UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC., **Plaintiff,** **v.** **FEDERAL ELECTION COMMISSION,** **Defendant,** ***and*** **SEN. JOHN MCCAIN, *et al.*,** **Intervening Defendants.**	**Case No. 04-1260 (DBS, RWR, RJL)** **THREE-JUDGE COURT**

INTERVENING DEFENDANTS' MEMORANDUM (1) IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND (2) IN SUPPORT OF INTERVENING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, JUDGMENT ON THE RECORD

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Intervening Defendants respectfully submit this memorandum showing why this Court should (1) deny Plaintiff's Wisconsin Right to Life ("WRTL") motion for summary judgment and (2) instead grant summary judgment, or—if material facts are reasonably to be found in genuine dispute—grant judgment, for defendant FEC and the Intervening Defendants.

WRTL's claims raise two sets of issues. *First*, WRTL brings a challenge to the constitutionality of the "electioneering communications" provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 91 ("BCRA") as applied to three broadcast ads mentioning Senator Russell Feingold by name that WRTL wished to pay for with its corporate treasury funds and to run in Wisconsin immediately preceding the 2004 federal election (in which Senator Feingold was a candidate). That claim, as shown below, is moot and, even were

this Court to reach the merits, the as-applied challenge should be rejected. The record conclusively demonstrates that the three 2004 ads are so similar in all material respects to the ads the Supreme Court reviewed in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), that the *McConnell* Court's analysis effectively disposes of this as-applied challenge. *Second*, WRTL brings a purported as-applied challenge to BCRA as it might apply to ads whose context, text, and timing is wholly unspecified, but which, by WRTL's lights, fall into a category it calls "grassroots lobbying." That claim is not ripe for adjudication and, in any event, is nothing more than a repeat of the facial challenge that *McConnell* has foreclosed.

STATEMENT OF FACTS

WRTL is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code. Plaintiff's Statement of Material Facts ¶ 1. WRTL created and has registered an affiliated federal political action committee ("PAC") with the Federal Election Commission ("FEC").[1] The WRTL-PAC has in the past raised and spent substantial funds, as described more fully below.

During the 2004 federal elections, WRTL and its PAC each opposed Senator Feingold's reelection and, in doing so, cited the interrelated right-to-life and judicial filibuster issues as reasons to defeat Senator Feingold. During the 2004 elections, a WRTL website page entitled "Endorsed Pro-Life Candidates"[2] stated that for the September 14, 2004 primary election in

[1] The website of the Federal Election Commission contains the statement of organization and public disclosure reports filed by WRTL-PAC dating back to 1993. *See* http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00173278.

[2] *See* Endorsed Pro-Life Candidates, *available at* http://www.wrtl.org/Sept04%20Primary%20Endorsed%20Candidates.pdf, attached as Exhibit 1.

Wisconsin, WRTL-PAC endorsed Bob Welch, Russ Darrow, and Tim Michels—the three Republican Senate candidates who hoped to run against Senator Feingold that fall. [3]

The WRTL-PAC issued a press release dated March 5, 2004, headed, "Top Election Priorities: Re-elect President Bush . . . Send Feingold Packing."[4] The release stated:

> [WRTL-PAC chair Bonnie] Pfaff also stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race. "No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate. Senators not only vote on legislation affecting the sanctity of human life but they have the power to confirm or not confirm the President's judicial nominations . . . . *We do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees.*
>
> * * *
>
> "Russ Feingold is so extreme in his anti-life position and the U.S. Senate is so important to the future of unborn babies that *the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections*" said Pfaff.

Id. (emphasis added). The release also noted that the WRTL-PAC asked the three Republican candidates it endorsed "if they would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee." *Id.* According to the release, "The three candidates all stated they would oppose a filibuster under those circumstances." *Id.*

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[3] In addition, the WRTL-PAC endorsed President George Bush for reelection, and it endorsed a Republican candidate in seven of the eight Wisconsin House districts. (No endorsement is listed for the 7th congressional district in Wisconsin.) The WRTL-PAC also endorsed 14 candidates in the 2004 elections for the Wisconsin State Senate (of whom 13 were Republicans), and 83 candidates for the Wisconsin State Assembly (of whom 80 were Republicans). *See supra* n.2.

[4] This press release is available on the WRTL website at: http://www.wrtl.org/News04/030504.pdf., and attached as Exhibit 2.

WRTL itself issued a subsequent press release, dated March 26, 2004, subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Feingold Packing!"[5] The release quoted WRTL legislative director Susan Armacost as saying:

> One of the most important elections in the history of the right to life movement will take place in November. . . . The people who represent us in Washington should, at the very least, have some modicum of respect for human life. Apparently, Feingold, Kohl and Kerry do not. This issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!

Id.

WRTL-PAC has a history of opposing Senator Feingold and making campaign expenditures to defeat him. In 1992, when Senator Feingold was first a candidate for the Senate, the WRTL-PAC made over $8,000 in independent expenditures against him or for his opponent.[6] In 1998, when Senator Feingold ran for reelection, WRTL-PAC made independent expenditures of $32,052, about half of which were against him and the other half in support of his opponent.[7] And, in the 2004 election cycle, WRTL-PAC spent over $7500 for mailings, radio ads, and

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[5] This press release is available on the WRTL website at: http://www.wrtl.org/News04/032604.pdf, and attached as Exhibit 3.

[6] *See* Political Money Line, Money in Politics Databases, Feingold, Russell Dana, *available at* http://www.politicalmoneyline.com/cgi-win/x_indepexp.exe?DoFn=92S8WI00026; Political Money Line, Money in Politics Databases, Kasten, Robert W Jr, *available at* http://www.politicalmoneyline.com/cgi-win/x_indepexp.exe?DoFn=92S0WI00072, attached as Exhibit 4.

