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.	)	
	)	DEFENDANTS' MOTION TO
	)	COMPEL
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN MCCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT'S AND INTERVENOR-DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS, REQUESTS TO ADMIT, AND RESPONSES TO INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 33(b)(5), 34(b) and 37(a), Defendant Federal Election Commission ("Commission" or "FEC") and Intervenor-Defendants Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan (collectively "defendants"), move to compel plaintiff Wisconsin Right to Life ("WRTL") to produce certain documents and to respond to certain interrogatories and requests for admission served by defendants. The defendants hereby certify pursuant to Rule 37(a)(2)(B) that the Commission (acting on its own behalf and on behalf of the Intervenors) made a good faith effort to confer with WRTL via a telephonic conference held on June 14, 2006 to secure the necessary discovery disclosures but have been unable to secure the information or material without

court action. In the interests of judicial economy, defendants tried to reach agreement with WRTL over the disputed discovery by narrowing the scope of some requests and by not pursuing others that could easily have been included here, but the discovery that is the subject of this motion is too important for the compilation of a full record for this Court (and ultimately the Supreme Court) to be abandoned.

The defendants now seek evidence directly relevant to the purpose and effect of WRTL's 2004 advertisements, and to the alleged burdens of financing those advertisements through its separate segregated fund ("PAC"). For example, defendants requested information pertaining to WRTL's own advocacy efforts in 2004 made in conjunction with the three specific advertisements for which WRTL claims a constitutional exemption, since such advocacy may shed light on the purpose and effect of WRTL's purported grassroots lobbying. Defendants also requested information concerning the sources of WRTL's funding for its public communications and advertisements because that information is necessary to understand whether raising money through its PAC creates any significant burden for WRTL. That information may also show whether corporate funds were being used to pay for WRTL's advocacy in a way that would circumvent the prohibition in 2 U.S.C. 441b against corporate funding of electioneering communications. As explained below, however, WRTL has relied upon an unduly narrow interpretation of the Court's April 17, 2006, Scheduling Order, a mistaken interpretation of the rules concerning the numerical limits on interrogatories,

and other flawed objections. This Court should compel WRTL to respond fully to defendants' relevant discovery.[1]

I. The Defendants Are Entitled To Obtain Evidence Relevant To The Purpose And Effect Of WRTL's Advertisements

The scope of allowable discovery under the federal rules is very broad, since parties may "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party …" Fed. R. Civ. P. 26(b)(1). If relevant, requested information is discoverable, and, "[g]enerally speaking, relevance for discovery purposes is broadly construed." Food Lion, Incorporated v. United Food and Commercial Workers, 103 F.3d 1007, 1012 (D.C. Cir. 1979) (internal quotations omitted). "For the purposes of discovery, relevancy is broadly construed and encompasses any material that bears on, or that reasonably leads to other matters that could bear on, any issue that is or may be in the case." Alexander v. FBI, 194 F.R.D. 316, 325 (D.D.C. 2000). "[O]nce a relevancy objection has been raised, the party seeking discovery must demonstrate that the information sought to be compelled is discoverable." Id. And once the "relevance of the material sought has been established, the party objecting to that discovery then bears the burden of showing why discovery should not be permitted." Id. at 325-26. See also Ellsworth Assocs., Inc. v. United States of America, 917 F. Supp. 841, 844 (D.D.C. 1996).

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[1] Four of WRTL's contractors for its advertising campaign, three of whom are represented by the same counsel as WRTL, have interposed many of the same objections as WRTL in response to third-party subpoenas. The contractors at issue are located outside this jurisdiction. Defendants expect that the Court's ruling on this motion will address the substance of the contractors' objections, and defendants therefore expect to confer with counsel upon receipt of the Court's order in an effort to avoid duplicative discovery motions around the country.

As this Court recognized in its Memorandum Opinion and Order of August 17, 2004 (slip op. at 6), the pattern of advocacy WRTL and its PAC used during the 2004 campaign is relevant in determining whether "WRTL's advertisements may fit the very type of activity McConnell [v. FEC, 540 U.S. 93, 124 S. Ct. 619 (2003)] found Congress had a compelling interest in regulating." This relevant context includes the PAC's use of media, its candidate endorsements, and its announced priority to "'send[] Feingold packing.'" Id. WRTL, however, has objected to several permissible discovery requests by relying upon an unduly narrow and self-serving interpretation of this Court's April 17, 2006 Scheduling Order. In particular, WRTL has improperly construed that Order to prevent discovery of relevant events during the 2004 campaign, which is necessary to understand the purpose and effect of WRTL's own advertisements.

