UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5292

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

FEDERAL ELECTION COMMISSION'S COMBINED OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND MOTION TO EXPEDITE DISPOSITION

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I. INTRODUCTION

The three-judge district court below 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, 91-92 (2002), because the Supreme Court's rationale in finding that provision constitutional in McConnell v. FEC, 124 S.Ct. 619 (2003), forecloses the kind of as-applied challenge that WRTL has brought here. Citing the reasons it gave in denying the preliminary injunction motion, the district court also denied WRTL's motion for an injunction pending appeal. This court lacks jurisdiction to review the district court's decision and, in any event, the district court plainly did not abuse its discretion in concluding that WRTL has little likelihood of success on the merits. For that and other reasons, this Court should deny WRTL's request for extraordinary relief that would enjoin application of a statute recently upheld by the Supreme Court.

WRTL intends to use money from its general corporate treasury to finance "grass roots lobbying," including three specific television and radio broadcast advertisements that identify by name Wisconsin's two United States Senators. These communications would be distributed in Wisconsin during the 30-day period before the upcoming September primary election in which one of the named Senators, Russell Feingold, is seeking his party's nomination, and during the 60-day period before the November general election. 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 those 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").

On July 28, 2004, WRTL filed a complaint challenging the constitutionality of BCRA § 203 as applied to it. The complaint seeks permanent injunctive and declaratory relief. WRTL concurrently filed a motion for a preliminary injunction to prevent the Federal Election Commission ("the Commission" or "FEC") from enforcing the provision against it. On August 12, after full briefing by the parties and a hearing, the three-judge court convened at WRTL's request, see BCRA § 403, denied the motion for a preliminary injunction. See Order of August 12, 2004, and Memorandum Opinion and Order of August 17, 2004 ("Mem. Opin.").[1] WRTL then filed in this Court an interlocutory appeal of the denial of the preliminary injunction and also filed a motion for an injunction pending appeal in the district court, which that court denied. See Order of August 18, 2004. On August 20, 2004, WRTL filed both an emergency motion for an injunction pending appeal ("Mot.") and a motion to expedite disposition in this Court.

The Commission opposes WRTL's motion for an injunction pending appeal and its motion to expedite disposition. First, as the Commission explains in its accompanying motion to dismiss, this Court lacks jurisdiction over this appeal because WRTL was required to bring its appeal directly to the Supreme Court. Second, as the Commission shows in this Opposition, even if this Court has jurisdiction, it should conclude, like the three-judge court, that WRTL has failed to satisfy the stringent requirements for the extraordinary relief of an injunction pending appeal. Third, the expedition that WRTL seeks is unnecessary to protect its interests and will harm the Commission and the public interest.

[1] The August 17 Opinion and Order directed the parties to file supplementary memoranda within 10 days to address whether the entire case should be dismissed. Mem. Opin. at 9.

II. BACKGROUND

A. Statutory and Regulatory Background

1. Regulation of Corporate-Financed Electoral Activities Prior to the Passage of BCRA

Federal law has long prohibited corporations, whether large or small, for-profit or not-for-profit, from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See, e.g., FEC v. Beaumont, 539 U.S. 146, 152-54 (2003). The FECA makes it "unlawful … for any corporation whatever … to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The FECA does not, however, ban any corporation from speaking. Rather, it permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C). The fund "may be completely controlled" by the corporation, and is "separate" from it "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." FEC v. National Right to Work Comm., 459 U.S. 197, 200 n.4 (1982) (quoting Pipefitters v. United States, 407 U.S. 385, 414-17 (1972)). The fund comprises donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in this fund can, for example, be contributed directly to federal candidates or used to pay for independent expenditures to communicate to the general public the corporation's views on candidates for federal office.

In FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238 (1986), the Supreme Court held that section 441b's prohibition on using corporate treasury monies to finance independent expenditures for speech could not constitutionally be applied to a subgroup

of corporations like MCFL that has three essential features.[2] The MCFL decision also narrowed the substantive scope of section 441b even as to corporations that do not come within the special subgroup by construing the provision's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. 479 U.S. at 248-49. See 2 U.S.C. 431(17) (pre-BCRA version). The Court had originated the concept of express advocacy in Buckley v. Valeo, 424 U.S. 1, 43-44, 77-80 (1976), in narrowly construing other provisions of the FECA regulating independent campaign expenditures to avoid the same kinds of constitutional infirmities. Buckley provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." Id. at 44 n.52.

2. Regulation of Corporate-Financed Electoral Activities After the Enactment of BCRA in 2002

After the Supreme Court adopted those narrowing constructions in Buckley and MCFL, Congress concluded that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." McConnell, 124 S.Ct. at 650. Corporations and labor unions crafted political communications that avoided explicit words of electoral advocacy but that "no less clearly intended to influence the election." Id. at 689 (footnote omitted). "Moreover, 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." Id. at 651 (footnote omitted).

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[2] MCFL was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; it had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 264.

"Congress enacted BCRA to correct the flaws it found in the existing system," McConnell, 124 S.Ct. at 689, and BCRA § 203 amended 2 U.S.C. 441b(b) by barring corporations and unions from paying for an "electioneering communication" with money from their general treasuries. 2 U.S.C. 441b(b)(2). BCRA defines the term "electioneering communication" in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), codified at 2 U.S.C. 434(f)(3)(A)(i).[3] The definition does not include print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, or other non-broadcast media such as telephone or Internet communications. See McConnell, 124 S.Ct. at 636.

B. Plaintiff Wisconsin Right to Life, Inc.

WRTL is a nonprofit corporation that administers its own separate segregated fund, the Wisconsin Right to Life Political Action Committee ("PAC"). Mem. Opin. at 1 ¶ 1, 2 ¶ 6; Exh. 2 (Statement of Organization) to the FEC's Opposition to Plaintiff's Motion for a Preliminary

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[3] BCRA excludes from this definition (i) a news story, commentary, or editorial by a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), codified at 2 U.S.C. 434(f)(3)(B)(i)-(iv).

BCRA authorizes the Commission to promulgate regulations that exempt communications in addition to those the statute itself exempts, so long as no advertisement that promotes, attacks, supports, or opposes an identified federal candidate can fall within any such exemption. See 2 U.S.C. 434(f)(3)(B)(iv). In 2002, the Commission promulgated two exemptions: 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). WRTL did not participate in the Commission's rulemaking, and, in the two years since that rulemaking began, WRTL has not petitioned the Commission to adopt any additional exemptions from the statutory regulation of electioneering communications.

Injunction ("Opp. P.I."). It alleges that it does not qualify as an "MCFL organization." See Mem. Opin. at 1-2 ¶ 3; supra pp. 3-4.

In March 2004, WRTL's PAC publicly endorsed three Republican candidates opposing Senator Feingold in the Wisconsin Senate race and announced that Feingold's defeat was a priority. Mem. Opin. at 2 ¶¶ 4, 7. WRTL's PAC had actively opposed Feingold's election in 1992 and his re-election in 1998, Opp. P.I., Exh. 8-9, and has already made independent expenditures regarding the Wisconsin Senate election this year, id., Exh. 3. Beginning as early as September 2003, candidates opposing Feingold have made his support of Senate filibusters against judicial nominees a campaign issue. Opp. P.I., at 2 ¶ 5. The Republican Party of Wisconsin also emphasizes that issue in criticizing Feingold. Opp. P.I., Exh. 15. In communications to the public, WRTL itself has voiced the same criticisms made by Feingold's Republican opponents and by WRTL's PAC. Mem. Opin. 2 ¶ 8; Opp. P.I., Exh. 18, 24-25. Until two days before filing its complaint in this case, WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters against judicial nominees. Mem. Opin. at 2 ¶ 9.