[7] This total consisted of expenditures of $15,947 against Senator Feingold and $16,026 in expenditures in support of Representative Neumann, his opponent. *See* Center for Responsive Politics, Wisconsin Right to Life: Independent Expenditures for 1998 Cycle, *available at* http://www.opensecrets.org/pacs/indexpend.asp?strID=C00173278&Cycle=1998, attached as Exhibit 5.

newsletters regarding the 2004 Wisconsin Senate race.[8] The Senate filibuster was an important campaign issue in the 2004 Wisconsin Senate race. Three Republican candidates—Russ Darrow, Bob Welch, and Tim Michels—sought the Republican nomination in the primary to run against Feingold. A news report in *The Milwaukee Journal Sentinel* in November 2003 headlined, "3 Seeking Feingold Seat Attack Him on Judges Issue: Republicans see Senate fight as important to voters," noted:

> In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. Feingold and Senate Democrat Herb Kohl both sit on the Judiciary Committee.
>
> "I think it will be a huge issue," said GOP Senate candidate Russ Darrow.[9]

The same article quoted Mr. Darrow as calling Senator Feingold "a leader in the stonewalling effort" on judges, and saying, "I think it is the worst kind of politics. It's why many Americans want a new face." Republican Senate candidate Bob Welch is quoted as saying that the filibuster of judges "was a dangerous precedent that would lead to a political backlash against Democrats." The third Republican candidate, Tim Michels, said the issue of judicial filibusters "is rising on people's radar screens." *Id.*[10]

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[8] *See* Center for Responsive Politics, Wisconsin Right to Life: 2004 PAC Summary Data, available at http://www.opensecrets.org/pacs/lookup2.asp?strid=C00173278&cycle=2004, attached as Exhibit 6. *See also* Ex. 3 to FEC Opp. To Mot. for Preliminary Injunction, Docket # 18.

[9] Craig Gilbert, *3 Seeking Feingold Seat Attack Him on Judge's Issue*, MILWAUKEE J. SENTINEL, Nov. 18, 2003, attached as Exhibit 7.

[10] All three Republican Senate candidates who vied for the nomination in Wisconsin to face Senator Feingold in November 2004 attacked him on the judges issue in the course of their campaign. For example, in a statement issued on January 16, 2004, Bob Welch said that "[i]t's a shame that the persistent obstruction of the President's judicial nominees by Russ Feingold and his left-wing allies has forced President Bush to take the step of using a recess appointment. . . ." and called Feingold's position "back room partisan politics at its worst." Press Release, *Welch*

In early 2004, the Wisconsin state Republican Party Chairman, Rick Graber, said of the party's effort to unseat Senator Feingold, "When people in this state understand where he is on things like the Patriot Act, *judicial nominees* and taxes, you're going to see a different perspective, and you'll see numbers move."[11] A news article reporting on the filing of the complaint in this case notes:

> Wisconsin Right to Life has endorsed three of Feingold's potential opponents in the Sept. 14 primary. Those three—Russ Darrow Jr. of West Bend, Tim Michels of Oconomowoc and state Sen. Bob Welch (R-Redgranite)—also have been critical of Feingold's stand on abortion rights and *judicial nominees* and have mocked the reform legislation promoted by Feingold, which became law in 2002 and was upheld 5-4 by the Supreme Court last year.[12]

WRTL aired three broadcast ads in the summer of 2004, financed with corporate treasury funds. All three criticized Senate filibusters against certain of President Bush's judicial

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Campaign: Statement on the Recess Appointment of Charles Pickering to the US Court of Appeals available at http://wispolitics.com/index.iml?Article=8020, attached as Exhibit 8. A press release by Tim Michels said Senator Feingold's position on judicial nominees was "his usual partisan game playing" and that he "has a long history of talking out of both sides of his mouth on this issue." Press Release, *Michels Campaign: Calls on Feingold to End Hypocrisy* (Nov. 12, 2003) *available at* http://wispolitics.com/index.iml?Article=4885, attached as Exhibit 9. On his campaign website, Russ Darrow lists seven "issues" in the Senate race, including "The right Russ [i.e., Russ Darrow] will not hold judicial nominations hostage." Darrow Campaign Website, available at http://www.russdarrowsenate.com/Isues.cfm, attached as Exhibit 10. In an interview, Darrow criticized Senator Feingold for "stonewalling the federal judges." He added, "I would never vote to stonewall any judge nominations. I would, if I were on the Judiciary Committee, as he is, I would want to see the vote go through to yes/no votes. That's our process in the United States." Press Release, *Russ Darrow: Doing Retail Politics* (Jan. 26, 2004) *available at* http://wispolitics.com/index.iml?Article=8715, attached as Exhibit 11.

[11] Stacy Forster, *Badger Poll Gives Feingold 52%, But It's Still Awfully Early*, MILWAUKEE J. SENTINEL, Feb. 9, 2004 (emphasis added). In a poll on the state party website, the state party asks "What is the #1 reason why Russ Feingold should be voted out of office in 2004," and lists as one of the four possible responses, "His obstruction of President Bush's judicial nominees." *available at* http://www.wisgop.org/, attached as Exhibit 12.

[12] Graeme Zielinski, *Group Opposes Campaign Limits*, MILWAUKEE J. SENTINEL, July 27, 2004 (emphasis added), attached as Exhibit 13.

nominees. The ads condemned "a group of Senators" who are "using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote."[13] The ads criticized the filibuster as "not fair," "causing gridlock," and resulting in a "state of emergency" in some courts because "qualified candidates aren't getting a chance to serve."[14] The ads specifically mentioned Wisconsin Senators Feingold and Kohl, urging voters to "contact Senators Feingold and Kohl and tell them to oppose the filibuster."[15] Significantly for this case, WRTL planned to continue airing the same three ads in a period that was either within 30 days of the September 14, 2004 primary election in Wisconsin, or within 60 days of the November 2, 2004 general election, or both. Am. Compl. ¶ 14.

Defendant's experts, Charles A. Franklin, Professor of Political Science at University of Wisconsin, Madison, and Douglas A. Bailey, an experienced political advertising consultant submitted sworn affidavits stating that, given the context, the three specific WRTL ads would most likely have had an effect on the 2004 Senate campaign.[16] Plaintiff has offered no expert testimony or other evidence to counter the opinions of these experts.

As noted, the WRTL ads referred by name to Senator Feingold, who was a candidate on the ballot in both the primary and the general elections; and the ads would have been broadcast within Wisconsin. In these circumstances, the ads, if WRTL had continued to broadcast them as planned, would have constituted "electioneering communications" under section 201 of BCRA,

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[13] Text of "Wedding," *see* Am. Compl. Ex. A.

[14] Text of "Loan," *see* Am. Compl. Ex. B.

[15] Text of "Wedding," "Loan," and "Waiting," *see* Am. Compl. Ex. A-C.

[16] Franklin Expert Report at 24-36, attached as Exhibit 14; Bailey Decl. ¶ 22, attached as Exhibit 15.

2 U.S.C. § 434(f)(3). Accordingly, they could not have been legally funded with WRTL's corporate treasury funds under section 203 of BCRA, *id.* at § 441b(b). WRTL filed suit, stating two claims: *First*, that BCRA's limitations were unconstitutional as applied to its three 2004 ads. Am. Compl. ¶¶ 53-63. *Second*, that BCRA's limitations are also unconstitutional as applied to future, unspecified ads, that WRTL terms "grassroots lobbying" ads. Am. Compl. ¶¶ 64-69.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Morgan v. Federal Home Loan Mortg. Corp.*, 328 F.3d 647, 650 (D.C. Cir. 2003) (quoting *Anderson*). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment . . . ." *Anderson*, 477 U.S. at 247-48.