For example, in its response to Request to Admit 15, WRTL refused to admit that its PAC made independent expenditures opposing Senator Russell Feingold's 2004 reelection campaign because WRTL asserts that this request seeks "admission of facts having to do with historical or planned advocacy in direct contravention to the [April 17th] Order." This response, however, finds no support in the Order, which states (at 2):

> With regard to the areas of permissible discovery that are in dispute, until further order, discovery shall be allowed into the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign (but not into any historical or planned future advocacy by plaintiff), and the burdens BCRA [Bipartisan Campaign Reform Act] places upon plaintiff's expression, including the limits of PAC fundraising, the effectiveness of using other media, and the option of employing alternative text for the intended advertisements. This Order is not intended to require disclosure of information that is otherwise proprietary.

The Order expressly permits discovery "into the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign" without any limitation; the "2004 campaign"

clearly refers to the 2004 Senate race in Wisconsin, not WRTL's self-defined "grass-roots lobbying" campaign. Thus, any public advocacy WRTL or its PAC conducted in proximity to the primary or general election in 2004 occurred as part of the "2004 campaign," regardless of whether WRTL conclusorily asserts that it was not part of its "grass-roots lobbying" campaign.

WRTL has also unjustifiably relied upon its narrow interpretation of the April 17 Order in its refusal to respond to the following discovery requests:

> **A. First Set of Document Requests, Number 4:** Copies of all documents from January 1, 2002 through the present communicating WRTL's (including WRTL PAC's) support of or opposition to United States Senator Russ Feingold or one of his opponents, regardless of whether those communications expressly advocate the election or defeat of a candidate.
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> **WRTL's Response:** WRTL objects to the overbroad and unduly burdensome formulation of this request as one for "all documents," especially given the overbroad and vague definition of WRTL and in light of the vague phrase "support or opposition to" without the express advocacy limitation which vagueness makes it impossible for WRTL to know what documents might be responsive. WRTL objects that this request is beyond the permitted scope of discovery in that the April 17, 2006 Scheduling Order expressly forbade discovery concerning "any historical … advocacy by plaintiff." *Id.* at 2.

During the pre-motion conference held by the parties, the defendants agreed to narrow this request, explaining that they sought only documents communicating WRTL's (including WRTL PAC's) support for or opposition to Senator Feingold and/or his opponents in the 2004 election cycle.[2] This clarification eliminates any reasonable objection WRTL asserts based on this Court's April 17, 2006 Scheduling Order.

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[2] We believe that WRTL's history of opposing Senator Feingold in prior election cycles is in fact relevant to the purpose and effect of its advocacy during the 2004 election cycle. Nevertheless, in an effort to compromise, we have agreed to limit this discovery request to communications that took place during the 2004 campaign.

Furthermore, WRTL's objections based on overbreadth and burdensomeness lack merit: Defendants' request is directly relevant to WRTL's pattern of opposition to Senator Feingold and is limited to documents that actually communicate support or opposition to the Senator or his opponents, not all documents that relate in some manner to such communications.[3] For example, if WRTL was sending out direct mail or buying newspaper advertisements opposing Senator Feingold during the same time it was running its broadcast advertisements, those kinds of communications would be relevant in understanding the effect of the 2004 advertisements for which it seeks a constitutional exemption. Or, if WRTL was communicating its opposition to Senator Feingold as part of its efforts to raise funds to pay for its broadcast advertisements, that, too, would be highly relevant in evaluating the purpose of its advertisements.

> **B. Second Set of Document Requests, Number 5:** All documents related to WRTL's "Campaign Finance" campaign referenced in the document produced by WRTL and Bates labeled by the Defendants as WRTL-02-74 through WRTL-02-75.[4]
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> **WRTL's Response:** WRTL objects to the overbroad and unduly burdensome formulation of this request as one for "all documents," especially given the overbroad and vague definition of WRTL, the definition of "related to" as referring to. WRTL objects that the information requested is First Amendment-protected and there is no governmental interest justifying required disclosure, in discovery or otherwise, of the information requested by this document request. WRTL also objects to this request as overbroad and beyond the scope of the Court's April 17, 2006 Scheduling Order which allows discovery only of "plaintiff's 2004 advertisements for the 2004 campaign." The April 17, 2006 Scheduling Order expressly forbade discovery concerning "any historical or future planned advocacy by plaintiff." *Id.* at 2. Since the

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[3] WRTL's vagueness objection, based upon the absence of an express advocacy limitation in this request, also lacks merit. See McConnell, 540 U.S. at 170 n.64 ("The words 'promote,' 'oppose,' 'attack,' and 'support' … 'provide explicit standards for those who apply them' …") (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

[4] A copy of this document is attached as Exhibit 1 hereto.