III. WRTL CANNOT CARRY ITS HEAVY BURDEN OF SHOWING THAT IT IS ENTITLED TO AN INJUNCTION PENDING APPEAL

A. The Standard for An Injunction Pending Appeal

"[T]he purpose of granting interim injunctive relief … [is] to maintain the status quo pending a final determination of the merits of the suit." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). WRTL, however, is asking the Court to alter the status quo by exempting it from BCRA's requirement — already found constitutional by the Supreme Court — that corporations either finance an electioneering communication through a separate segregated fund or avoid clearly identifying a candidate in the communication. WRTL therefore must make a particularly strong showing that it should receive

the extraordinary relief of an injunction pending appeal.

The four-factor test that the courts of this Circuit have long used in deciding whether to grant a preliminary injunction also governs the decision whether to issue an injunction (or stay) pending appeal. See Louisville and Nashville R.R. Co. v. Sullivan, 617 F.2d 793, 799 (D.C. Cir. 1980); Holiday Tours, 559 F.2d at 842 n.1, 843-44; Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 924, 925 (D.C. Cir. 1958). To prevail, WRTL must demonstrate that (1) it has a substantial case on the merits; (2) it would be irreparably injured without the injunctive relief; (3) an injunction pending appeal would not cause substantial injury to other parties; and (4) the public interest would be furthered by the injunction. See Holiday Tours, 559 F.2d at 843; see also CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995) ("substantial likelihood of success on the merits" necessary for preliminary injunction).

In denying the plaintiff's motions for a preliminary injunction and an injunction pending appeal, the three-judge court unanimously and unequivocally held that WRTL failed to satisfy its burden on each of the relevant factors. See Mem. Opin. at 4-6. WRTL has failed to demonstrate that this assessment by the district court is wrong.

B. WRTL Has Failed to Show that It Is Substantially Likely to Succeed on the Merits

1. This Court Lacks Jurisdiction Over This Appeal

Obviously, WRTL has no chance of success on the merits of its appeal if this Court lacks jurisdiction over it. As discussed more fully in the Commission's motion to dismiss appeal (also filed today), WRTL's motion for an injunction pending appeal alleges no statutory basis for this Court's appellate jurisdiction. The statute giving this Court jurisdiction over preliminary injunctions, 28 U.S.C 1292(a), is inapplicable by its own terms because 28 U.S.C 1253 permits a direct appeal to the Supreme Court from the denial of a preliminary injunction by a three-judge

district court. See Donovan v. Richland County Ass'n for Retarded Citizens, 454 U.S. 389, 389-90 (1982). The motion for injunction pending appeal should be denied for this reason alone.

2. The District Court Correctly Concluded that WRTL Cannot Show a Likelihood of Success on the Merits

The McConnell decision upholding BCRA § 203 on its face greatly strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (Rehnquist, Circuit Justice, 1984). That presumption "'is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of … [the government] in balancing hardships.'" Bowen v. Kendrick, 483 U.S. 1304 (Rehnquist, Circuit Justice, 1987) (quoting Walters, 468 U.S. at 1324; bracketed words added). In McConnell, Chief Justice Rehnquist relied on that very presumption in denying the application to vacate the stay of judgment entered by the three-judge court that, unlike the district court here, had, inter alia, held the same provision of BCRA that is at issue here unconstitutional. See Opp. P.I., Exh. 26 (citing Bowen v. Kendrick).

As the three-judge court explained (Mem. Opin. at 4), the Supreme Court in McConnell "upheld the electioneering communication provisions of the BCRA in their entirety." The McConnell Court initially noted that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view … [§ 203] as a 'complete ban' on expression rather than a regulation." McConnell, 124 S.Ct. at 695 (citing Beaumont, 539 U.S. at 162-63, and Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658 (1990)). "'The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.'" McConnell, 124 S.Ct. at 695 (quoting Beaumont, 539 U.S. at 163). The Court also held that the compelling governmental interests that support requiring corporations to finance

express advocacy communications from a PAC apply equally to their financing of electioneering communications. Id. at 696.

a. McConnell Forecloses As-Applied Challenges to the Corporate Financing Restrictions of BCRA § 203

As the district court explained (Mem. Opin. at 4), the "reasoning of the McConnell Court leaves no room for the kind of 'as applied' challenge WRTL propounds before" this Court. Contrary to WRTL's argument (Mot. at 3), the Supreme Court did not uphold BCRA § 203 only as applied to communications that are the "functional equivalent of express advocacy." Rather, as we explain below, the Court recognized that the 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, 124 S.Ct. at 696.