With respect to WRTL's claim that BCRA is unconstitutional as applied to the three 2004 ads, there is no *genuine* issue as to any material fact. WRTL does not concede all the material facts, but it has failed to adduce evidence such that a reasonable fact finder could find in its favor. Alternatively, the preponderance of the evidence as to the material issues of fact irrefutably favors the FEC and the Intervening Defendants. Accordingly, should the Court conclude that it is not in a position to grant summary judgment, under Federal Rules of Civil Procedure 56, the Court should treat the paper record as the equivalent of a trial on the merits, as this Court did in *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176, 206-209

(D.D.C. 2003), and grant judgment in favor of the FEC and the Intervening Defendants, based on factual findings pursuant to Federal Rules of Civil Procedure 52.

Regarding WRTL's claim that BCRA is unconstitutional with respect to future, unspecified ads, summary judgment is appropriate because the claims are not ripe and are, in any event, foreclosed as a matter of law by *McConnell*.

II. THE DISPUTE CONCERNING THE THREE ADS PLAINTIFF SOUGHT TO RUN IN 2004 IS MOOT; AND EVEN IF IT WERE NOT, THE COURT SHOULD REJECT PLAINTIFF'S PURPORTED AS-APPLIED CHALLENGE ON THE RECORD DEVELOPED HERE

A. Plaintiff's As-Applied Challenge Concerning the Three 2004 Ads Is Moot

In its Scheduling Order issued April 17, 2006, this Court directed the parties to address whether and to what extent this case presents a live controversy. On May 1, 2006, Intervening Defendants submitted their response, which will not be repeated here. For the reasons previously stated, Plaintiff's challenge to the three specified ads should be dismissed as moot.

B. Plaintiff's As-Applied Challenge Concerning the Three 2004 Ads Lacks Merit

1. The 2004 Ads Are Similar in All Material Respects to the Ads the Supreme Court Reviewed in *McConnell*

This Court previously recognized that "[t]he facts suggest that WRTL's advertisements may fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating."[17] On appeal, the Supreme Court considered this language and concluded that it was "not clear" whether this Court "intended to rest on this ground" and thus, in "light of this ambiguity," remanded the case for further consideration.[18] As the record demonstrated at the

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[17] Mem. Op. & Order at 6.

[18] *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 126 S. Ct. 1016, 1018 (2006) (*per curiam*) ("The FEC argues that the District Court also rested its decision on the

time, and as the current record demonstrates even more thoroughly, the three 2004 ads are similar in all material respects to the ads the Supreme Court passed on in *McConnell*, and hence they are permissibly subject to regulation under Title II of BCRA. For this reason alone, WRTL's as-applied challenge to the three specified ads cannot stand.

The Supreme Court in *McConnell* considered and upheld the regulation of ads that bear the same essential characteristics as the three 2004 ads at issue here. Plaintiffs in the *McConnell* case made a similar argument that BCRA unconstitutionally banned "grassroots lobbying" and attached, in support, two ads that purportedly "sought to lobby and pressure federal officeholders on issues of unquestioned importance to the groups that sponsor them."[19] The first ad read:

> Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets, draining American jobs. Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal. Tell Congressman Paul to vote 'No' and keep China on probation until this label stands for fairness. Paid for by the AFL-CIO.[20]

The second ad urged voters to contact a candidate without expressly criticizing that candidate's position:

> It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting

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alternative ground that the facts of this case 'suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating.' No. 04-1260 (DC Aug. 17, 2004), App. to Juris. Statement 8a. It is not clear to us, however, that the District Court intended its opinion to rest on this ground. . . . Given this ambiguity, we cannot say with certainty that the District Court's dismissal was based on this alternative ground.").

[19] Brief for Appellants/Cross-Appellees Senator Mitch McConnell at 52, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674).

[20] Appendix to Brief for Appellants/Cross-Appellees Senator Mitch McConnell at 1A, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1674).

> their hands on more of your dough. Call Harry Reid and John Ensign, tell them no matter who goes to Washington you want them to cut your taxes. Otherwise they'll be nothing left but crumbs.[21]

WRTL's three 2004 ads are indistinguishable in relevant respects. *First*, they discuss an issue of importance to WRTL, the judicial filibuster issue. *Second*, they encourage constituents to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster.[22] *Third*, the ads do not expressly state either Senator's position on the filibuster, but suggest that they are members of the "group of Senators" who are "using the filibuster delay tactic to deny judicial nominees . . . a 'yes' or 'no' vote."[23] *Fourth*, the ads do not expressly urge citizens to vote for or against Senator Feingold in the upcoming election, but implicitly oppose his reelection. If WRTL or others were allowed to fund ads of this type with general corporate treasury funds, Title II of BCRA would become a dead letter, open to precisely the same type of evasion that prompted Congress to replace the "express advocacy" test with BCRA's more expansive definition of electioneering communications.[24]

In upholding Title II of BCRA, the Supreme Court in *McConnell* considered exemplary ads highlighted by the plaintiffs in *McConnell* that are similar in all material respects to the three WRTL ads. The Court reasoned that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the 30- and 60-day periods preceding federal primary and

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21 *Id.* at 4A.

22 Text of "Wedding," "Loan," and "Waiting," *see* Am. Compl. Ex. A-C.

23 *Id.*

24 Accordingly, this case does not present the question whether regulating some very different type of ad—such as ads for a car dealership that is owned by and named after a Member of Congress—would fail to serve the purpose that motivated Congress to enact Title II of BCRA and which the Supreme Court held was constitutionally sufficient.

general elections] if the ads are intended to influence the voters' decisions and have that effect." *McConnell*, 540 U.S. at 206. As this Court noted, the Supreme Court "voiced suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements 'will *often* convey a message of support or opposition' regarding candidates." Mem. Op. & Order at 6 (quoting *McConnell*, 540 U.S. at 239). The Supreme Court relied on campaign experts who testified that so-called issue ads are effective campaign ads and that political parties and candidates often directed donors to support the "issue advocacy" ads run by non-profit corporations. *McConnell*, 540 U.S. at 126-29.

Given that the three 2004 ads are substantially similar to ads that the Supreme Court considered in *McConnell*, it is not surprising that the record here convincingly confirms that the three WRTL ads "fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." Mem. Op. & Order at 6. The historical and political context of the ads, their text as illuminated by this context, and their pre-election timing confirm that the ads were related to upcoming federal elections.