> request asks for materials outside the 2004 advertisements for the 2004 campaign, they are outside the scope of the Order, overbroad, and irrelevant.

The two-page document in question appears to be a planning chart that summarizes WRTL's various media efforts to publicize both its anti-filibuster advertisements and its efforts in this lawsuit to challenge the electioneering communication provision of BCRA. Despite the fact that the chart on its face describes these public relations efforts as two subparts of an organized media campaign, WRTL has refused to respond to reasonable discovery requests about the "Campaign Finance" portion of its efforts. During the deposition of Barbara Lyons, the person designated by WRTL to provide testimony in the deposition taken pursuant to Rule 30(b)(6), counsel for WRTL instructed Ms. Lyons not to answer the following question: "What does the campaign finance launch refer to?" WRTL Dep. (Lyons) at 78 – 79, attached as Ex. 2 hereto. Mr. Bopp based this instruction on his belief that "That's future advocacy, beyond the scope of order," id., despite the fact that the chart itself indicates that the advocacy in question was to begin on August 15, 2004, as part of a continuing media campaign involving the advertisements that are the subject of this case.[5] Indeed, before Mr. Bopp instructed the witness not to answer, Ms. Lyons explained that the chart "was a kind of a week-by-week job plan of what needed to be done and when it would be done."

[5] Counsel for WRTL and its contractors instructed witnesses not to answer questions regarding most of the topics at issue in this motion to compel at the four depositions taken by defendants. Although counsel's instructions not to answer prevented defendants from pursuing proper lines of questioning, defendants have not requested a re-opening of the depositions as part of the relief sought by this motion in light of the statutorily mandated expedition in this case and in order to focus on the most critical evidence withheld, the documents themselves.

Id. at 78. The chart's subtitle is "Weekly Activity for Each Campaign Component." "Weekly Activity" chart, WRTL-02-74 to WRTL-02-75, attached as Ex. 1 hereto.

WRTL's objections to producing documents related to the "Campaign Finance" portion of its publicity campaign have no merit. This "campaign" does not involve future advocacy, but appears instead to have been one part of a highly structured effort to gain publicity in connection with Senator Feingold and the judicial filibuster, and to challenge BCRA. It is clearly within the timeframe — the 2004 campaign — contemplated by the Court's April 17 Order. Specifically, the "Campaign Finance" campaign was one component of WRTL's overall media campaign that it often referred to as a single "Special Initiative." The manager of the advertising campaign even referred to "the need for continuity" between the filibuster portion of the campaign and the other portions of the campaign — i.e., the campaign finance advertisement part of the campaign — and relayed to the people working on the project the feeling from another contractor that "both phases of the campaign dealt with basic American values." Vanderground email, July 2, 2004, HM-01-317, attached as Ex. 3 hereto. Barbara Lyons, WRTL's executive director, sent an email regarding "our campaign" that included updates on both the filibuster advertisements and the campaign finance advertisements. Lyons email, July 21, 2004, HM-01-286, attached as Ex. 4 hereto ("All scripts are ready for court case.") The campaign was so integrated that WRTL and four of its contractors have not only refused to produce certain documents but have also extensively redacted sections from documents that speak comprehensively to WRTL's overall media campaign. See, e.g., "Filibuster Project Notes," July 9, 2004, HM-01-323 to HM-01-324, attached as Ex. 5 hereto; "Filibuster/Bipartisan Campaign Reform Act — Action Plan," HM-01-319 to

HM-01-321, attached as Ex. 6 hereto. WRTL has even redacted portions of public press releases that it contends are outside the scope of this Court's order. See WRTL press releases, Aug. 17, 2004 and Sept. 8, 2004, WRTL-02-S-15 to WRTL-02-S-17, attached as Ex. 7 hereto. Both the withheld documents and versions of the documents that do not contain redactions should be produced.

Finally, WRTL's objection does not explain its conclusory assertion that this request is prohibited because of the First Amendment. WRTL cites nothing in support of its asserted First Amendment privilege, and the mere fact that the request involves speech does not mean that it is exempt from production under the normal rules of discovery. That speech was clearly part of WRTL's advocacy campaign in 2004 and information about it is relevant to evaluating the "heart of the lawsuit" — the purpose and effect of WRTL's advertisements for which it seeks a constitutional exemption. International Union v. National Right to Work Legal Defense, 590 F.2d 1139, 1152 (D.C. Cir. 1978). Moreover, the requested documents are not available from any "alternative sources" known to defendants, id., and they do not involve the kind of sensitive information about individuals that might expose people to intimidation and other threats, see NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

