United States District Court
District of Columbia

Wisconsin Right to Life, Inc., *Plaintiff*, *v.* **Federal Election Commission,** *Defendant*, *and* **Sen. John McCain** et al., *Intervenor-Defendants.*	**Civil Action No. 04-1260 (DBS, RWR, RJL)** THREE-JUDGE COURT Oral Argument Requested

Plaintiff's Summary Judgment Motion

Wisconsin Right to Life, Inc. ("WRTL") moves for summary judgment in its favor. Fed. R. Civ. P. 60. In support of this motion, WRTL files contemporaneously its *Memorandum in Support of Plaintiff's Summary Judgment Motion* and *Plaintiff's Statement of Undisputed Material Facts*. LCvR 7(h). A draft order is provided. LCvR 7(c). Oral argument on this motion is requested. LCvR 7(f).

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr., D.C. Bar #CO0041
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

United States District Court
District of Columbia

Wisconsin Right to Life, Inc., *Plaintiff*, *v.* **Federal Election Commission,** *Defendant*, *and* **Sen. John McCain** et al., *Intervenor-Defendants.*	**Civil Action No. 04-1260 (DBS, RWR, RJL)** THREE-JUDGE COURT Oral Argument Requested

Memorandum in Support of *Plaintiff's Summary Judgment Motion*

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

James Bopp, Jr., D.C. Bar #CO0041
Richard E. Coleson
Jeffrey P. Gallant
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

June 23, 2006

Table of Contents

Table of Authorities iii

Case & Facts 1

Argument 17

I. The Constitution Specifically Protects Grassroots Lobbying. 17

II. Grassroots Lobbying Is Not the Functional Equivalent of Express Advocacy. 22

A. There Is a Distinction Between Grassroots Lobbying and Electioneering. 22

B. Grassroots Lobbying Ads Are "Genuine Issue Ads," Not "Sham Issue Ads." 27

C. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns. 34

D. If There Are Residual Concerns about Using Corporate General Treasury Funds for Grassroots Lobbying, a Segregated Bank Account Could Be Used. 36

III. WRTL's Ads Are Not Electioneering. 38

A. WRTL's Ads Are Not the "Functional Equivalent of Express Advocacy." 38

B. Other Activity Does Not Create Functional Equivalence. 40

IV. Other Options Are Inadequate. 47

A. The PAC Option Imposes an Unconstitutional Burden on Grassroots Lobbying. 48

B. Other Forms of Communication Are Inadequate. 50

C. Requiring That a Group Not Incorporate Burdens the Freedom of Association. 51

D. Other Times Are Inadequate. 51

E. Not Naming a Candidate Is Inadequate. 51

Conclusion 53

Table of Authorities

Cases

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 53

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 25, 48

BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002) 43-45

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 44-45

Boy Scouts of America v. Dale, 530 U.S. 640 (2001) 19

**Buckley v. Valeo*, 424 U.S. 1 (1976) 17-19, 23-24, 28, 38, 42, 51

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 19, 44

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 36, 38, 53

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 40

**Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961) 19, 43-45

FEC v. Beaumont, 539 U.S. 146 (2003) 48

**FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) 24, 35, 37, 40, 47-48

FEC v. NRA, 254 F.3d 173 (D.C. Cir. 2001) 40

FEC v. Survival Educ. Fund, 65 F.3d 285 (2d Cir. 1995) 40

**First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) 18, 20, 26, 35

Healy v. James, 408 U.S. 169 (1972) 41

Liberty Lobby, Inc. v. Pearson, 390 F. 2d 489 (D.C. Cir. 1968) 43

**McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) 16-17, 28-29, 33, 38, 52

**McConnell v. FEC*, 540 U.S. 93 (2003) . . . . . *passim*

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 26

Mine Workers v. Pennington, 381 U.S. 657 (1965) 45

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 43

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) 19

North Carolina Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999) 40

Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993) . 44-46

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 28

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 36

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 19

Roth v. United States, 354 U.S. 476 (1957) 18

Speiser v. Randall, 357 U.S. 513 (1958) 41

United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967) 43

**Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) 2, 24, 43, 46

Constitution, Statutes & Rules

2 C.F.R. § 100.29(a)(1) 8

2 C.F.R. § 100.29(a)(2) 8

2 C.F.R. § 100.29(a)(3) 8

11 C.F.R. § 100.29 . . . . . 8, 42

11 C.F.R. § 100.29(b)(3)(i) 9

11 C.F.R. § 104.20 9

11 C.F.R. § 104.20(a)(1)(i) 9

11 C.F.R. § 104.20(c)(7) 37

11 C.F.R. § 109.20(a) 9

11 C.F.R. § 110.11 9

11 C.F.R. § 114.1(e)(1) 49, 51

11 C.F.R. § 114.1(e)(2) 49

11 C.F.R. § 114.10 38

11 C.F.R. § 114.2(b)(2) 38

11 C.F.R. § 114.6 49

11 C.F.R. § 114.7(a) 49

26 C.F.R. § 56.4911-2(b)(1) 22

26 C.F.R. § 56.4911-2(b)(2)(ii) 22

26 C.F.R. § 56.4911-2(b)(2)(iii) 22

45 C.F.R. § 1612.2(a)(1) 22

45 C.F.R. § 1612.2(b)(1) 22

2 U.S.C. § 431(8)(A)(i) 23

2 U.S.C. § 431(9)(A)(i) 23

2 U.S.C. § 431(17) 42

2 U.S.C. § 431(18) 42

2 U.S.C. § 434(f) 9, 18

2 U.S.C. § 434(f)(2)(E) 37, 53

2 U.S.C. § 434(f)(3) 1, 4, 42

2 U.S.C. § 434(f)(3)(A)(i) 8

2 U.S.C. § 434(f)(3)(A)(i)(I) 24

2 U.S.C. § 434(f)(3)(A)(i)(II) 8

2 U.S.C. § 434(f)(3)(A)(i)(III) 8

2 U.S.C. § 434(f)(3)(B)(iv) 27

2 U.S.C. § 441b 24, 47

2 U.S.C. § 441b(a)-(b)(2) 1

2 U.S.C. § 441b(b)(2)(C) 46

2 U.S.C. § 441d 9

2 U.S.C. §434(f)(3) 1

2 U.S.C.§ 431(8)(A)(i) 23

2 U.S.C.§ 431(9)(A)(i) 23

8 U.S.C. § 1101(a)(20) 37

26 U.S.C. § 501(c)(3) 22-23, 50

26 U.S.C. § 501(c)(4) 2, 22-23, 37

26 U.S.C. § 527(e)(2) 23

26 U.S.C. § 56.4911-2(b)(1) 23

26 U.S.C. § 56.4911-2(b)(2)(i) 23

26 U.S.C. § 56.4911-2(b)(2)(ii) 22

26 U.S.C. § 56.4911-2(b)(iii) 22

Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 . . . . . *passim*

U.S. Const. amend. I . . . . . *passim*

U.S. Const. amend. X 18

U.S. Const. amend. XVII 18

U.S. Const. art. I, § 1 18

U.S. Const. art. IV, § 4 18

U.S. Const. preamble 18

Other Authorities

71 Fed. Reg. 13557 25

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords 26

http://thomas.loc.gov/cgi-bin/bdquery/D?d109:58:./temp/ ~bdO8mc::|/bss/d109query.html| 25

http://www.60plus.org/ 21

http://www.aarp.org/ 21

http://www.fec.gov/law/Rulemaking Archive.shtml 26

Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002) 26

Case & Facts[1]

