge. Furthermore, the record controverts this fact because it shows WRTL routinely uses non-broadcast media and generally makes little use of broadcast media. See FEC Facts 10-17. The Commission objects to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17.

47. This paragraph describes the plaintiff's Amended Verified Complaint, a document that speaks for itself and is not a "material fact" within the meaning of LCvR 7(h). The Commission objects to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17.

48. The Commission objects to this paragraph because it describes the plaintiff's Amended Verified Complaint, a document that speaks for itself, and because it contains the legal conclusion that WRTL "was prohibited" from running advertising, which is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

49. The Commission objects to this paragraph as speculative, vague, and ambiguous. The Commission further objects to this fact as immaterial to plaintiff's cause of action. The Commission further objects to the use of the phrase "electioneering communication prohibition periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

50. No response.

51. The Commission objects to any implication that Ms. Lyons has the requisite foundation to make all of the statements in her affidavit from personal knowledge.

52. The Commission has no response to the first sentence. As to the second

sentence, the Commission objects because it contains a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

53-54. The Commission objects to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

55. The Commission objects to this purported fact with regard to how WRTL and its PAC choose to raise and spend funds as immaterial to plaintiff's cause of action.

56. The Commission objects to this purported fact with regard to how WRTL-PAC chooses to spend funds as immaterial to plaintiff's cause of action.

57-60. The Commission objects to these purported facts with regard to how WRTL-PAC chooses to raise and spend funds as immaterial to plaintiff's cause of action. The Commission further objects on the grounds that the statements in these paragraphs are speculative, and because the declarant attesting to the Amended Verified Complaint cited in these paragraphs lacks personal knowledge regarding the statements presented. The record controverts these facts to the extent the facts suggest that contribution limits in 2 U.S.C. 441(a)(a)(1)(C) or 2 U.S.C. 441a(a)(3)(B) in any way limited WRTL's fundraising ability. From January 2003 through June 2004, no donor to WRTL-PAC made an annual contribution of more than $1,000. See FEC Fact 8. The Commission further objects to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse

v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

61. The Commission objects to these purported facts with regard to how WRTL-PAC chooses to raise and spend funds as immaterial to plaintiff's cause of action. The Commission further objects on the grounds that the statements in these paragraphs are speculative, and because the declarant attesting to the Amended Verified Complaint cited in these paragraphs lacks personal knowledge regarding the statements presented. The Commission objects to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 10-17.

62-65. The Commission objects to these purported facts with regard to how WRTL-PAC chooses to raise and spend funds as immaterial to plaintiff's cause of action. The Commission further objects on the grounds that the statements in these paragraphs are speculative, and because the declarant attesting to the Amended Verified Complaint cited in these paragraphs lacks personal knowledge regarding the statements presented.

66. The Commission objects to these purported facts with regard to how WRTL-PAC chooses to raise and spend funds as speculative and immaterial to plaintiff's cause of action. The Commission further objects to this paragraph because it contains a legal conclusion that is not properly included in a statement of material facts under Local

Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

Respectfully submitted,

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March 28, 2005

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.	)	
	)	CERTIFICATE OF SERVICE
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 2005 I caused to be served by hand delivery a copy of the Federal Election Commission's Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, Statement of Material Facts, Statement of Genuine Issues, and proposed Order on the following local counsel for plaintiff:

M. Miller Baker, Esq.
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I further certify that I also caused to be served a courtesy copy of the same documents by e-mail in PDF format on James Bopp, Jr., Lead Counsel for Plaintiff, at JBoppjr@aol.com.

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