The 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." 124 S.Ct. 687 n.73 (emphasis added). As the three-judge court explained, the Supreme "Court's deliberate declaration of its ruling as encompassing 'all applications of the primary definition' suggests little likelihood of success for an 'as applied' challenge to some applications of that definition, such as the one plaintiff brings before us." Mem. Opin. at 4-5 (emphasis in original).

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, 124 S.Ct. at 715 (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 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, 124 S.Ct. at 696 (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." 124 S.Ct. at 696 (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. See id. at 694 (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 124 S.Ct. at 668 n.52, 669, 677, 692, 718. The three-judge court found that 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. Because of this "informative contrast," the court "cannot possibly conclude that plaintiff has made out a substantial likelihood of success on the merits." Id. at 6.

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; 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.

As the quotations above from McConnell show, the Court never "conceded that the ban reaches protected speech that Congress may not regulate" (WRTL Mot. at 11), nor did the Court "acknowledge that some issue ads … may not constitutionally be regulated by Congress" (id. at 12; emphasis in original). These assertions rely upon a footnote (124 S.Ct. at 696 n.88) that in no way sanctions as-applied challenges, much less the 16-factor test (a mysteriously reduced version of the 18-factor test that WRTL advocated in the district court) that WRTL asks the Court to enact in lieu of BCRA's bright-line definition. 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 has recognized two general categories of speech, and that the interests that justify a statute's regulating one type might not apply to a statute's 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 effect on 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. 124 S.Ct. at 696 n.88. Thus, nothing in footnote 88 indicates that as-applied challenges are "[a]nother option" (WRTL Mot. at 9) besides using PAC funds or omitting explicit references to federal candidates.[4]

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

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[4] WRTL's reliance on Judge Leon's opinion in McConnell and Justice Stevens' concurrence in Austin (WRTL Mot. at 13-15) is misplaced. As Judge Leon himself recognized when he joined the three-judge court's decision below, 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 (Mot. at 7-8), 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," 124 S.Ct. at 687 n.73, of the primary definition are constitutional. Justice Kennedy's dissent, id. at 768-69, 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.

return to just the sort of uncertainty that the Court found unacceptable in Buckley and that led the Court in McConnell to uphold the constitutionality of BCRA's bright-line definition of "electioneering communication." See 124 S.Ct. at 689; 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").

b. The Political Advertisements that WRTL Calls "Grass Roots Lobbying" Are the Kind of Communications that McConnell Found Congress Had a Compelling Interest in Regulating

Even if this Court were to conclude that McConnell does not foreclose as-applied challenges to BCRA § 203, WRTL cannot make the necessary substantial case on the merits about its own ads. As the three-judge court found, "[t]he facts suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating." Mem. Opin. at 6 (citing McConnell, 124 S.Ct. at 695). The undisputed facts demonstrate that WRTL, directly and through its PAC, is actively opposing Feingold's reelection. See supra pp. 5-6; Mem. Opin. at 2, 6. Indeed, the PAC has announced that "sending Feingold packing" is a priority. Id. at 6. The PAC has endorsed opponents seeking to unseat Feingold. Id. WRTL's anti-Feingold press releases and Web sites highlight the very subject of the advertisements that WRTL intends to finance from its corporate treasury during the primary and general elections — the filibusters concerning some judicial nominees. Those advertisements ask the listener or viewer to "visit" a WRTL Web site ("BeFair.org") that sets out and criticizes Feingold's alleged record on judicial nominees. Mem. Opin., Exh. A-C.