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81, Congress defined "electioneering communications" as targeted, broadcast communications that reference a clearly identified candidate within 60 days before general (or special or runoff) elections and 30 days before primaries (or nominating conventions or caucuses). 2 U.S.C. §434(f)(3). Congress prohibited corporations from using general treasury funds to pay for electioneering communications. 2 U.S.C. § 441b(a)-(b)(2) ("prohibition"). SUF 4-6. The Federal Election Commission considered creating an exception to this prohibition for grass-roots lobbying broadcasts in its regulations implementing BCRA but decided it was beyond the exception-making authority granted it by Congress to do so. SUF 11.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court upheld this prohibition against a First Amendment facial challenge, not being "persuaded that plaintiffs ha[d] carried their heavy burden of proving that [the prohibition] [wa]s [substantially] overbroad." *Id.* at 207. The present case is a constitutional challenge by Wisconsin Right to Life, Inc. ("WRTL") to the prohibition as applied to grassroots lobbying, brought under the First Amendment guarantees of free speech, association, and petition and under the inherent, reserved constitutional right of the sovereign people in a republican system of government to communicate with citizens urging them to contact their representatives concerning pending legislative matters.

On July 28, 2004,WRTL filed its verified complaint and sought a preliminary injunction to permit continued running of its grassroots lobbying ads past the August 15th beginning of the

[1]A full statement of facts and record citations is contained in *Plaintiff's Statement of Undisputed Material Facts* ("SUF"), incorporated herein by reference. Also, facts specific to certain arguments are recited at other appropriate places in this memorandum.

electioneering communication prohibition period. Docket 1, 4. A three-judge court was convened pursuant to BCRA § 403(a)(1). Docket 3, 9, 10. WRTL's preliminary injunction motion was denied August 12, 2004, Docket 23, with a *Memorandum Opinion and Order* issued August 17th. Docket 26. Pursuant to WRTL's declaration that it would not continue broadcasting its three ads beyond August 15, 2004, absent injunctive relief, WRTL ceased broadcasting its grassroots lobbying ads because they were then prohibited and for fear of enforcement by the FEC against WRTL. SUF 71.

On September 16, 2004, this court sua sponte ordered briefing on whether the case should be dismissed. Docket 32. On March 14, 2005, WRTL moved for summary judgment. Docket 41. On March 28, the FEC did the same. Docket 43. The cross-motions were denied as moot in the dismissal order. Docket 49. The *Order* and the *Memorandum and Order* dismissing this case were filed May 10, 2005. The court did so both on the bases that (a) *McConnell* precluded all as-applied challenges and (b) in any event (based on factors beyond the communications at issue), WRTL's activity might be of the sort targeted by Congress in BCRA and so should not be recognized for an exception to the electioneering communications prohibition.

WRTL noticed appeal on May 12, 2005, and the Supreme Court noted probable jurisdiction on September 27, 2005. After full briefing and oral argument (Jan. 17, 2006), the Supreme Court unanimously decided (Jan. 23, 2006) that as-applied challenges could be brought and remanded the case to this Court to decide the second issue, namely, whether the Constitution requires an exception to the electioneering communication prohibition for the sort of grass roots lobbying at issue here. *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL*").

WRTL is a nonprofit (§ 501(c)(4)), nonstock, ideological Wisconsin corporation, but it does not qualify for any exception permitting it to pay for its broadcast ads from corporate funds. SUF 1-2, 7. The Federal Election Commission ("FEC") is the government agency charged with enforcing

the relevant provisions of the Federal Election Campaign Act ("FECA"), as amended by BCRA, and applicable regulations. SUF 3.

Senate filibustering of federal judicial nominations became an issue in Senate politics almost from the moment Republicans reclaimed the majority in January 2003 because Democrats could no longer block judicial nominations by simply not bringing them up for a vote. SUF 12. In 2003, conservatives, and especially pro-life groups, saw the transformation of the judiciary as key to achieving their political goals in general and overturning *Roe v. Wade* in particular. SUF 13. Between March 2003 and June 2004, Senate Democrats had blocked confirmation votes sixteen times. SUF 14. The Senate Republican leadership attempted to break the impasse several times, including a forty hour marathon session in November 2003, but the Democrats remained sufficiently united to continue the filibusters. SUF 15.

The Republican leadership made another attempt at ending the deadlock in July 2004, holding four votes on stalled nominations between July 20 and 22, ending with the twentieth failed attempt. SUF 16. On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, which would have closed debate and stopped the filibuster of a confirmation vote on the nomination of William Gerry Myers III to be a United States Circuit Judge for the Ninth Circuit. Because a three-fifths vote to invoke cloture was required, the motion failed and the filibuster continues. SUF 17. The filibuster of William Myers was the 17th time such a filibuster had prevented an up or down vote on a federal judicial nominee since March 2003, and Senate "Judiciary Chairman Orrin Hatch . . . predicted that the number of Democratic filibusters would hit double digits before the Senate adjourns in the fall" and a Roll Call article predicted "*Fall Showdown Seen on Judges*." SUF 18. The number of filibusters of judicial nominees reached "double digits" on July 22, when three more judicial nominees were denied up-down votes by a Democrat filibuster:

nominees Henry W. Saad, Richard A. Griffin and David W. McKeague. Helen Devar, SUF 19. At the time the original complaint was filed WRTL understood and believed that the Senate Republican leadership planned a "Fall Showdown," i.e., the leadership intended to bring up for vote additional judicial nominees throughout the fall and that by year's end Democrats could have to filibuster as many as sixteen nominees for the entire 108th Congress. SUF 19.

As it turned out, Senate Republican leaders decided in November 2004 not to press the predicted confrontation, i.e., the "Fall Showdown," at that time. Majority reelection of President George W. Bush and Republican increases in both houses of Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators on May 23, 2005. SUF 35. The filibuster stalemate was broken on May 23, 2005, when a bipartisan coalition of fourteen senators agreed to vote for cloture on most of the President's most controversial judges in exchange for no changes to the filibuster rule and the ability to continue to block nominees that Democrats could not agree to. Since that agreement, the filibuster has not been successfully used to block judicial confirmations. SUF 36.