First, as this Court previously found, one of WRTL's top priorities in 2004 was to defeat Senator Feingold's bid for re-election. Mem. Op. & Order at 2. In its announcement endorsing three candidates who were seeking the Republican nomination to challenge Senator Feingold, WRTL-PAC proclaimed that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections."[25] WRTL itself issued a press release, dated March 26, 2004, subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Feingold Packing!"[26] WRTL-PAC's history of

[25] *See* Ex. 2. [supra n.4]

[26] *See* Ex. 3. [supra n.5]

expenditures opposing Senator Feingold's election as detailed above[27] provides further convincing evidence that it was no coincidence that WRTL sought to broadcast the ads mentioning Senator Feingold and attacking his position on the highly politicized filibuster issue immediately preceding a federal election in which Senator Feingold was a candidate.

Second, the judicial filibuster issue was a "hot button" issue in Wisconsin during the 2004 campaign. The Republican Party of Wisconsin emphasized that issue in criticizing Senator Feingold, asking in its online poll "[w]hat is the #1 reason why Russ Feingold should be voted out of office in 2004" and offering "[h]is obstruction of President Bush's judicial nominees" as one of four possible answers.[28]

Third, WRTL chose to run its ads from late July 2004 through mid-August, precisely when the Senate was on its summer recess.[29] Thus WRTL chose a time period during which, on the one hand, it was less likely that there would be any *lobbying* effect because the Senate was in recess, and on the other hand, it was more likely that there would be a *campaign* effect because the election was imminent. WRTL was apparently alone in running anti-filibuster ads during the Senate's 2004 summer recess. As WRTL concedes, the national effort against filibusters did not begin to air ads until the spring of 2005. Plaintiff's Summary Judgment Motion at 4-5 ("WRTL Mot."). Indeed, that is when the filibuster issue came to a head, with the Republican Senate leadership threatening to use the so-called "nuclear option"—changing the Senate rules to require only 51 votes to end debate on judicial nominees. WRTL sought to air the ads in

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[27] *See supra* nn.6-8 and accompanying text.

[28] *Feingold Re-Elect Bottoms Out in New Poll*, Republican Party of Wisconsin, *available* at http://www.wisgop.org/view.phtml?func=rf&lg=id=24, attached as Exhibit 16.

[29] The Library of Congress, Days in Session Calendars 108th Congress 2nd Session, *available at* http://thomas.loc.gov/home/ds/h1082.html, attached as Exhibit 17.

question in the summer of 2004, after the Senate broke for its July recess and just prior to the primary and general elections, instead of joining the national effort in the spring of 2005 when the issue reached peak importance.[30]

WRTL asserts that the content of its ads, viewed in a vacuum, reveals no electioneering purpose. WRTL Mot. at 38-40. But the lesson of this nation's experiment with the "express advocacy" test is that corporate ads that identify a candidate and that are run shortly before an election almost always are intended to influence electoral outcomes and do affect elections, even if the ads stop short of explicitly advocating a candidate's election or defeat. *See McConnell*, 540 U.S. at 206. Indeed, as the Supreme Court noted in *McConnell*, "it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.'"[31] Recent experience with the abuse of the "magic words" test leaves no doubt that, if WRTL's proposed exception to BCRA for its three 2004 ads were adopted, it would create a new blueprint for the widespread evasion of the federal campaign finance laws. *Id.* at 193. This is especially the case in situations like this in which the alleged grass roots lobbying ad is being run during an election period, by a party that has specifically taken sides in a pending election.

The record also demonstrates that the WRTL ads likely would have had an effect on the election, as did the virtually identical ads considered in *McConnell*, had they continued to be broadcast immediately preceding the 2004 Senate election, Charles H. Franklin, Professor of

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[30] WRTL ran no anti-filibuster ads on any occasion prior to late July 2004. Lyons Dep. 82:4-7, attached as Exhibit 18. Subsequently, they ran anti-filibuster ads on only one other occasion, Lyons Dep. 102:2-103:1, but not during the spring of 2005 with the national anti-filibuster ad campaign, Lyons Dep. 101: 19-25.

[31] *McConnell*, 540 U.S. at 194 n.77 (*quoting* 251 F. Supp. 2d., at 305 (Henderson, J.) (*quoting* declaration of Douglas L. Bailey, founder, Bailey, Deardourff & Assoc. 1-2, App. 24, ¶ 3)).

Political Science at University of Wisconsin, Madison,[32] provided a detailed and well-documented analysis of the effects of advertising on Wisconsin elections. As he explained, WRTL's ads helped to set the agenda for the 2004 election by making the filibuster an important issue. *Id*. at 24. By directly attributing responsibility for voting on this issue to Senator Feingold, moreover, the ads increased the importance of the filibuster issue in voter evaluations of the candidate. *Id*. at 29. Finally, these effects were enhanced given the context of the 2004 election, in which WRTL previously had itself issued public statements criticizing Senator Feingold's position on the filibuster issue and calling for his electoral defeat. *Id*. at 34. Professor Franklin concluded that the ads would have had an effect in changing the minds of some undecided "swing" voters by highlighting the judicial filibuster issue as important and tying it to their evaluation of the candidates. Franklin further concluded they would have affected pro-life voters by giving them added incentive to get out the vote. *Id*. at 36.

Douglas Bailey, an experienced political advertising consultant, also submitted a sworn declaration on behalf of defendants, testifying that WRTL's 2004 ads "will undoubtedly influence the election."[33] Bailey explained that voters are likely to vote for candidates if they "perceive that the candidate is likeable and shares similar values to them." *Id.* It is not as much the substantive issues at stake; rather, it is the voters' "feel" for a candidate that will cause them to support a given candidate. *Id*. So-called "grass roots lobbying ads," or "issue ads" that

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[32] Professor Franklin is a Professor of Political Science at the University of Wisconsin, Madison, and has studied and published articles on elections and political campaigns for over twenty years. Franklin Curriculum Vitae at 1, attached to Franklin Expert Report. He was a member of the Board of Overseers, National Election Study for eight years, and has served on numerous national election study committees. *Id.* at 4.

[33] Bailey Decl. ¶ 8. Bailey has been a political consultant for over thirty years, specializing in planning political campaigns and the broadcast advertisements that shape their outcome. *Id*. ¶ 1. The Supreme Court relied on Bailey's testimony in *McConnell*. 540 U.S. at 194 n.77.

mention a candidate's name provide voters with a "feel" for the candidate. *Id*. Such ads are often more effective than ads explicitly urging citizens to vote for a particular candidate because they "subtly influence a voter to reach certain conclusions about the candidate while giving the voter the impression he came to that conclusion entirely independent of political propaganda." *Id*. ¶ 10.