> **C. Second Set of Document Requests, Number 6:** All documents related to WRTL's plan to create and broadcast campaign finance advertisements in 2004, including but not limited to the radio ad entitled "News Bulletin," referenced in WRTL's August 16, 2004 news release that was produced by WRTL and Bates labeled by the Defendants as WRTL-02-38 through WRTL-02-39.
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> **WRTL's Response:** WRTL objects to the overbroad and unduly burdensome formulation of this request as one for "all documents," especially given the overbroad and vague definition of WRTL, the definition of "related to" as referring to. WRTL objects that the information requested is First Amendment-protected and there is no

> governmental interest justifying required disclosure, in discovery or otherwise, of the information requested by this document request. WRTL also objects to this request as overbroad and beyond the scope of the Court's April 17, 2006 Scheduling Order which allows discovery only of "plaintiff's 2004 advertisements for the 2004 campaign." The April 17, 2006 Scheduling Order expressly forbade discovery concerning "any historical or future planned advocacy by plaintiff." *Id.* at 2. Since the request asks for materials outside the 2004 advertisements for the 2004 campaign, they are outside the scope of the Order, overbroad, and irrelevant.

For substantially the same reasons explained in the previous section, the Court should compel WRTL to provide documents relating to the planned radio advertisement entitled "News Bulletin." Lyons e-mail, August 16, 2004, WRTL-02-39 to WRTL-02-40, attached as Ex. 8 hereto. Defendants obtained this document from WRTL as part of WRTL's response to Defendants' First Request for Production of Documents #2, so WRTL has already conceded that it relates "to the creation, drafting, production, broadcast, purpose or effect" of the three advertisements that are the subject of this case. For that reason alone, it is too late for WRTL to argue that other information about the News Bulletin radio ad is irrelevant or outside the scope of the Court's Order. Documents regarding this advertisement also bear directly on the ability of WRTL to employ "alternative text for the intended advertisements" because WRTL planned for months to run this alleged grassroots lobbying advertisement during the electioneering communication window of time — without naming any officeholders. April 17, 2006 Scheduling Order at 2.

D. Defendants' Second Set of Document Requests,

> **Number 8:** All documents related to the proposed "Statewide Survey" referenced in the document produced by WRTL and Bates labeled by the Defendants as WRTL-02-70 through WRTL-02-71, including, but not limited to, the development of the questions asked in the survey and the results of the survey.

> **WRTL's Response:** WRTL objects to the overbroad and unduly burdensome formulation of this request as one for "all documents," especially given the overbroad and vague definition of WRTL, the definition of "related to" as referring to. WRTL objects that the information requested is First Amendment-protected and there is no governmental interest justifying required disclosure, in discovery or otherwise, of the information requested by this document request. WRTL objects to this request as requesting proprietary information, which is protected by First Amendment and other interests and is expressly protected by the Court's April 17, 2006 Scheduling Order. WRTL also objects to this request as overbroad and beyond the scope of the Court's April 17, 2006 Scheduling Order which allows discovery only of "plaintiff's 2004 advertisements for the 2004 campaign." The April 17, 2006 Scheduling Order expressly forbade discovery concerning "any historical or future planned advocacy by plaintiff." *Id.* at 2. Since the request asks for materials outside the 2004 advertisements for the 2004 campaign, they are outside the scope of the Order, overbroad, and irrelevant.

WRTL conducted a public opinion survey in order to "[u]ncover effective message strategies/propositions" on the issues of judicial filibusters and the McCain-Feingold law. "Proposal for Statewide Survey," WRTL-02-70, attached as Ex. 9 hereto. WRTL used the survey to create the advertisements at issue in this case, and it constitutes direct evidence as to the purpose and likely effect of WRTL's advertisements. WRTL has refused to produce documents related to the statewide survey and counsel for WRTL has instructed witnesses not to answer questions about the specifics of the survey, including whether the survey analyzed how different potential messages would affect the recipients' views of Senator Feingold. Vanderground Dep. at 94-98, attached as Ex. 10 hereto. The firm that conducted the survey was also doing polling for one of Senator Feingold's opponents. Id. This information is also relevant to the "heart of the lawsuit" that WRTL has brought to gain an exemption from federal law. Int'l Union, 590 F.2d at 1152. Because this specific polling was done for an advertising campaign that is almost two years old and is the focus of this litigation, the need to have this evidence included in

the record for the Court outweighs WRTL's preference that the poll be considered "proprietary" and kept confidential.