From late March to May 23, 2005, some $8.5 million was spent by groups advertising for and against the filibuster issue because the Republican leadership had signaled that it was going to schedule a vote to change the rules to require only fifty-one votes to end debate on judicial nominations. SUF 20. During the national debate in the spring of 2005 over the so-called "nuclear option," a.k.a. the "constitutional option," in which the Republican senators indicated an intent to change the U.S. Senate rules to preclude judicial nominee filibusters, the central question was whether Senate Majority Leader Frist could get fifty *Republican* senators to support the rule change

because it was certain that no Democrat senators would support it. Since Wisconsin had no Republican senators, there was no senator to lobby in Wisconsin. SUF 21.

A significant number of the ads in the spring of 2005 for and against judicial filibusters were designed to affect or influence the vote in the Senate on the filibuster issue, while some may have been more aimed at public opinion generally. SUF 22. Those ads that were directed or aimed at influencing the vote in the Senate, mentioned a specific senator by name, pointed to his or her role in the debate, and were broadcasted primarily in the states where those senators were from. SUF 23. Those ads aimed at public opinion generally, the second group described above, did not specifically mention the name of a senator who was involved in the issue, they did not directly call on people to contact their senator, and they said that nominees deserve an up or down vote (or something comparable on the other side of the issue) . SUF 24. Ads in the second group, which do not mention an office holder, can be helpful in trying to influence votes in Congress by raising the salience of issues among the public and possibly by shifting public opinion, which could have the effect of also influencing those who pay attention to public opinion. SUF 25. Defendants' expert Franklin testified that to the extent that these ads do not directly identify or point to an elected official and ask that citizens contact that official, it would be reasonable to assume that they have less direct lobbying or effect than if they simply discussed the issue and took a position on the issue. SUF 26. Franklin testified that the two sorts of ads on the filibuster issue just described would both fall within the range of what grassroots lobbying covers and would both properly be considered issue ads. SUF 27.

Judicial filibusters became an issue for WRTL when it became aware of a problem with President Bush's judicial nominees being filibustered in the U.S. Senate sometime in 2003 through news accounts and through communications from the National Right to Life Committee ("NRLC"). SUF 96. The idea of running grassroots lobbying ads was first discussed among WRTL staff in the

spring of 2004. SUF 97. WRTL was opposed to judicial filibusters because judicial candidates are important to WRTL and because it believed that President Bush's judicial nominees should receive an up or down vote. SUF 98. WRTL's reason for running the ads at issue in this case was because WRTL was concerned about the filibusters and wanted to impact the problem in some way. SUF 99, 215, 218-19, 221, 224-25, 230-33, 237-42.

At the June 21, 2004 Board of Directors meeting that approved developing and broadcasting ads opposing the filibustering of judicial nominees, the purpose of the ads was discussed and it was to do a grass-roots lobbying campaign to ask people to contact Senators Kohl and Feingold to urge them to oppose the filibusters, and no other purpose was discussed. SUF 100. While including only Senator Kohl's name, without identifying Senator Feingold, would have eliminated the legal problem with the grassroots lobbying ads becoming electioneering communications during the prohibition periods, it would not have promoted the objective of WRTL's grassroots lobbying campaign, so it was never considered by WRTL. SUF 107. The timing of WRTL's anti-filibuster ads was chosen to allow prompt creation and airing of the ads in order to have an affect before the expected "Fall Showdown" on filibuster votes would take place, which, according to WRTL's best information, was expected to be around September 2004. SUF 101, 222, 223, 230-33, 237-42. WRTL had no discussion of the impact that WRTL's anti-filibuster ads would have on Senator Feingold's campaign. SUF 102. WRTL did not think that running WRTL's anti-filibuster ads would have any effect on Senator Feingold's campaign because they were grassroots lobbying campaigns and did not speak about elections. SUF 103. WRTL's advertising consultant also believes that they would not have had any effect on the elections. SUF 239-41. WRTL collectively, i.e., within WRTL and in conjunction with its media consultant Hanon McKendry, came to the decision that running WRTL's anti-filibuster ads on TV and radio was the most effective means of reaching the most people. SUF

104. In addition to employing broadcast means, WRTL also planned to pursue its anti-filibuster campaign through official letters to Wisconsin's two Senators, news releases, newspaper op-ed pieces, and action alerts (which were WRTL communications that could be delivered in a variety of ways and, in this case, actually delivered by email and automated telephone messages), but no newspaper ads were done on this issue. SUF 105.

WRTL began broadcasting a radio advertisement (Complaint Exhibit A) on July 26, 2004, and was in the process of producing a second radio ad (Complaint Exhibit B) and one television ad (Complaint Exhibit C), at the time the original complaint was filed, which WRTL intended to run throughout August, for the purpose of influencing the votes of Senators Feingold and Kohl regarding filibusters of judicial nominees expected that fall, i.e., the "Fall Showdown," before Congressional adjournment. Although the ads mentioned Sen. Feingold, who was a candidate in the upcoming primary and general elections, they were not electioneering communications when the original complaint was filed because they were not within the electioneering communication blackout periods before the Wisconsin primary, which was to be held on September 14, or the general election, which was to be held on November 2. SUF 8-10, 37.

Because of the timing of anticipated Senate filibusters and votes to invoke cloture concerning motions to confirm judicial nominees, i.e., the anticipated "Fall Showdown," WRTL intended to run the three ads (Exhibits A, B, and C) and materially similar ads between the time of filing the original complaint and the adjournment of Congress, including within the blackout periods if WRTL obtained the relief sought herein. The timing of these events was beyond the control of WRTL. SUF 38. The radio ads that were at Exhibits A and B were broadcast in Milwaukee, Eau Claire, and Green Bay, Wisconsin between July 26 and August 14, 2004. SUF 39. The television ad that was Exhibit C was broadcast in the same media markets as the radio ads. SUF 40.

From August 15 to September 14 (30 days before the primary) and from September 3 to November 2 (60 days before the general election), the then-current ads (Exhibits A, B, and C of the amended complaint) and materially similar ads WRTL proposed would become electioneering communications as to Wisconsin senatorial candidate Russell Feingold, and WRTL would be prohibited from running these ads. SUF 41. WRTL's then-ongoing advertisements would become electioneering communications from August 15 to November 2, because they meet the statutory and regulatory definitions found at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29. SUF 42. Specifically, the advertisements at Exhibit A, B, and C, and planned future advertisements, were being, and would continue to be, broadcast for a fee on television and radio. 2 U.S.C. § 434(f)(3)(A)(i); 2 C.F.R. § 100.29(a). SUF 43. The advertisements at Exhibit A, B, and C, and planned future advertisements, would be broadcast within 30 days before the Wisconsin primary and/or within 60 days before the general election. 2 U.S.C. § 434(f)(3)(A)(i)(II); 2 C.F.R. § 100.29(a)(2). SUF 44. The advertisements at Exhibit A, B, and C, and planned future advertisements, "refer[ed] to," and would continue to refer to, "a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I); 2 C.F.R. § 100.29(a)(1). SUF 45. The advertisement entitled "Wedding" (Exhibit A) was a radio broadcast ad being broadcast, at the time of the original complaint, for a fee paid by WRTL that clearly referenced federal candidate Sen. Feingold by mentioning his name and asking listeners to contact him (and Sen. Kohl) to oppose the filibustering of judicial nominees. SUF 46. The advertisement entitled "Waiting" (Exhibit C) was a television broadcast ad to be broadcast for a fee paid by WRTL beginning August 2 that clearly referenced federal candidate Sen. Feingold by mentioning his name and asked listeners to contact him (and Sen. Kohl) to oppose the filibustering of judicial nominees. SUF 47. The advertisements at Exhibits A, B, and C, and planned future advertisements, were, and would continue to be, "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i)(III); 2 C.F.R.