Most tellingly, as the three-judge court noted, "WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message — a campaign issue — during the months prior to the electioneering blackout period, and only as the blackout period approached

did WRTL switch to broadcast media." Mem. Opin. at 6. The Supreme Court in McConnell found that the timing during the pre-election period of "almost all" ostensible issue advertisements referring to candidates "confirmed" "the conclusion that such ads were specifically intended to affect election results." 124 S.Ct. at 651. See also id. at 697, 715. The timing of WRTL's decision to begin broadcasting its advertisements tells the same story.

In sum, WRTL has failed to "ma[k]e a substantial case on the merits." Holiday Tours, 559 F.2d at 843. But without such a substantial indication of success, "there … [is] no justification for the court's intrusion into the ordinary processes of … judicial review." Virginia Petroleum Jobbers Ass'n, 259 F.2d at 259.

C. WRTL Has Failed to Demonstrate that It Will Suffer Irreparable Injury If This Court Denies the Motion for an Injunction Pending Appeal

WRTL has not met its burden of demonstrating that it will suffer irreparable harm in the absence of an injunction pending appeal. "[I]t is 'simply wrong' to view the provision [BCRA § 203] as a 'complete ban' on expression rather than a regulation." McConnell, 124 S.Ct. at 695. WRTL has multiple options for disseminating its anti-filibuster message to the general public. First, during the 30-day and 60-day pre-election periods, WRTL can use its separate segregated fund to finance the broadcast of its political advertisements that clearly identify a candidate for federal office. See id. at 696.

Second, WRTL has other ways to communicate its message: the many non-broadcast means, including print media (newspaper and magazine advertisements, press releases, pamphlets, mailings, billboards), electronic communications (e-mail and Internet postings), and telephone calls. All may lawfully be financed with corporate treasury money. WRTL has used these means in the past (Mem. Opin. at 2 ¶ 9), and it offers no evidence showing that they have suddenly become inadequate.

Third, WRTL could also use its corporate treasury to finance the three broadcast advertisements with only minor alterations. Each of the advertisements, see Mem. Opin., Exh. A-C, could be run without mentioning Senator Feingold's name or otherwise clearly identifying him individually. McConnell found this option consistent with BCRA and constitutionally acceptable. 124 S.Ct. at 696. For example, WRTL could change "Contact Senators Feingold and Kohl and tell them to oppose the filibuster" to "Contact the members of the Senate and tell them to oppose the filibuster," and accompany that directive with the Senate's telephone number or the address of its extensive Web site (www.senate.gov).

WRTL rests its claim of irreparable harm in part on its mistaken legal assumption that any allegation of First Amendment harm shows sufficient irreparable harm. However, "[a] litigant must do more than merely allege the violation of First Amendment rights." Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987). See also NTEU v. United States, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991); Christian Knights of the Ku Klux Clan Invisible Empire v. District of Columbia, 919 F.2d 148, 149-50 (D.C. Cir. 1990). To constitute irreparable injury, a harm "must be both certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). But, as the three-judge court found (Mem. Opin. at 7), the "actual limitation on plaintiff's freedom of expression … is not nearly so great as plaintiff argues."

WRTL also argues (Mot. at 18) that it will suffer irreparable injury because it "does not have the money in its PAC to broadcast these ads and would not be able to raise sufficient PAC funds in time to broadcast the ads." However, WRTL's inability to attract sufficient contributions to its PAC to finance all the political activities that WRTL wishes to undertake can hardly be attributed to the federal campaign finance laws; WRTL is no different from any other corporation that wishes it had more revenue. The Supreme Court long ago upheld the