E. Defendants' Requests for Admission

WRTL objected to several of defendants' requests for admission based on its unsupported assertions they are beyond the scope of the Court's April 17 Order because they allegedly address facts "having to do with historical or planned advocacy." Plaintiff WRTL's Responses to Defendants' Requests for Admissions at 4, 6 –7, 9 – 10, & 14 –17, attached as Ex. 11 hereto. The Court should compel WRTL to respond to the following requests for admission, each of which clearly concerns advocacy related to the 2004 campaign and WRTL's advertisements:

> 15. WRTL PAC made independent expenditures opposing Feingold's 2004 reelection campaign.
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> 20. WRTL PAC's March 5, 2004 announcement of its endorsement of the three 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.'"
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> 23. The Republican Party of Wisconsin publicly criticized Senator Russell Feingold over the judicial filibuster issue in the summer of 2004.
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> 24. In its press releases and "e-alerts" to the public in the summer of 2004, WRTL itself voiced criticisms of Senator Feingold on the filibuster issue that were substantially similar to those made by his Republican opponents and by WRTL PAC.
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> 52. On June 24, 2004 Barbara Lyons accepted, on behalf of WRTL, a proposal from consultants Hanon McKendry and NMB Research, LLC, to conduct a statewide telephone opinion survey for a total cost of $18,000 to be conducted in late July 2004. WRTL-02-70 to WRTL-02-71.

58. In September 2003, WRTL Executive Director Barbara Lyons stated to the press that WRTL would be working hard to unseat Senator Feingold in 2004 and that "I think Russ Feingold's been in Washington too long. We need to send him back to Wisconsin." See J.W. Espino, "Wisconsin Right to Life Director Opposes Violence," The Post-Crescent, September 11, 2003.

59. At a September 2004 rally in Eau Claire, Wisconsin, Vice President Cheney said, "The Democrats in the Senate have been doing everything they can — including using the filibuster — to keep the President's sensible, mainstream nominees off the bench ... a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels…." (See http://www.whitehouse.gov/news/releases/2004/09/print/20040929.html). At an October 2004 rally in Ashwaubenon, Wisconsin, the Vice-President reiterated that "a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels." (See http://www.whitehouse.gov/news/releases/2004/10/print/20041021-27.html).

The purpose and effect of WRTL's advertisements cannot be understood in a vacuum, but must be evaluated in the context of WRTL's other advocacy and the prominent issues in the 2004 campaign. The above requests are within the scope of the Court's April 17 Order and are relevant within the meaning of Fed. R. Civ. P. 26(b)(1): This relevance must be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (emphasis added). Accordingly, this Court should compel WRTL to respond to each of the above requests for admission.

II. The Defendants Are Entitled To Obtain Evidence Relevant To WRTL's Alleged Burden Of Financing Its Advertisements Through Its PAC

As the Supreme Court explained in McConnell, 540 U.S. at 206, under BCRA, "corporations and unions may finance genuine issue ads during [the pre-election] time

frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." More generally, the Court, quoting its prior decision in FEC v. Beaumont, 539 U.S. 146, 163 (2003), explained 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, and it lets the Government regulate campaign activity through registration and disclosure, see [2 U.S.C.] §§ 432-434, without jeopardizing the associational rights of advocacy organizations' members."

124 S. Ct. at 695. "Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against circumvention of valid contribution limits." Id. at 696 (citations and quotation marks omitted).

Consistent with this precedent and this Court's April 17 Order ("burdens BCRA places upon plaintiff's expression, including the limits of PAC fundraising…"), the defendants have sought discovery into the relative burdens of raising funds for WRTL's corporate treasury versus its PAC, including information regarding WRTL's receipt of funds from business corporations. In particular, because the Federal Election Campaign Act limits an individual's yearly contributions to a PAC to $5,000, the defendants have sought information about how often WRTL or its PAC has received large contributions. If, for example, WRTL has rarely received annual contributions from individuals in excess of $1,000, then it cannot claim that the limit on contributions to PACs is the cause of any significant fundraising burden. If WRTL has received contributions from business corporations to pay for the kinds of ads that are regulated as electioneering communications — funds that could not be contributed to its PAC — then such funding may be circumventing the Act's prohibition on corporate contributions to PACs.