§ 100.29(a)(3), meaning that the broadcast ads "can be received by 50,000 or more persons . . . in the State [Sen. Feingold] seeks to represent." 2 C.F.R. § 100.29(a)(3). SUF 48. The advertisements at Exhibits A, B, and C, and planned future advertisements, were being, and would be, "publicly distributed," i.e., "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system or satellite system." 2 C.F.R. § 100.29(a)(3). SUF 49.

On August 15, 2004, when the electioneering communication prohibition period began, WRTL planned to be broadcasting a total of three radio and television ads, Exhibits A, B, and C, so that they would be "publicly distributed" on that date. 11 C.F.R. § 100.29(b)(3)(i). SUF 50. On August 15, WRTL would have spent or contracted to spend more than $10,000 "for the direct costs of producing or airing one or more electioneering communications." 11 C.F.R. § 104.20(a)(1)(i). SUF 51. The public distribution and disbursement amount would have triggered a "disclosure date" for WRTL on August 15, requiring it to file a report of its electioneering communication activity on FEC Form 9 "by 11:59 p.m. Eastern Standard/Daylight Time" on August 16. SUF 52.

WRTL intended, and intends in the future, to comply with all record keeping and reporting requirements for its electioneering communications as set out in the Federal Election Campaign Act ("FECA") and FEC regulations, 2 U.S.C. § 434(f); 11 C.F.R. § 104.20, providing accurate disclosure information as to the source and disbursement of funds at the levels at which Congress asserted a disclosure interest. SUF 53. WRTL was also complying with, and will continue to comply with, the applicable disclaimer requirements for electioneering communications. 2 U.S.C. § 441d; 11 C.F.R. § 110.11. This may be seen on the advertisements' scripts at Exhibits A, B, and C, providing disclosure of the fact that WRTL was paying for the ads, that they were not authorized by any candidate or candidate's committee, and providing a World Wide Web address where a person

hearing or viewing the ads could find contact information for WRTL and the Senators. SUF 54. WRTL did not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements. SUF 55.

The ads at Exhibits A, B, and C of the Amended Complaint expressed an opinion on pending Senate legislative activity, which was imminently up for a vote, and urged listeners to contact their Senators and to urge them to vote a certain way in the upcoming vote, so that these ads constitute bona fide grass-roots lobbying. SUF 56. The ads dealt with concrete, imminent, legislative issues (while Congress was in session), beyond the timing and control of WRTL, with which the two incumbent Senators were dealing and would have to shortly deal further. SUF 57. The ads referred to both a candidate and a non-candidate and dealt with them equally. SUF 58. The ads dealt exclusively with the legislative issue. SUF 59. The ads focused on the legislative issue in question, not on any candidate. SUF 60. The ads did not refer to any political party. SUF 61. The ads dealt with an issue with which WRTL had a clear and long-held interest. SUF 62. The ads did not expressly advocate the election or defeat of a clearly identified candidate for federal office. SUF 63. The ads contained no words that promoted, supported, attacked, or opposed a candidate. SUF 64. The ads did not reveal a candidate's record or position on the issue. SUF 65. The ads did not comment on a candidate's character, qualifications, or fitness for office. SUF 66. The ads did not mention any upcoming election. SUF 67. The ads were broadcast independent of any candidate or political party in that they were not "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 109.20(a). SUF 68, 106.

This case sought declaratory and injunctive relief permitting WRTL to run both the then-current grass-roots lobbying advertisements (Exhibits A, B, and C to the amended complaint) and materially similar ads in the future. SUF 70. WRTL intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition periods before future primary and general elections in Wisconsin when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Wisconsin. WRTL is concerned about a range of issues that regularly have and will become issues in the legislative and executive branch. Because the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that WRTL's need to broadcast grass-roots lobbying ads will again coincide with the electioneering communications blackout periods. And given the limited funds in WRTL's PAC account, it is also highly likely that WRTL will at such times not have adequate PAC funds to pay for such ads and will be unable to raise the funds in the usual short time span available when hot issues are coming to a head. SUF 72.

A materially similar grassroots lobbying ad was broadcast on radio by WRTL in January 2006, an ad that would have been a prohibited electioneering communication but for the timing. SUF 112-15. It was entitled "**Filibuster Radio Ad: 60 Seconds**," with text as follows:

> Some Senators are at it again. Threatening to filibuster qualified judicial nominees. This time, the stakes are even higher. They want to use the filibuster to block a vote on the nomination of Judge Samuel Alito for the U.S. Supreme Court.
>
> Judge Alito has received the highest qualification rating for judicial nominees and deserves a simple "yes" or "no" vote to prevent gridlock in our judicial system.
>
> Contact Senators Feingold and Kohl at 202-224-3121 and tell them to oppose the filibuster of Judge Samuel Alito for the U.S. Supreme Court. That's 202-224-3121.
>
> Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

SUF 114. Following this ad, Senator Kohl opposed the filibuster of now-Justice Alito and WRTL issued a news release stating its opinion that the grassroots lobbying had worked. SUF 116-117. Also following this ad, Senator Kohl voted in opposition to the filibuster of Judge Brett M. Kavanaugh, which vote WRTL believed was affected by its grassroots lobbying. SUF 118.

Using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option for WRTL's anti-filibuster ads. As of August 6, 2004, WRTL-PAC had $13,766.90 in its account. This money was the only money that could be used for federal contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If PAC funds were used for the grassroots lobbying ads, those funds would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make. SUF 73-79.

The approximately $14,000 in funds in the WRTL-PAC account in early August of 2004 would not have been sufficient for the planned advertising expenditures. The projected cost of WRTL's planned grassroots lobbying campaign was $100,000. PAC money is difficult to raise, being subject to source, amount, disclosure requirements, and donor resistance to such contributions, and WRTL believed that it could not raise sufficient funds in its PAC to fund the grassroots lobbying campaign. SUF 80-95.