Bailey further explained that "[c]ontext and timing will ordinarily determine whether" an ad is an electioneering ad. *Id*. ¶ 12. During the pre-election period, issue ads "inexorably intertwine with the campaign election message itself, augmenting voters' overall perception of candidates by providing additional context in which to view the candidate." *Id*. Moreover, "[w]hile an ad that refers to a candidate may have an effect as an issue ad a year away from an election, that same ad will impact the viewer as an electioneering ad when it is aired right before an election." *Id*. ¶ 12.

Because the judicial filibuster issue was a "hot button" issue in the 2004 campaign,[34] running an anti-filibuster ad that mentioned Feingold—and stressed that "a group of Senators" are "using the filibuster delay tactic to deny judicial nominees . . . a 'yes' or 'no' vote"—would have given anti-filibuster viewers a negative "feel" for Feingold. As Bailey concluded, the ads implicitly portrayed Senator Feingold in a negative light and provided a negative general context in which voters would view him when they cast their ballots. *Id*. ¶ 22.

WRTL has put forward no experts of its own and offers no substantive evidence to refute the Franklin and Bailey conclusions, or the conclusions relied on in *McConnell*. WRTL only points to Franklin's statement during his deposition that, given the target audience of "adults, ages 45+ with a male skew," the ads would be unlikely to change minds. WRTL Mot. at 39.

[34] *See supra*, n.28 and accompanying text.

But this does not undermine Franklin's conclusion that, among even that target audience, the ads would affect the election by mobilizing voters.[35] Moreover, even though the ads were directed at a particular target audience, others undoubtedly saw and heard the ads.

WRTL also relies on the self-serving and conclusory assertion of WRTL's Executive Director, Barbara Lyons, that in her personal opinion—which she admitted was not based on any empirical research—the ads would not have affected the campaign because they "were grassroots lobbying campaigns [that] did not speak about elections."[36] Similarly, WRTL relies on the personal opinion of its media consultant, Jason Vanderground from the advertising agency Hanon McKendry, that the ads would not have had any effect on the election. WRTL Mot. at 6; SUF at 239-41. Vanderground admitted, however, that he had done nothing to "test the effect of the ads in any way,"[37] and that he based his personal opinion merely on the tone of the ads, rather than on any empirical research.[38] These opinion are not just unsupported; they are also directly contrary to the Supreme Court's conclusion in *McConnell* that broadcast ads that mention candidates shortly before an election constitute electioneering even when they do not explicitly mention the election. Thus, there can be no reasonable dispute that it is likely that the WRTL ads would have influenced the 2004 election if they had been broadcast during the pre-election period.

2. WRTL Has Failed To Show That It Could Not Have Effectively Disseminated Its Message Using Alternative Means

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35 Franklin Expert Report at 36.

36 Lyons Dep. 33:5-33:16; WRTL Mot. at 6.

37 Vanderground Dep. 133:7-8, attached as Exhibit 19.

38 Vanderground Dep. 134:3-12.

The Supreme Court in *McConnell* bolstered its rejection of a facial challenge to Title II of BCRA, holding that BCRA was narrowly tailored because corporations and unions had alternative means to disseminate their message. The Court found that "corporations and unions may finance genuine issue ads during [the electioneering] time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id*. at 206. Not surprisingly, WRTL similarly fails to prove that this conclusion has been overcome here. Indeed, whatever the scope of the remand in this case, there is no basis to believe that it extends to re-visiting the pure question of law sustained in *McConnell* that the alternative means left untouched by BCRA are adequate to sustain the holding that BCRA is narrowly tailored as a matter of law. Nonetheless, because plaintiff has claimed that it cannot adequately disseminate its message under Title II, we will respond to its factual allegations also.

First, WRTL could have run the exact same ads on any radio or television outlet, at any time, simply by using funds raised by WRTL-PAC, rather than WRTL's general treasury funds. *See* 2 §§ 441b(b)(2), 441b(c)(1). As this Court previously recognized, BCRA does not prohibit spending or speech; rather, it requires corporations and unions to channel certain spending through their PACs. Mem. Op. & Order at 7. *See also McConnell*, 540 U.S. at 204 ("Because corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [section 203 of BCRA] as a 'complete ban' on expression rather than a regulation.") (quoting *FEC v. Beaumont*, 539 U.S. 146, 162-163 (2003)). The PAC option has long "provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy." McConnell, 540 U.S. at 203. *McConnell* reaffirmed the option as applied to electioneering communications; although corporations may not use general treasury funds to

finance such communications, "they remain free to organize and administer separate segregated funds, or PACs . . . ." *Id*. at 204. BCRA, accordingly, does not impermissibly burden groups who want to run genuine "issue ads" because "in the future [they] may finance genuine issue ads during [BCRA's electioneering] time frames by simply avoiding any specific reference to federal candidates, *or in doubtful cases by paying for the ad from a segregated fund*." *Id*. at 206(emphasis added).

WRTL has contended that its PAC funds, which totaled approximately $14,000 in August 2004, were unavailable for the three 2004 ads. *See* Lyons Aff., Docket #20 ¶ 10; WRTL Mot. at 12. However, WRTL-PAC's FEC filings undermine Lyons's affidavit and show that the WRTL-PAC funds lay substantially untouched through the end of 2004.[39] When questioned as to the discrepancy between her prior sworn statement and WRTL's failure to use the WRTL-PAC funds, Lyons could not offer an explanation.[40]

WRTL contends that even if it had used the WRTL-PAC funds for the ads, those funds would not have covered the total cost. WRTL Mot. at 12. But even if that were the case, WRTL has not shown that its PAC could not have raised sufficient funds. On this record, it would appear that a PAC funding shortfall simply resulted from lack of effort, poor planning, or lack of member support. After all, in the 2000 election year, WRTL-PAC raised over $150,000.[41] In

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[39] *Compare* WRTL-PAC, FEC Form 3X, Aug. 31, 2004, *available at* http://query.nictusa.com/cgi-bin/fecimg/?_24038510725+0, attached as Exhibit 20, *with* WRTL-PAC, FEC Form 3X, Jan. 31, 2005, *available at* http://query.nictusa.com/cgi-bin/fecimg/?_25038713959+0, attached as Exhibit 21.

[40] Lyons Dep. 157:8-25.