WRTL should be compelled to respond to the following discovery requests:

> **A. First Set of Interrogatories, Number 5:** Describe in detail the date, amount, and source of any donation of $1,000 or more (cash or in-kind) that WRTL has received since January 1, 2002 that was donated to support WRTL's grassroots lobbying efforts.
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> **WRTL's Response:** WRTL objects that, because it has never been permitted to engage in electioneering communications, there is no governmental interest justifying required disclosure, in discovery or otherwise, of the information required to be disclosed when electioneering communications are actually done. In the Bipartisan Campaign Reform Act of 2002, Congress asserted no interest in the disclosure of information concerning grassroots lobbying, only in information concerning electioneering communications that were actually made, and even as to those it only asserted an interest in the disclosure of donors of $1,000 or more and only from the fund from which the electioneering communications were actually made (i.e., the general fund or a special fund as described in BCRA). WRTL has not contested the disclosure requirements and has agreed to the required disclosure as required by law if and when it is permitted to make electioneering communications. Until such a time, WRTL objects to any disclosure of donor information as protected by the First Amendment rights of free expression and association. WRTL also objects to this question as irrelevant to the extent it seeks information about possible donations "to support" state grassroots lobbying. WRTL objects to the words "to support" as vague, e.g. does it refer to donations that are accompanied by an express earmarking communication, or to donations made with an awareness that WRTL was supporting or opposing legislation (or in hopes that it might) but with out express earmarking, or to donations received in response to a solicitation for donations that listed grassroots lobbying projects along with other WRTL projects as examples of what WRTL was doing (in which situation it is impossible to know to which project the donor was expressing "support" and in what percentage as compared to other projects). WRTL objects that discovery of any information about funding for grassroots lobbying other than 2004 is impermissible as prohibited under the Court's April 17, 2006 Scheduling Order, which permitted discovery only as to "the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign (but not into any historical or planned future advocacy by plaintiff)." *Id.* at 2.

WRTL's objections are without merit. As the defendants clarified in the conference with WRTL that preceded this motion, the defendants are not seeking the identity of any individuals in this or any other discovery request; in this request, defendants merely seek general descriptions for the sources of WRTL's large donations,

e.g., from individuals, non-profit corporations, or business corporations. Thus, WRTL has no reasonable First Amendment objection to this request. As explained supra p. 6 n. 3, the word "support" is not vague, and the interrogatory's focus on donations used to support WRTL's grassroots lobbying efforts was designed to target the request to create a reasonable comparison between relevant fundraising for WRTL's general treasury and fundraising for its PAC. Finally, the request does not violate the Court's April 17 Order because it does not address the purpose and effect of past or future advocacy. Rather, it merely seeks information about large donations during a limited number of years so that defendants can develop evidence about the impact on WRTL, if any, of the FECA's limits on contributions to PACs.[6] Although the April 17 Order limits discovery regarding the purpose and effect of plaintiff's advocacy to the 2004 advertisements directly at issue in this case in the context of the wider 2004 campaign, the Order does not limit evidence about the potential limits of PAC fundraising to 2004. It is reasonable to seek evidence about more than one election cycle in assessing the potential burden of raising money through a PAC.

> **B. First Set of Document Requests, Number 8:** All documents related to or discussing WRTL's efforts to raise funds for electioneering communications or independent expenditures from 2002 to the present.
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> **WRTL's Response:** WRTL objects to the overbroad and unduly burdensome formulation of this request as one for "all documents,"

[6] WRTL objects in part by arguing that it has "never been permitted to engage in electioneering communications" and that it has "agreed to the required disclosure as required by law if and when it is permitted to make electioneering communications." This objection is a red herring. Defendants are not attempting through this discovery request to obtain the information that WRTL would have to report under BCRA's disclosure provisions regarding electioneering communications. As explained above, the defendants are simply seeking to understand the effect of the Act's contribution limits on WRTL's fundraising, not seeking the identity of any individual donors.

> especially given the overbroad and vague definition of WRTL. WRTL objects to the production of documents that might otherwise be responsive to this request but for the fact that they involve state, not federal, activity, as being overbroad, unduly burdensome, irrelevant, and beyond the permissible scope of the April 17, 2006 Scheduling Order, which expressly forbade discovery concerning "any historical or planned future advocacy by plaintiff." *Id.* at 2. WRTL likewise objects to production of documents for other than the year 2004 as being beyond the permissible scope of Order. WRTL produced documents related to funds for grassroots lobbying, *see* Folder #7, some of which might have, but never did, become electioneering communications, so there are no other responsive documents as to electioneering communications. WRTL objects to the request for funds raised for independent expenditures, which would have been funds raised in the federal PAC, because they are beyond the permissible scope of the April 17, 2006 Scheduling Order which forbade discovery into other advocacy and because they are irrelevant. Specifically, WRTL objects to producing a 2004 WRTL PAC fundraising letter for the reasons stated.