constitutionality of the restrictions governing the solicitation of contributions to corporate separate segregated funds, see FEC v. National Right to Work Comm., 459 U.S. 197, 201-02 (1982), and those restrictions have not prevented many segregated funds from accumulating considerable financial assets. Nor can WRTL blame the contribution limits set by the Federal Election Campaign Act. Although the yearly limit on individual contributions to a political committee like WRTL's PAC is $5,000, publicly available reports that the PAC filed with the Commission from January 2003 through June 2004 show that, during that period, the PAC received contributions from no individual that totaled more than $1,000. Opp. P.I., Exh. 3. The alleged "burdens inherent in PAC funding" (Mot. at 18) are unconstitutional only as applied to MCFL organizations, see McConnell, 124 S.Ct. at 698-99, but WRTL alleges that it does not qualify for that exemption, apparently because it has chosen to accept money from business corporations or to engage in its own business activities. Finally, in upholding BCRA § 203, the Supreme Court in McConnell held that a PAC option was a "constitutionally sufficient" means for corporations to pay for election-related advocacy. 124 S.Ct. at 694. Contrary to WRTL's contention (Mot. at 18), the Court did not consider the PAC option sufficient "only in the context of …'sham issue ads.'" It clearly stated that, "in the future [under BCRA] corporations … 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." 124 S.Ct. at 696 (emphases added).[5]

[5] WRTL's position is notably weaker than that of the environmental group in the hypothetical posed by Justice Kennedy in dissent. McConnell, 124 S.Ct. at 768-69 (Kennedy, J., dissenting). In that hypothetical, the group had no PAC and would assertedly have had difficulty in establishing one in the "short time required" to respond to a proposed environmental legislative measure that really was sudden and unexpected. Id. Yet the McConnell majority was unmoved by this example.

In sum, the three-judge court noted "the near-total absence of irreparable harm to the plaintiff [WRTL]" if its motion for a preliminary injunction were denied. Mem. Opin. at 8. WRTL has not demonstrated any reason why this Court should reach a different conclusion.

D. An Injunction Pending Appeal Will Cause the Commission and the Public Substantial Harm

Even a temporary lifting of the electioneering communication requirements for a single entity would undermine BCRA's operation during the 2004 elections, and thus harm the public interest. An injunction pending appeal would also harm the Commission by preventing it from enforcing a congressional enactment upheld by the Supreme Court. See Mem. Opin. at 8 ("We hold that an injunction against the performance of its statutory duty constitutes substantial injury to the Commission"). BCRA has been in effect since 2002; that is the status quo. The requested injunction would radically change the status quo without the benefit of further policy deliberations by Congress and the Commission.

As then-Justice Rehnquist explained in staying a federal court decision enjoining the enforcement of a state statute, "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice, 1977). The same kind of irreparable injury is suffered nationally when a federal statute cannot be enforced. See Opp. P.I., Exh. 26 (Chief Justice Rehnquist denying the application to vacate the stay of judgment entered by the three-judge court in McConnell).

WRTL offers no counter to the harms just described. Instead, it conflates its own interests with the public interest and rehashes its arguments why, in its view, it is likely to succeed on the merits. Mot. at 19-20.

In sum, on a motion for an injunction pending appeal, the movant bears the burden to justify the court's granting such an extraordinary remedy. WRTL has failed to establish that it is substantially likely to prevail on the merits, and it has further failed to demonstrate that the balance of equities or the public interest favors the granting of an injunction.

IV. THE COURT SHOULD DENY WRTL'S MOTION TO EXPEDITE THE DISPOSITION OF THIS APPEAL BECAUSE EXPEDITION IS UNNECESSARY TO PROTECT WRTL AND WOULD PREJUDICE THE COMMISSION

WRTL asks that its emergency motion for an injunction pending appeal serve as its opening brief on the merits of its appeal of the denial of its motion for a preliminary injunction;[6] it also seeks an expedited schedule for the remaining briefs on the merits of the underlying appeal. Motion to Expedite Disposition at 1. The proposed consolidation is completely unwarranted and would severely prejudice the Commission.[7]

If the Court grants WRTL's emergency motion for an injunction pending appeal, WRTL will get all the relief it allegedly needs until the Court decides the appeal. In that case, there would be no reason to expedite the appeal of the denial of the preliminary injunction. If the

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[6] WRTL's motion is inadequate in its substance, not only in its form, to be treated as a brief on the merits. For example, it does not identify any statutory basis for this Court's appellate jurisdiction. See Fed. R. App. P. 28(a)(4); D.C. Cir. Rule 28(a)(4).