[41] WRTL-PAC FEC Form 3X, Jan. 26, 2001, *available at* http://images.nictusa.com/cgi-bin/fecimg/?_21036811096+0, attached as Exhibit 22.

contrast, in the 2004 election year, WRTL-PAC raised only $5935.[42] WRTL offers vague assertions—unsupported by any evidence—that fundraising has become more difficult for PACs, WRTL Mot. at 49, but it points to no actual changes that would explain any such phenomenon.[43]

Second, WRTL could have disseminated its message at any time, in any outlet, and even with corporate funds, "by simply avoiding any specific reference to federal candidates," as the Supreme Court noted. *McConnell*, 540 U.S. at 206. WRTL argues unconvincingly that its ads must name Members of Congress because many citizens otherwise would not know whom to call. WRTL Mot. at 51-52. But it is noteworthy that the ads do not provide contact information for either Senator they name; instead, they direct viewers to WRTL's website, which, as shown, included material expressly opposing Senator Feingold's reelection.[44]

Third, WRTL could have disseminated its message through the print or electronic media rather than on television and radio. It is only broadcast communications that are subject to BCRA's limitation on use of corporate treasury funds. Running the ads via the print or electronic media would not have been subject to BCRA's limitations.

WRTL contends that it believed TV and radio to be the most effective means of communicating its message. WRTL Mot. at 6, 50. But WRTL's past and subsequent practice belies this unsupported assertion. As this Court observed in its Memorandum Opinion and Order

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[42] WRTL-PAC FEC Form 3X, January 31, 2005, *available at* http://query.nictusa.com/cgi-bin/fecimg/?_25038713959+0, Exhibit 21.

[43] Although it never provides a justification for, or evidence of, its difficulties fundraising, WRTL clearly had the capability for mass distribution of solicitations of its more than 57,000 members given that it had a database that contained membership status, phone numbers, addresses, e-mail addresses and other information, and bulk mailings could be generated from that database. WRTL-PAC was able to make use of those capabilities, and WRTL regularly rented lists to WRTL-PAC. *See* Armacost Dep. 26:11-29:20; 47:2-48:4, attached as Exhibit 23.

[44] *See supra* n.2 and accompanying text.

denying WRTL's Motion for Preliminary Injunction, "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. Op. & Order at 6. In 2004, WRTL communicated its anti-filibuster message through a variety of print and electronic media: WRTL discussed the filibuster issue in its news releases, sent to the media, and in its E-Alerts, sent to its members;[45] WRTL ran op-ed pieces in the print media against the filibuster;[46] Lyons was interviewed for newspapers and magazines regarding the filibuster issue;[47] WRTL-PAC purchased ads discussing the filibuster issue in WRTL's quarterly publication, Life Without Limits, with a readership of approximately 35,000;[48] and, finally, candidate comparison pieces, distributed to hundreds of thousands of people, also likely discussed the filibuster issue.[49]

Tellingly, prior to running the ads at issue, WRTL did not run any TV or radio ads on this issue.[50] Subsequent to running these ads, WRTL ran radio ads on this issue on only one other occasion and for a short period of time, relating to the nomination of then-Judge Samuel Alito to the United States Supreme Court.[51]

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45 Lyons Dep. 97:20-98:16.

46 Lyons Dep. 94:15-21.

47 Lyons Dep. 96:8-21.

48 Lyons Dep. 103:18-104:11; 126:14-127:21.

49 Lyons Dep. 110:10-111:3.

50 Lyons Dep. 82:4-7.

51 Lyons Dep. 102:2-103:1.

Finally, of course, WRTL was free to use its treasury funds to broadcast ads that referred to Senator Feingold outside the statutory pre-election window, for such ads would not be electioneering communications under BCRA. WRTL argues in response that running their ads before the pre-election period would have been insufficient because "[i]f it is a week before a crucial legislative vote, no other time than that week is available in which the people can receive the necessary information when it matters." WRTL Mot. at 51. That theoretical statement has no bearing here, where WRTL chose to run its ads when the Senate was on recess and then chose not to resume running such ads when the issue reached its peak importance in 2005, and the the national anti-filibuster campaign ran ads.

3. WRTL's "Segregated Fund" Alternative Lacks Merit

WRTL is subject to § 441b's segregated-fund requirement only because it chooses to accept contributions from corporations. Under the exemption recognized in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), some nonprofit advocacy corporations may use their own corporate treasury funds to finance electioneering communications. *See McConnell*, 540 U.S. at 209-211. This exemption does not apply, however, when the non-profit organization receives corporate (or union) contributions, for then the non-profit corporation has the potential to "serv[e] as [a] conduit[] for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264.

Repeating an argument unsuccessfully raised by a plaintiff in the *McConnell* case,[52] WRTL suggests that this Court should rewrite § 441b to permit WRTL to finance its electioneering communications with funds received from noncorporate contributors without

[52] 12 Brief for Appellants The National Rifle Association at 28-33, National Rifle Association v. Federal Election Comm'n, 540 U.S. 93 (2003) (No. 021675).

establishing a segregated PAC fund. WRTL Mot. at 37-38. Because WRTL did not pay for or seek to pay for its ads with non-corporate dollars, WRTL's proposal amounts to a request for an advisory opinion. Indeed, the record contains no suggestion that WRTL ever segregated its corporate from its non-corporate funds. In any event, money under these circumstances is fungible, and segregating non-corporate funds will not prevent WRTL from indirectly using corporate funds to finance electioneering communications. Moreover, WRTL fails to carry the burden of showing that the marginal differences between the way Congress chose to advance its interests and WRTL's alternative are so great that they are of constitutional significance.

III. THE DISPUTE CONCERNING UNIDENTIFIED ADS THAT PLAINTIFF MIGHT SOMEDAY WISH TO RUN IS NOT RIPE FOR ADJUDICATION; AND THE CLAIM IS IN ANY EVENT PRECLUDED BY *MCCONNELL*

WRTL spends considerable time in its Motion for Summary Judgment arguing that BCRA should be declared unconstitutional as applied to *all* "grassroots lobbying" ads. This issue is not ripe for adjudication and is also plainly foreclosed by *McConnell*. By requesting a declaration that BCRA is unconstitutional as to any ad that constitutes "grassroots lobbying," WRTL merely repeats the facial challenge that the Supreme Court rejected in *McConnell*.[53]

A. The Dispute About "Grassroots Lobbying Ads" Is Not Ripe For Adjudication

Intervening Defendants' response to this Court's April 17, 2006 Scheduling Order, submitted May 1, 2006, demonstrated that the case is not ripe with respect to hypothetical and unidentified advertisements WRTL might hope to broadcast in the future. Intervening Defendants will not repeat those arguments here.

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[53] This Court rightly observed at the inception of this case that the scope of WRTL's request is "sweeping." Mem. Op. & Order at 3.