Defendants' experts Douglas Bailey (SUF 128) and Charles Franklin, III (SUF 180) prepared declarations (excerpts are included as exhibits hereto) and were deposed by WRTL. Jason Vanderground is a lead consultant employed by Hanon McKendry, the advertising and brand consulting firm hired by WRTL to prepare its grassroots lobbying campaign. SUF 204-09. He has eight years of experience with Hanon McKendry, the last three of them as a lead consultant, whose job it is to lead a team of people working on a client's account. SUF 205, 208. He handled WRTL's account. SUF 209. Vandergound's nonprofit client accounts include Citizens for Compassionate

Care, Kids First! Yes!, Michigan Catholic Conference, Massachusetts Catholic Conference, Right to Life, U.S. Conference of Catholic Bishops, Life Ed, Alliance Defense Fund, Colorado Alliance for Reform in Education, and Focus on the Family. SUF 206. Hanon McKendry had done work for other Right to Life clients and had a reputation for doing high quality communications, which reputation was passed on to WRTL by Barbara Listing at Michigan Right to Life. SUF 207.

WRTL's ads at issue in this case are grassroots lobbying, as Bailey and Franklin agree. SUF 26-30, 167. Bailey prefers the term "public policy advertising" in place of grassroots lobbying, and he has no consulting experience with "public policy advertising." SUF, 136-145. The "grassroots issue campaigns" that Bailey said in his declaration for this case (at ¶ 3) that he had "extensive experience consulting" on he defined as "building of an organization of supporters." SUF 136-38. Franklin agrees that the three elements – (1) relates to specific legislation, (2) reflects a point of view on the legislation's merits, and (3) encourages the general public to contact legislators – are characteristics of grassroots lobbying but don't exhaust the nature of it, and he would not say that these three being present necessarily means that an effort is clearly only a grassroots lobbying effort. SUF 30. 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.

Grassroots lobbying is sometimes tied to upcoming votes in Congress, and Congress is often in session in the fall of election years, including within sixty days of an election. SUF 31-33. Organizations that want to influence government policy often engage in grassroots lobbying as a means to influence current office holders and how they vote in Congress. SUF 34. Grassroots lobbying is intended to influence public officials to vote or act in a way preferred by the communicator in three situations: (1) when the official is undecided, in order to steer him or her in

the preferred direction, (2) when the official is opposed to the preferred position, in order to encourage a change of mind, and (3) when the official supports the preferred position, in order to encourage the official to maintain that position and to provide the official the ability to cite constituent support for the position. SUF 127. In his declaration for this case, Bailey said that "there would be no reason to tell voters to contact Feingold and Kohl urging them to oppose the filibuster if they were already opposed to it." SUF 148. When asked at his deposition why public policy advertising would "mention the names of specific office holders," Bailey responded, "if it is in advance of an issue, generally it's because that office holder is undecided on the issue or it is taking on a position and you want the public to weigh in with them to cause them to take the other issue." SUF 149. Bailey later in his deposition agreed again that "one circumstance when a group might do advertising is when the position of the officeholder is undecided. SUF 150, 164. And Bailey later in his deposition agreed again that "public lobbying advertisements are run when a particular office holder has a position on an issue or a bill, and the attempt is to persuade them to change that position." SUF 151.

Grassroots lobbying can be effective in affecting the voting of public officials. SUF 22-26, 110, 116-118, 168, 177-79. In those advertising campaigns where one is attempting to get the public to lobby legislators, it is important to run the advertising close in time to when the legislative vote will occur so that it sticks in people's minds a little bit more. SUF 213.

Naming a candidate is typical and needed in grassroots lobbying. SUF 23, 26, 125, 147, 149. It would have been less effective for WRTL to direct recipients to the Senate switchboard or the BeFair.org website (prepared as part of WRTL's grassroots lobbying campaign) than to name Senators Kohl and Feingold in WRTL's ads. SUF 108, 125 (73, 119), 126, 214, 234-35.

The use of a website, such as BeFair, is much more memorable than a phone number in an ad and so is used because people may not be in a position to record a phone number. SUF 236. The percentage of response is significantly higher with a memorable URL than a phone number. SUF 236. WRTL had prior experience with referring people to a website for action and contact information on pending legislation. SUF 109.

Broadcast ads are the most effective media for a grassroots lobbying campaign, and non-broadcast communications would not have provided WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message. SUF 69, 73, 111, 119-124, 210-12, 227-28.

Grassroots lobbying might affect elections, according to Defendants' experts, because almost everything affects elections, especially the discussion of public issues. SUF 130, 132, 189. Bailey employs the term "campaign ad" to refer to"anything that is run in the midst of the campaign that is likely to have political impact," so that "an issue ad run in a campaign is a campaign ad," SUF 129, because it might have some impact. SUF 130. He believes this is true whether or not an ad names a candidate. SUF 131, 193 (Franklin same). Bailey did concede in his deposition, however, that broadcasting WRTL's ads "in the midst of the campaign" "might have no impact . . . on the election itself." SUF 163. According to Franklin, any public communication by any means (including phone calls, newspaper advertising, direct mail, website information, radio and television advertising, discussions on radio talk shows, or news broadcasts) can affect elections, but the degree of affect cannot be determined by examination of the communication itself. SUF 190-93.

Franklin did no research on grassroots lobbying efforts generally or specifically and was not asked to do so or to opine on their effectiveness even though he was aware that affecting the filibuster issue was WRTL's purpose in running its ads. SUF 194. Franklin found no empirical evidence on the ultimate effect of public messages on voters in a time period of greater than two

weeks, so that there were specifically no studies that examined such effects out to two months before an election. SUF 195. Where there are competing public messages, the net effect is likely to be reduced as they tend to cancel each other out and later advertising of all kinds can update voters' preferences, so that there is not a long-term persistence of the earlier ads. SUF 197-98. In his report, Franklin wrote that for the target audience of WRTL's three ads, i.e., "public policy aware adults, ages 45+ with male skew," "it is unlikely that political ads will change opinions," which Franklin said meant that persons in the target audience would notice messages "because they are politically aware and involved and interested," but "it should not be expected to convert someone who feels on the other side." SUF 201. However, in answer to the question of whether this would be an audience you would want to target if you were wanting the listener to respond by calling a senator about the issue and lobby them, Franklin responded affirmatively:

> As an empirical question, these would be the people that are probably most likely to be involved enough to make a phone call or a contact, though they may be people that would already be mobilized. So I think the answer is probably yes, these would be people that would be more likely to make the call than people who are the opposite, unaware, involved, yes. [SUF 202.]

Bailey was asked to review a series of storyboards for six broadcast advertisements taken from Appendix J of the expert witness report of Goldstein in the *McConnell* litigation, which story boards were marked as Exhibit 4 and internally identified as GIA 1-6. SUF 152 (Exhibit 4 attached). In his report in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), Intervenor Defendants' expert Kenneth M. Goldstein reported on analysis by a team of student coders of advertisements on CMAG storyboards and said: "In this report, I refer to ads coded as providing information or urging action as 'Genuine Issue Ads," and ads coded as generating support or opposition for a particular candidate as 'Electioneering Ads.'" SUF 153. The six ads in Exhibit 4 were considered "genuine issue ads" by Goldstein's coders and he decided they were genuine issue ads. *McConnell*, 251 F.