[7] Even if the Court grants the injunction pending appeal sought by WRTL or the preliminary injunction it also requests, WRTL could still be subject to a civil enforcement action by the Commission under the retroactivity doctrine if BCRA § 203 ultimately is found to be constitutional as applied to WRTL or if the preliminary injunction is reversed. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 532 (1991); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97-98 (1993). Moreover, interim injunctive relief would not immunize WRTL for actions it takes during the period in which the injunction is in effect. See Edgar v. MITE Corp., 457 U.S. 624, 648-49 (1982) (Stevens, J., concurring); Suster v. Marshall, 149 F.3d 523, 527 (6th Cir. 1998), cert. denied, 525 U.S. 1114 (1999); Donaldson v. United States Dep't of Labor, 930 F.2d 339, 346 (4th Cir. 1991). Thus, the preliminary injunction sought by WRTL provides little benefit to WRTL — another reason why expedition is unwarranted.

Court denies the emergency motion because WRTL cannot meet its burden under the applicable four-part test, then for the same reasons there is no need to expedite review.

In addition, any purported need for an immediate ruling on the motion for a preliminary injunction is belied by WRTL's own delay in bringing this suit. See, e.g., Anderson v. FEC, 634 F.2d 3, 5 (1st Cir. 1980) (denying preliminary injunction when "[p]laintiffs did not commence this action until late in the campaign"). BCRA was enacted more than two years ago, and the Supreme Court upheld the electioneering communications provisions on December 10, 2003. When "an application for [a] preliminary injunction is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required," Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 80 (4th Cir. 1989) (internal quotation marks omitted), even when First Amendment rights allegedly are at issue. See Tenacre Foundation v. INS, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996); Anderson, 634 F.2d at 4-5. The Senate filibuster of judicial nominees has been a public issue in Wisconsin at least since March 2003, in part as a result of WRTL's own activities. WRTL's decision to wait until the last minute to file suit provides no basis for consolidating its motion for an injunction pending appeal with the merits of its underlying appeal, particularly because the appeal from the denial of a preliminary injunction may soon be moot.[8]

[8] It is likely that the three-judge district court will soon rule on WRTL's request for permanent relief and dismiss the entire case. As we explain in our filing today with the district court, the conclusion that McConnell forecloses the kind of as-applied challenge brought by WRTL makes unnecessary any further development of facts, such as information about WRTL's finances and its decision to broadcast particular ads in this election season. The district court is likely, therefore, to deny WRTL's request for permanent relief and issue a final decision dismissing the case. Thus, the appeal of the denial of the preliminary injunction may soon be moot, and because BCRA § 403 requires that any appeal of a final judgment be filed in the Supreme Court, this Court would have no further role to play.

WRTL also asks this Court to waive the normally applicable requirements for briefs. Motion to Expedite at 2. Granting this request would greatly prejudice the Commission, as would the request that the Commission's brief on the merits be completed in only a week. Under Fed. R. App. P. 32(a)(7), a principal brief may contain 14,000 words if a proportional typeface is used. This is the equivalent of about 50 pages. However, the rules allow only 20 pages for a response to a motion. Fed. R. App. P. 27(d)(2). Where, as here, the case concerns the constitutionality and enforcement of a landmark federal statute, the Commission should not be forced to defend the governmental and public interests at stake under such extraordinary and unnecessary restrictions of time and length.

V. CONCLUSION

For the foregoing reasons, this Court should deny the motions of WRTL for an emergency injunction pending appeal and for an expedited disposition of the appeal.

Respectfully submitted,

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