B. *McConnell* Squarely Addressed—And Rejected—The Broad "Grassroots Lobbying" Exception WRTL Seeks

In addition to its failure to meet the Article III ripeness requirement, WRTL's expansive request for a "grassroots lobbying" exception must fail because it simply reprises the overbreadth arguments that the Supreme Court rejected in *McConnell*. The Supreme Court recognized in that case that assessing BCRA's constitutionality required it to "examine the degree to which BCRA burdens First Amendment expression and evaluate whether a compelling governmental interest justifies that burden." *McConnell*, 540 U.S. at 205. The "compelling interest" component of that analysis was, the Court observed, "easily answered by . . . prior decisions regarding campaign finance regulation, which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id*. (citation and internal quotation marks omitted).

Specifically, the Court cited its repeated deference to legislation "aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id*. (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)). The Court also referred to its cases recognizing that "certain restrictions on corporate electoral involvement permissibly hedge against circumvention of [valid] contribution limits." *Id*. (internal quotation marks and citation omitted; alteration in original).

Recognizing the strong weight of authority supporting the compelling interest behind BCRA, the *McConnell* plaintiffs sought to distinguish those prior cases by "argu[ing] that the justifications that adequately support the regulation of express advocacy *do not apply to significant quantities of speech encompassed by the definition of electioneering communications*." *Id*. at 205-06 (emphasis added). Specifically, the *McConnell* plaintiffs

emphasized the argument that Title II would unconstitutionally impinge on efforts to influence legislation, particularly grassroots lobbying. Just as WRTL argues here, a plaintiff in the *McConnell* case asserted that BCRA's "electioneering communication" restrictions would "eliminate a whole category" of speech:

> That whole category of speech is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. . . . buys broadcast ads in the district of a legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to "Call Representative Swing-vote and ask for her to vote for the bill sponsored by Representatives Commonweal and Controversy."
>
> Defendants [sic] assertions that (1) "'genuine' issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA … and (2) that "it is not necessary to refer to 'specific candidates for federal office in order to create effective [issue] ads" … simply *does not apply to grass roots lobbying.* And citizen groups need to remain free to engage in grass roots lobbying . . . during the time when legislation is being considered, which often can and often does fall during the days just before an election . . . .[54]

Other plaintiffs in the *McConnell* case likewise argued that BCRA's amendments to § 441b would improperly prohibit corporations from financing ads that urged voters to contact Members of Congress to support or oppose legislation.[55]

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[54] Reply Brief of Appellants/Cross-Appellees National Right to Life Committee, et al., No. 02-1733 (Aug. 21, 2003) at 6-7 (emphasis in original).

[55] Brief for Appellants The National Rifle Association at 36-37, *NRA v. FEC*, 540 U.S. 93 (2003) (No. 02-1675) (arguing, *inter alia*, that "[b]roadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate Title II"); *see also* Brief of AFL-CIO Appellants/Cross-Appellees at 19, *AFL-CIO v. FEC*, 540 U.S. 93 (2003) (No. 02-1755) (arguing that "§ 203 precludes . . . communications that . . . [c]all upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so"); Opening Brief of the "Business Plaintiffs" at 18, *Chamber of Commerce v. FEC*, 540 U.S. 93 (2003) (No. 02-1756) (asserting that "many issue ads conclude by asking viewers to contact candidates and express support for or opposition to legislation or policy positions").

The Supreme Court rejected these arguments and concluded that the so-called grassroots lobbying ads described by the petitioners were permissibly covered by BCRA's electioneering communications provisions. The Court reasoned that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the 30- and 60-day periods preceding federal primary and general elections] *if the ads are intended to influence the voters' decisions and have that effect*." *McConnell*, 540 U.S. at 206 (emphasis added). Reviewing the record, the Court acknowledged that the "precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose [was] a matter of dispute." *Id*. "Nevertheless," the Court found it sufficient that the record demonstrated that "the vast majority of ads clearly had such a purpose." *Id*. The *McConnell* record had also shown, after all, that political parties and candidates often directed donors to support the "issue advocacy" ads run by non-profit corporations, and that "issue ads" were frequently the most effective type of campaign advertising. *Id*. at 127, 129.

The Supreme Court thus rejected precisely the type of generalized "grassroots lobbying" claim that WRTL now repeats.[56]

C. WRTL Cannot Distinguish Its "Grassroots Lobbying" Claim From The Claims Rejected In *McConnell*

WRTL attempts to distinguish its broad "grassroots lobbying" claim from *McConnell* by suggesting an evanescent and legally irrelevant distinction between "grassroots lobbying," on the one hand, and "electioneering" and "sham issue ads" on the other. The distinction that WRTL

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[56] The Court specifically referred to so-called "issue ads," of which WRTL claims "grassroots lobbying" ads are a species. *See* WRTL Mot. at 13 ("Grassroots lobbying ads are a subset of issue advertising. SUF 27-29. Grassroots lobbying is customarily done when a bill or matter or an issue is directly before the Congress and it tends to be when votes are scheduled. SUF 145.").

proposes, however, is illusory and would invite precisely the type of circumvention of the campaign finance laws that Congress sought to foreclose in BCRA. As the Supreme Court recognized in *McConnell*, Congress acted within constitutional bounds in closing the door to this type of evasion of the law.

1. WRTL's Definition of Grassroots Lobbying Would Encompass the Same Types of Ads That the Supreme Court Considered in *McConnell*

WRTL begins by defining the scope of grassroots lobbying. WRTL Mot. at 22. WRTL refers to the to the Internal Revenue Code (IRC), which defines "[g]rassroots lobbying communications" as "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." 26 U.S.C. § 4911(d)(1)(A). WRTL then identifies three "required elements" under the IRC definition: (1) the communication "[r]efers to specific legislation;" (2) it "[r]eflects a view on such legislation;" and (3) it "encourages the recipient of the communication to take action with respect to such legislation." 26 C.F.R. § 56.4911-2(b)(2)(ii). These characteristics, claims WRTL, make grassroots lobbying distinguishable from the types of "electioneering" communication and "sham issue ads" that constitutionally may be regulated.

The three elements WRTL suggests to demarcate its exemption—refers to legislation, reflects a position on that legislation, and calls the recipient to take action—could be used to describe *almost every ad* in the record the Supreme Court considered in *McConnell*, including the ads quoted above.[57] The definition that WRTL now proposes also tracks the definition used by appellants in *McConnell* who argued that advertisements urging voters to contact Members of Congress to support or oppose legislation would improperly be subject to regulation under

[57] *See supra* nn. 20-21 and accompanying text.

BCRA.[58] In short, WRTL's definition of "grassroots lobbying" makes plain that WRTL is merely recycling the same sweeping challenge that was rejected in *McConnell*.