Supp. at 747-48 (opinion of Judge Kollar-Kotelly). SUF 154. The sixth ad in Exhibit 4 that was recognized by Goldstein as a genuine issue ad in *McConnell*, *id.* at 748 (opinion of Judge Kollar-Kotelly), was a National Pro-Life Alliance advertisement entitled "**Feingold Kohl Abortion 60**" that was broadcast within sixty days of the 2000 election and mentioned Wisconsin Senators Kohl and Feingold; it was quoted in Judge Henderson's opinion as follows:

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

Id. at 312 (opinion of Judge Henderson). SUF 155. Bailey's comparison of WRTL's ads to this recognized genuine issue ad and to the Yellowtail ad set out as a "sham" issue ad by the Supreme Court in *McConnell* is discussed in text below.

Argument

I. The Constitution Specifically Protects Grassroots Lobbying.

The required analysis is strict scrutiny under the First Amendment rights of expression, association, and petition, with the burden on Defendants to prove narrow tailoring to a compelling interest. The right to petition is protected strictly in whatever context it arises and was not raised or considered in *McConnell v. FEC*, 540 U.S. 93 (2003).

The people are sovereign. U.S. Const. preamble; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted

to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to require that Senators be "elected by the people." U.S. Const. amend. XVII. The people mandated Congress not to restrict their rights to speak, associate,[2] and petition in the exercise of the people's sovereign right to participate in representative self-government. U.S. Const. amend. I.

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley,* 424 U.S. at 14 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

While the individuals who make up WRTL could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying through broadcast ads is prohibited for up to 90 days during an election year. Citizen groups formed under the right of association are an essential component of democracy in action. In *Buckley*, this Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which

[2]"[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[3] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by permitting amplified individual speech. *Id.* at 22.

Grassroots lobbying is also protected by rights not considered in *McConnell*, i.e., the inherent right of the people to participate in self-government and the express First Amendment right to petition, along with a line of cases protecting corporations' right to contact both legislators and the public about pending legislative and executive matters.

The right of corporations to petition both the legislative and executive branches was recognized in *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 135 (1961). The Supreme Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not constitute a violation of the Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government"). This *Noerr-Pennington* line

---

[3]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest."' *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

of cases is developed further below, *infra* at 44, in a discussion of why questions of intent may not be considered in the present situation.

In *Bellotti*, 435 U.S. 765, the Supreme Court applied the right of petition to corporations which sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, and held that this was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31.

The overarching principle of these cases is the right of the people to lobby incumbent politicians about their conduct in office without regard to the context in which the need to assert the right to petition arises.[4] Where the express right of petition and the inherent necessity of the people's participation in self-government are added to the rights of free expression and association, the electioneering communication prohibition must yield to the weight of constitutional necessity and allow an exception for grassroots lobbying.

For example, in 2005 there was a great debate on reforming Social Security. President Bush made speeches across the nation to generate support so that people would pressure their

[4]It should be noted that the only reason that the present issue about grassroots lobbying arises is because an incumbent politician chooses to run again. Choosing to run for reelection is a benefit to the incumbent, now candidate, because he or she has the possibility (perhaps even the likelihood, given the benefits of incumbency) of being reelected and exercising government power in the future. However, if the electioneering communication provision bans grassroots lobbying, the incumbent's interests are served, but not the people's. In the present case, Sen. Kohl could be lobbied, but not Sen. Feingold. So incumbents who choose to run again gain a special exemption from the attempt by the people to influence them through grassroots lobbying. This goes a step beyond anything considered in *McConnell*. And the problem is compounded because members of Congress often push important legislative matters to the end of the session, which will often be in the blackout period.

representatives to support his plan. This was grassroots lobbying. Senators, Representatives, and political party leaders similarly tried to sway public opinion for or against the President's viewpoint. The people, through nonprofit corporate citizen groups, also lobbied.[5] This is the work of a vibrant republic, with active involvement of the people. But what if an election were pending within 60 days as this debate occurred?[6] All but the people, through their citizen groups, could continue using the most effective means to do grass-roots lobbing—broadcast media. This would violate the people's right to petition.

---

[5]For example, AARP was grassroots lobbying against the President's plan. *See* http://www.aarp.org/ (visited March 7, 2005). The 60 Plus Association was grassroots lobbying for the President's plan. *See* http://www.60plus.org/ (visited March 7, 2005).

[6]In *McConnell*, the ACLU provided a summary Chart of "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." Joint Appendix at 622-26, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*) and made the following observations about pre-election legislative activity:

> [E]lection years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. . . . During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* [Chart]. Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election.

Brief of Appellant at 12-13, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*). The Chart is included as an appendix to the *Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant* in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006). In addition, the Chamber's brief provides details of the roll call votes in prohibition periods in the 108th Congress. *Id.* at 6. A longstanding practice in Congress is to attach riders to appropriation bills, which are considered in the fall prohibition periods. Movement of controversial legislation to prohibition periods may reasonably be expected because less opposition can be generated at such times.

II. Grassroots Lobbying Is Not the Functional Equivalent of Express Advocacy.

A. There Is a Distinction Between Grassroots Lobbying and Electioneering.

Grassroots lobbying is a familiar concept and is defined in federal law. The Internal Revenue Code provides that a "[g]rass roots lobbying communication" is "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. § 56.4911-2(b)(2)(i). It has three "required elements": "(A) [r]efers to specific legislation . . . ; (B) [r]eflects a view on such legislation; and (C) encourages the recipient of the communication to take action with respect to such legislation . . . ." 26 U.S.C. § 56.4911-2(b)(2)(ii). The phrase "[e]ncourages the recipient . . . to take action" is defined, 26 U.S.C. § 56.4911-2(b)(iii),[7] as are the terms "legislation" and "specific legislation." 26 U.S.C. § 56.4911-2(d)(1)(i), (ii), (iii) examples).[8] Under the IRC, advocacy groups such as WRTL that are exempt under 26 U.S.C. § 501(c)(4), may spend an unlimited amount of their general treasury funds on lobbying, either grassroots lobbying

[7]"[E]ncourages the recipient of the communication to take action" is defined to include (A) telling recipients to contact the legislator or official, (B) providing some sort of contact information for the legislator or official, (C) providing a postcard or the like for the recipient to send to the legislator or official, or (D) identifying legislators or officials as being: opposed to the communicator's position, undecided, the recipient's representative, or on the legislative committee or subcommittee considering the matter. 26 C.F.R. § 56.4911-2(b)(2)(iii).