Like Interrogatory Number 5 discussed above, this document request simply seeks information relevant to the alleged burden of paying for electioneering communications with PAC funds. Specifically, this request seeks information concerning efforts WRTL has made, if any, to raise money to pay for electioneering communications and independent expenditures — two kinds of spending that WRTL must accomplish through its PAC rather than its general corporate treasury. This request is not prohibited by the Court Order's limiting discovery regarding past and future advocacy, because it does not seek information about the purpose and effect of any such advocacy. Instead, it seeks information about the process and burdens, if any, of raising funds within the limits of the Act.

In particular, WRTL's objection to providing a 2004 PAC fundraising letter is wholly without merit. Any such letter from 2004 is unquestionably within the relevant time period for discovery, and the contents of such a letter are likely to shed light on whether WRTL made any attempts to raise funds for its PAC to pay for the

advertisements at issue in this case. More generally, the requested discovery may lead to admissible evidence relating to similarities between fundraising for the judicial filibuster issue and for WRTL's electioneering communications or independent expenditures. Moreover, the contents of the 2004 fundraising letter could discuss or mention the purpose and effect of WRTL's 2004 advertising campaign (or describe steps being taken to defeat Senator Feingold), even if WRTL chose not to use PAC funds directly to pay for the ads at issue here. WRTL should be compelled to produce the 2004 WRTL PAC solicitation letter and any other similar documents.

III. The Defendants Did Not Exceed The Allowable Number Of Interrogatories

WRTL refused to answer any of nine interrogatories in defendants' second set of interrogatories. Although the defendants' first set of interrogatories included only seven interrogatories, WRTL's response to the second set erroneously stated that the first set had exceeded the allowable number of interrogatories. Specifically, WRTL stated:

> WRTL objects to the Second Set of Interrogatories as violating Fed. R. Civ. P. 33(a). The Defendants' First Set of Interrogatories, including all discrete subparts, has already exceeded the Rule's limit of 25. Plaintiff has not stipulated, in writing or otherwise, to answer more than the number of interrogatories the Rules allow, nor has the Court granted leave for Defendants to serve more than 25 interrogatories on the Plaintiff.

While the First Set of Interrogatories was formally numbered as 7,

> Parties cannot evade [Rule 33's] presumptive limitation through the device of joining a "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it request that the time, place, persons present, and contents be stated separately for each such communication.

> Fed. R. Civ. P 33(a) advisory committee's note (1993). Plaintiffs' [sic] First Interrogatory asked for information for nine different positions within WRTL, encompassing an indeterminate number of actual persons. The Second Interrogatory asked for the job responsibilities for twelve persons and positions within WRTL. There are at least 21 discrete subparts to these interrogatories. The Third Interrogatory asks for information about an indeterminate number of "consultant, advisors, corporations, firms or other individuals or entities." [footnote omitted] The Sixth Interrogatory asked Plaintiff for three discrete explanations of the advertisements at issue in its Verified Complaint. The Defendants' First Set of Interrogatories reached the limitation provided by Fed. R. Civ. P. 33(a) and Plaintiff have [sic] not stipulated to nor has the Court granted Defendants leave to serve more.

WRTL's objection lacks merit. Although Fed. R. Civ. P. 33(a) limits "any party" to serving only 25 interrogatories, WRTL completely overlooks the fact that the interrogatories in question were posed not by a single defendant, the FEC, but by five separate defendants, all different parties. Under the plain terms of the rule, then, each defendant is entitled to serve 25 interrogatories. Indeed, the court in St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP., 217 F.R.D. 288, 289 (D. Mass. 2003), held that a local court rule, which limited "each side" in a case to only 25 interrogatories, was unenforceable in the face of Rule 33(a), so that each defendant was entitled to serve 25 interrogatories without asking leave of court. And as noted by the court in Trevino v. ACB American, Inc., 232 F.R.D. 612, 614 (N.D. Cal. 2006), according to the rules, "each plaintiff may serve each defendant with 25 interrogatories" (emphasis in original). Even if the four intervenors were treated as a single group — i.e., allocated 25 interrogatories instead of 100 — that would still give the defendants a combined total of 50 interrogatories.

Because WRTL ignores this part of Rule 33(a), the Court need not even consider the finer points of WRTL's deeply flawed attempt to disaggregate defendants' first and

second interrogatories into 21 subparts. The first interrogatory merely asks for a list of people who have held different positions at WRTL, and the second interrogatory merely asks for several job descriptions. Plaintiff WRTL's Responses to Defendants' First Interrogatories at 4, attached as Ex. 12 hereto. WRTL should not be permitted to inflate the alleged number of interrogatories the defendants have posed by claiming that each piece of information defendants seek in a particular category constitutes a discrete "subpart." Rather, the Court:

> should decide whether the first question is primary and subsequent questions are secondary to the primary question… if the first question can be answered fully and completely without answering the second question, then the second question is totally independent of the first and not factually subsumed within and necessarily related to the primary question.