Were WRTL's expansive and fluid definition of "grassroots lobbying" to be accepted as a general exception from the definition of "electioneering communications," the Supreme Court's ruling in *McConnell* would be eviscerated and a new loophole would be opened that for-profit corporations and labor unions could easily exploit. The door would be reopened for all corporations and unions to fill the airwaves in a candidate's district with broadcast ads funded from their general treasuries that refer to that candidate in the immediate pre-election period. WRTL should not be permitted to bring this kind of broadside attack simply by labeling its claim as an "as applied" claim.

2. WRTL Seeks To Replace the *McConnell* Standard With Its Own Revived "Express Advocacy" Test

In support of its efforts to relitigate the Supreme Court's holding in *McConnell*, WRTL suggests that this Court determine what constitutes a so-called genuine grassroots lobbying ad by limiting its inquiry to the text of the ad—without considering its context or effect as the Supreme Court did in considering the facial constitutionality of BCRA's restrictions on "electioneering communications." According to WRTL, examining the text of the ad alone will enable the court to determine whether that text is the "functional equivalent" of "express advocacy." This argument misreads *McConnell*.

First, the categorical boundary that WRTL attempts to draw between grassroots lobbying and electioneering is both practically nonexistent and constitutionally irrelevant. As the Supreme Court recognized in *McConnell*, the problems Congress sought to eliminate through

[58] *See supra* nn.19-21 and accompanying text.

BCRA are caused by both pure electioneering ads and ads that straddle both categories. It was precisely because of the proliferation of so-called "issue ads" that had a purpose and effect of influencing election results that Congress enacted section 203 of BCRA. And, it was precisely this overlap that the Supreme Court recognized when it upheld that provision. *See McConnell*, 540 U.S. at 193-94, 205-06.[59] This was not a new revelation; the Supreme Court has long recognized that electioneering and lobbying often overlap. *See Buckley v. Valeo*, 424 U.S. 1, 42 (1976) ("[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."). To claim, as WRTL does now, that "the sort of 'genuine issue ads' that constitute grassroots lobbying can be neatly cabined"[60] ignores this reality as well as the exhaustive record that led to the Court's decision in *McConnell*.

Second, WRTL's argument that properly prohibited "electioneering" communication can be identified by resorting to an "grassroots lobbying" test ignores the core premise behind *McConnell*'s holding. The Supreme Court made it very clear that "the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled." *McConnell*, 540 U.S. at 205. The Court explained that in *Buckley*, and again in *MCFL*, it interpreted FECA's expenditure limitations as limited in scope to express advocacy in order to save the statute from unconstitutional vagueness. *Id*. at 192. But, the Court explained, those cases "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id*. at 192-93. "Indeed," the Court stated,

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[59] Justice Kennedy, in dissent, acknowledged this. *Id*. at 327 (Kennedy, J., concurring in the judgment and dissenting in part) ("[T]here is a general recognition now that discussions of candidates and issues are quite often intertwined in practical terms.").

[60] WRTL Mot. at 35 n.12.

> the unmistakable lesson from the record in [the *McConnell*] litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless. . . Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

Id. at 193-94 (footnotes and internal citations omitted). It was with this understanding that the Court upheld BCRA's electioneering communications provisions. The Court reasoned that the same "compelling interest" in curbing corporate and union influence that justified regulating "express advocacy" also supported the regulation of so-called "issue ads" broadcast during the pre-election periods identified by BCRA. After all, the "vast majority" of such ads—even if they do not explicitly say so—"are *intended to influence the voters' decisions and have that effect*," thereby serving as the "functional equivalent" of "express advocacy." *Id*. at 206 (emphasis added).

Instead of explaining why so-called "grassroots lobbying" ads do not implicate the same "compelling interests" justifying the regulation of "issue ads" (of which, according to WRTL, grassroots lobbying ads are a "subset"), WRTL proposes a new test for its as-applied exception that would effectively reverse *McConnell*. Seizing on *McConnell*'s "functional equivalent" language, WRTL suggests that what the Court was actually doing in that case was performing a "narrow tailoring" analysis:

> The "narrow tailoring issue is whether grassroots lobbying ads equate to 'communication that in express terms advocate the election or defeat of a clearly identified candidate for federal office. *Buckley*, 424 U.S. at 44. Or is grassroots lobbying a 'genuine issue ad,' which may not be prohibited?"

WRTL Mot. at 28. Thus, according to WRTL, if an ad on its face—regardless of its context, intent or effect—is the "functional equivalent" of express advocacy, it can be regulated under

Title II of BCRA. The only ads that qualify under this standard, according to WRTL, are so-called "sham issue" ads, such as the famous "Yellowtail" ad quoted in *McConnell*. If an ad does not amount to a sham issue ad, then it drops cleanly into the other (non-overlapping) category of "genuine issue ads," which WRTL claims may not be constitutionally regulated.

That is not what the Supreme Court held in *McConnell*. The Court did not conclude that only ads that are *facially* "equivalent" to an obvious campaign ad can be regulated. *McConnell* upheld the primary definition of" electioneering communication," because such ads, regardless of their facial content, were likely designed to (and did) influence an election.[61] Moreover, the Court found that the regulated speech was not banned in any event, because corporations such as WRTL could simply avoid naming federal candidates or could finance their ads using separate, segregated funds.

* * *

WRTL's claim that BCRA should be declared unconstitutional as to unidentified future ads implicates no material facts, because there is no set of facts raised by this case under which this argument would state a claim. Rather, as a matter of law, WRTL's argument fails, either

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[61] This fact was made clear again in this case by political consultant Douglas Bailey. Although WRTL spends significant time focusing on Bailey's testimony that WRTL's ads are more "subtle" on their face than other ads (thereby making them less likely to meet WRTL's flawed "express advocacy" test), Bailey explained quite clearly in both his declaration, and again in his testimony, why WRTL's position makes little sense. *First*, he noted that an ad can qualify as "grassroots lobbying advertising," as WRTL defines it, while also having an electoral effect. Bailey Dep. at 14:12-22, 55:16-21, attached as Exhibit 24. *Second*, he clarified that the more "subtle" ads can in fact be more "effective" in influencing elections than ads that "categorically state with a sledgehammer what the position of the public officials are." Bailey Dep. at 42:12-15; Bailey Decl. ¶ 13. *Finally*, Bailey explained that WRTL's attempt to sever the text of an ad from its content is a fictional exercise that has little to do with the actual effect of the ad on an election. Bailey Dep. at 46:7-14. Bailey Decl. ¶ 12.

because it is unripe for constitutional adjudication, or because it foreclosed by *McConnell*. Intervening Defendants are therefore entitled to summary judgment on this second claim as well.

CONCLUSION

For the foregoing reasons, the Court should: (1) deny WRTL's motion for summary judgment, and (2) grant Intervening Defendants' motion for summary judgment or, in the alternative, issue judgment in their favor on the existing record.

Respectfully submitted,

/s/

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