[8]Another definition of "grassroots lobbying" is found in a provision that forbids the Legal Services Corporation from engaging in it. It is defined as "any . . . communication . . . which contains a direct suggestion to the public to contact public officials in support of or in opposition to pending or proposed legislation, regulations, executive decisions, or any decision by the electorate on a measure submitted to it for a vote. . . ." 45 C.F.R. § 1612.2(a)(1). "Legislation" is defined as "action or proposal for action by Congress . . . intended to prescribe law or public policy. The term includes, but is not limited to, action on bills, constitutional amendments, ratification of treaties and intergovernmental agreements, approval of appointments and budgets, and approval or disapproval of actions of the executive." 45 C.F.R. § 1612.2(b)(1) (with further sub-definitions appended).

or direct lobbying.[9] Charities exempt under 26 U.S.C. § 501(c)(3), however, may spend only an insubstantial amount on lobbying of any kind.

Electioneering, by contrast, is referred to as "political intervention" in the IRC context and is more severely restricted. Nonprofit corporations under § 501(c)(3) may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office," *id.*, while advocacy groups under § 501(c)(4) may do so, but may spend only an insubstantial amount on political intervention. Political intervention is dealt with under the term of "exempt function," in 26 U.S.C. § 527(e)(2):

> [it] means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

So the IRC distinguishes between lobbying, which is seeking to influence legislation, and political intervention, which is seeking to influence elections.

While "influence" or "influencing" has not been construed in the IRC context, FECA contains a definition of electioneering that is similar to the use of "political intervention"under the IRC. FECA defines "contributions" and "expenditures" as being made "for the purpose of influencing any election for Federal office." 2 U.S.C.§§ 431(8)(A)(i) and 431(9)(A)(i). Because of the vagueness and potential overbreadth of this "influence" language, the Supreme Court construed it to require explicit words expressly advocating the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at 79-80; *McConnell*, 540 U.S. at 190-92. *See also Buckley*, 424 U.S.

---

[9] "Direct lobbying" refers to "any attempt to influence any legislation through communication with . . . any member or employee of a legislative body . . . or . . . any government official or employee . . . who may participate in the formulation of the legislation . . . ." 26 C.F.R. § 56.4911-2(b)(1).

at 42-44 (construing "relative to" to require express advocacy) and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-49 (1986) ("*MCFL*") (construing "in connection with an election," in the prohibition at § 441b, to require express advocacy). As a result of these constructions, FECA clearly applied only to electioneering and not grassroots lobbying prior to enactment of BCRA.

Central to these "express advocacy" holdings, and to the speech protections of the First Amendment generally, was the idea that the *speaker* must be able to know, based on the meaning of the words he is speaking, which side of the line he is on. Requiring "explicit words" of advocacy of the election or defeat of a candidate does this. *Buckley*, 424 U.S. at 43. Thus, the speaker is not left to "hedge and trim," wondering how the hearer might interpret the message based on factors external to the communication itself. *Id. McConnell* endorsed the express advocacy construction of the language at issue in *Buckley* and *MCFL* to avoid vagueness and overbreadth. 540 U.S. at 192. Moreover, a necessary implication of the Supreme Court's reversal of this Court in the present case in *WRTL*, 126 S. Ct. 1016 (2006), is that neither the mere facts of (a) proximity to an election and (b) some possible effect on elections is cognizable in the present analysis because those were argued strongly by Defendants as the very reasons why there could be no as-applied challenge to the electioneering communication prohibition. So the Supreme Court necessarily rejected those factors as governing in its reversal and remand for consideration "in the first instance."

BCRA added the electioneering communication provision, which applies to certain communications that "refer[] to a clearly identified candidate for Federal office," without any further content requirements. 2 U.S.C. § 434(f)(3)(A)(i)(1). *McConnell* upheld this provision on its face because it was not vague or overbroad. 540 U.S. at 194. It was not vague because "clearly identifying a candidate" is not vague. *Id*. (quoting definition). And it was not overbroad because electioneering communications generally were found to be the "functional equivalent of express advocacy." *Id.* at

206. However, since effective grassroots lobbying requires reference to an incumbent, who may be a candidate, this provision, on its face, encompasses grassroots lobbying, and this case presents the need to distinguish, for purposes of campaign finance laws, between grassroots lobbying and electioneering.[10]

The distinction between grassroots lobbying and electioneering has been discussed in campaign finance cases, but has not yet been definitively decided. Justice Stevens raised the distinction in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where he said that "there is a vast difference between *lobbying* and debating public issues on the one hand, and political

---

[10]Sen. McCain and prime sponsors of campaign finance reform legislation have proposed bills to regulate grassroots lobbying in which they provided grassroots lobbying definitions. *See*, *e.g.*, S. 2128, *available at* http://thomas.loc.gov/cgi-bin/bdquery/D?d109:58:./temp/~bdO8mc::|/bss/d109query.html|.

In addition, a broad-spectrum coalition recently asked the FEC for an expedited rulemaking to create a grassroots lobbying exception (which has not happened). The FEC has published the rule proposed to it in Notice 2006-4, entitled "Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication." 71 Fed. Reg. 13557. The petition sought an expedited rulemaking

> to revise 11 C.F.R. 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following principles: 1. The "clearly identified federal candidate" is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate's candidacy, or a political party; and 6. The communication does not refer to the candidate's character, qualifications or fitness for office.

WRTL does not believe that this rule goes as far as the U.S. Constitution would extend protection to grassroots lobbying, but the proposed rule is a very good rule that balances the concerns of all sides and provides a workable test. It would provide the ability to engage in useful grassroots lobbying, and it would eliminate any realistic concerns about such grassroots lobbying being employed as the functional equivalent of express advocacy.

campaigns for election to public office on the other." *Id* . at 678 (Stevens, J., concurring) (emphasis added). Justice Stevens' view seems to have been carried over to his opinion for the Court in *McConnell* where, in footnote 88, the Court reiterated that, while government may regulate electioneering, it may not regulate "genuine issue ads" and distinguished *McConnell* from *Bellotti*, 435 U.S. 765, and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *McConnell*, 540 U.S. at 206 n.88. Justice Kennedy, moreover, argued in *McConnell* that corporations ought to be able to do both electioneering and lobbying. 540 U.S. at 764 (Kennedy, J., dissenting).[11]

---

[11]The BCRA prime sponsors saw the difference between electioneering and grassroots lobbying, proposing to the FEC the following exception to the prohibition on electioneering communications:

> The term "electioneering communication" does not include any communication that: ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 10 (copy on file with authors) (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002) (copy on file with authors)). Both documents are available at the FEC's website, http://www.fec.gov/law/Rulemaking Archive.shtml (select "Electioneering Communications" then "Comments on This Rulemaking"). This proposal by the prime sponsors brings the issue to a very fine point: Assuming a grassroots exception that clearly identifies a candidate, e.g., "Your Senator," is there a constitutional justification for forbidding a citizen group to simply name its Senator? Is the incremental burden on the citizen group narrowly tailored to a compelling interest? Naming the candidate is necessary, as Judge Leon noted from the *McConnell* record,

B. Grassroots Lobbying Ads Are "Genuine Issue Ads," Not "Sham Issue Ads."

When the Supreme Court did its strict scrutiny analysis under the First Amendment, it employed as its narrow tailoring analysis a functional equivalence test:

> plaintiffs argue 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. This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.

