UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wisconsin Right to Life, Inc., **Plaintiff,** **v.** **Federal Election Commission,** **Defendant** **and** **Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, Representative Martin Meehan,** **Intervening Defendants**	**Case No. 04-1260 (DBS, RWR, RJL)** **THREE-JUDGE COURT**

MEMORANDUM OF INTERVENOR-DEFENDANTS SENATOR JOHN MCCAIN AND REPRESENTATIVES TAMMY BALDWIN, CHRISTOPHER SHAYS, AND MARTIN MEEHAN IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S RULE 16 PROPOSAL FOR DISCOVERY AND SUMMARY JUDGMENT BRIEFING

Intervening Defendants join in the request of Defendant Federal Election Commission ("the Commission") that this Court permit the parties to take discovery for a period running from the entry of the Court's order to July 10, 2006. During this period, the parties will serve and respond to written discovery, prepare and exchange any expert reports, and conduct expert and fact-witness depositions. The Intervening Defendants respectfully submit that permitting the

parties to develop a full factual record will assist this Court in its resolution of the case and will ensure that there exists a complete record for the Supreme Court, should a subsequent appeal ensue. As in *McConnell v. FEC*, 540 U.S. 93 (2003), while expedition is important, it should not come at the cost of depriving the parties and the Court of a proper record.

In *McConnell*, the three-judge court correctly concluded that discovery was appropriate and set a schedule that permitted the parties to develop a substantial record. *See* Attachment A. As the Commission notes, that factual record proved essential to resolution of the case—both before the three-judge court and before the Supreme Court. Indeed, in upholding the "electioneering communications" provisions of the Bipartisan Campaign Reform Act ("BCRA"), the *McConnell* Court relied substantially on the factual record developed before this Court. *See, e.g.*, *McConnell*, 540 U.S. at 193 ("And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election"); *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 875, 882 (D.D.C. 2003) (Leon, J.) (considering expert testimony on how the public views pre-election communications, and that an election advertisement's effect must be examined in context).

To be sure, *McConnell* involved a facial challenge to BCRA, while this case involves an as-applied challenge. Yet, as the term "as-applied" itself suggests, the facts are, if anything, *more* important in an as-applied challenge than in a facial challenge. Indeed, because the Supreme Court has previously rejected a broad attack on the constitutionality of the "electioneering communications" provisions of BCRA, the sole question that can be presented here is whether *the particular facts involved in this case* justify departing from that holding. WRTL's contention that that question can be answered without a full record is seriously mistaken.

For the foregoing reasons, Intervening Defendants respectfully request that this Court deny Plaintiff's Motion to Reinstate, Order Supplemental Briefing on, and Expedite Cross-Motions for Summary Judgment and direct the parties to proceed with discovery as the Commission proposed in the Joint Report of the Parties Pursuant to LCvR 16.3(d).

Dated this 27th day of March, 2006.

Respectfully submitted,

/s/_____

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