Estate of Manship v. United States, 232 F.R.D. 552, 555 (M.D. La. 2005) (internal quotation marks omitted). In interrogatory number one, for example, there is no secondary question; rather, the request simply seeks the identification of various relevant persons. The fact that the answer may list several people does not mean that the request itself has as many subparts as there are people identified in the answer. (In any event, even if the number of job descriptions were counted separately, the request seeks only five — not twelve — descriptions. Barbara Lyons and Susan Armacost, for example, are identified by both name and position.)

Moreover, according to WRTL's math, the defendants' first set of interrogatories exceeded the allowable limit all by itself. Yet WRTL did not object to the first set of interrogatories on that basis, but instead answered the interrogatories or objected to them on other grounds. WRTL thus provided the defendants no notice that it considered the first set of interrogatories to contain numerous subparts that warranted separate counting,

and WRTL therefore waived the right to suddenly assert that defendants' first set of interrogatories consisted of more than the seven numbered interrogatories. Cf. Safeco Ins. Co. of America v. Rawstrom, 183 F.R.D. 668, 669-71 (C.D. Cal. 1998) (finding that Rule 33 requires that "grounds for objection must be stated in a response filed within the period allowed for response" and that defendant could not raise an objection in a later response that she failed to raise in her initial response); Allahverdi v. Regents of the Univ. of New Mexico, 228 F.R.D. 696, 698 (D.N.H. 2005) ("When a party believes that another party has asked too many interrogatories, … the responding party should not answer some interrogatories and object to the ones to which it does not want to respond").

Although WRTL raised no substantive objections to any of the interrogatories in the defendants' second set, and has thus waived the right to make any such objection now, it is important to note that any untimely relevancy objection that WRTL might belatedly make would be without merit. In particular, Interrogatories 7 through 9 are central to the issues before the Court:

> 7. With respect to money that WRTL solicited for its alleged grassroots lobbying campaign concerning judicial filibusters, list: a) the total amount of money raised; b) the number of individual donors and the total amount that was raised from individual donors; c) the number of business corporation donors and the total amount that was raised from business corporations; d) the number of non-profit corporation donors and the total amount that was raised from non-profit corporations; e) the amount of each donation from an individual that was equal to or greater than $5000; f) the amount of each donation from a business corporation that was equal to or greater than $5000 and, for each such donation, the name and address of the business corporation; and g) the amount of each donation from a non-profit corporation that was equal to or greater than $5000 and, for each such donation, the name and address of the non-profit corporation.

8. For each corporate donation to WRTL in 2004 that was equal to or greater than $10,000, list the name and address of the corporation, and the amount and date of each donation.

9. List the total dollars in donations that WRTL received in 2004 from: a) business corporations; and b) non-profit corporations.

In her deposition, Barbara Lyons testified that business corporations made donations to WRTL to help finance the broadcasts of the three advertisements at issue in this case. WRTL Dep. (Lyons) at 143, attached as Ex. 2 hereto. The amount raised from such corporations was probably more than $50,000 and perhaps more than $100,000. Id. at 144-45. More generally, WRTL has also provided documents indicating that it received approximately $317,000 in corporate contributions in 2004. "Corporate Contributions to General Fund 1/1/04 through 12/31/04," WRTL-05-097 to WRTL-05-103, attached as Ex. 13 hereto. Interrogatories 7 though 9 above seek additional information about the particular sources of funds used to finance the ads at issue in this case, as well as the identity of WRTL's large corporate donors.[7] In light of the Supreme Court's repeated recognition of the compelling governmental interest in avoiding circumvention of the Act's limitations on corporate contributions, this information is highly relevant. In particular, learning the identity of WRTL's largest corporate donors in 2004 will enable the defendants to determine whether those corporations, through their PACs, made independent expenditures or contributions in connection with the 2004 Senate campaign in Wisconsin. If, for example, a corporation's PAC made a contribution to support Senator Feingold's opponent and also made a donation to help pay for

[7] Again, defendants do not seek the names or addresses of any individual contributor, but only an indication of how much of the advertising campaign concerning filibusters was paid for by individuals, how many individuals contributed to the campaign, and how many individuals gave more than $5,000 for the effort — the limit an individual can give to WRTL's PAC in any one year.

WRTL's advertisements, such evidence would be relevant concerning the ads' purpose and effect.

Accordingly, WRTL should be compelled to respond to the defendants' second set of interrogatories.

Respectfully submitted,

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