Id. at 205-06. So if a communication is like express advocacy, which may be regulated under precedent (which held that regulating express advocacy was narrowly tailored), then it too is narrowly tailored. But Defendants and their experts seek to relitigate this holding of *McConnell* and to stand *McConnell* on its head, saying that the *less* a communication is like express advocacy then the more the prohibition on electioneering communications is narrowly tailored to it. SUF 160, 162 (the more "subtle" it is the more effective it is). This also stands BCRA on its head because Congress authorized the FEC to make exceptions by regulation for such activity as grassroots lobbying provided that the exception did not permit communications that promote, attack, support, or oppose ("PASO") a candidate. 2 U.S.C. § 434(f)(3)(B)(iv). But according to Defendants and their experts, the less an ad might be perceived to PASO a candidate, the more effective it is and the more it must be restricted.

This argument is illogical and is built on the fundamental flaw that anything that might have even a remote possibility of affecting elections may constitutionally be regulated. Defendants' experts make extremely broad statements about what affects elections, not confining their assertions

---

infra at note 22, and is easily justifiable on the basis of the people's exercise of their sovereignty in a republican form of government and their express right to petition, which includes grassroots lobbying.

of electoral effect to whether or not a candidate is named in the communication or to any communication format, even saying that talk shows and news programs affect elections. SUF 129-130, 132, 176, 191-93. If this is so, then the electioneering communication prohibition is unconstitutional for underbreadth under the Supreme Court's analysis in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and this Court should so decide.

The narrow tailoring issue is whether grassroots lobbying ads equate to "communications 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? "Genuine issue ad" was a term of art in the *McConnell* litigation, so when the Supreme Court said "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*," 540 U.S. at 206 n.88 (emphasis added), that term meant something specific in the case. In his report in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), Intervenor Defendants' expert Kenneth M. Goldstein reported on the analysis that he had asked a team of student coders to do on advertisements (on CMAG storyboards) in an effort to determine their nature. He said: "In this report, I refer to ads coded as providing information or urging action as 'Genuine Issue Ads," and ads coded as generating support or opposition for a particular candidate as 'Electioneering Ads.'" Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants 7. SUF 153.

The six ads in Exhibit 4 to Bailey's deposition were considered "genuine issue ads" by Goldstein's coders and he decided they were genuine issue ads. *McConnell*, 251 F. Supp. at 747-48 (opinion of Judge Kollar-Kotelly). SUF 152, 154. The sixth ad in Exhibit 4 that was recognized by Goldstein as a genuine issue ad in *McConnell*, *id.* at 748 (opinion of Judge Kollar-Kotelly), was a National Pro-Life Alliance advertisement entitled "Feingold Kohl Abortion 60" that was broadcast

within sixty days of the 2000 election and mentioned Wisconsin Senators Kohl and Feingold; it was quoted in Judge Henderson's opinion as follows:

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

Id. at 312 (opinion of Judge Henderson). SUF 155.

Bailey was asked to review Exhibits 5-7, which were WRTL's ads that were attached as exhibits to the Amended Verified Complaint, but in the following sequence: Exhibit 5 (AVC Exhibit C: TV Script entitled "Waiting"); Exhibit 6 (AVC Exhibit A; Radio Script entitled "Wedding"); Exhibit 7 (AVC Exhibit B; Radio Script entitled "Loan"). SUF 156. Bailey was asked to assume that all nine ads presented in Exhibits 4-7 were to be broadcast within federal electioneering communication prohibition periods. SUF 157.

In answer to the question of whether the six advertisements in Exhibit 4 (GIA 1-6) would "influence an election," Bailey agreed, saying that they were "all campaign ads" and would "inevitably . . . have some impact, maybe a little, maybe a lot, on an election that is in process, sure." SUF 158. Bailey was then asked to compare the six advertisements in Exhibit 4 (GIA 1-6) with WRTL's one television and two radio ads at Exhibits 7-9 in the deposition and indicate if there was "any material difference in the message or how the message [wa]s conveyed." SUF 159. Bailey responded to this question by indicating that he thought there was a difference in that WRTL's ads

"are probably more effective campaign ads" because "they are not so obvious" and "are a little more subtle." SUF 160.

Bailey was next asked to compare for "material content" the last ad in Exhibit 4, namely GIA 6 (which was the television ad by the National Pro-Life Alliance just set out above, which asked hearers to contact Senators Kohl and Feingold to ask the Senators to "change their vote and oppose partial birth abortion"), with WRTL's television ad "Waiting" at Exhibit 5. SUF 161. Bailey observed the difference that the partial-birth abortion ad stated the position of the Senators on the partial birth abortion issue while WRTL's "Waiting" ad did not on the filibuster issue, and he declared WRTL's ad the more effective because it was "more subtle" and so "would perhaps have more impact than the other one." SUF 162. Bailey acknowledged that broadcasting WRTL's ad "in the midst of the campaign," "could have, could have, it might have no impact, but could have substantial impact on the election itself." SUF 163.

Bailey indicted his belief that WRTL's "Waiting" television ad implied the positions of Senators Kohl and Feingold, although he again agreed with the statement that "one circumstance when a group might do or individuals might do public lobbying advertising is when the position of the office holder is undecided." SUF 164. When asked what words in the text of WRTL's "Waiting" television ad (deposition Exhibit 5) were not "perfectly consistent with the proposition that the position of one or more of the senators might have been undecided," Bailey insisted "But it wasn't." SUF 165. When pressed as to where in the text of the ad itself there was anything inconsistent with the idea that one or both of the Senators might have been undecided, Bailey replied, "These words are the entire ad. That's what the ad says. That's why the ad is being run." SUF 166. Bailey acknowledged that the partial birth abortion ad at Exhibit 4, GIA 6, was public policy advertising (his term for grassroots lobbying), Bailey Dep. 47:5-13, as were all three of WRTL's ads. SUF 167.

He acknowledged that public lobbying advertising "can be" successful in persuading a public official to change his position, adding that "[g]enerally, frankly, it's not, but it can be." SUF 168.

After comparing WRTL's ads to "genuine issue ads," Bailey was next asked to compare WRTL's ads to the one advertisement that the Supreme Court in *McConnell* identified as a "sham issue ad," the famous Yellowtail ad, which was set out by the Supreme Court as follows:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

McConnell, 540 U.S. at 193 n.78. Bailey was presented with Exhibit 8, which was labeled as being taken from the Supreme Court's *McConnell* decision at page 193, note 78, and was entitled in the exhibit as "Citizens for Reform "Yellowtail ad." SUF 169. He was asked to assume that the Yellowtail ad was being run during an electioneering communication prohibition period and that Yellowtail was a member congress and a candidate. SUF 170. Bailey said that "[o]n the face of [the Yellowtail ad], he wouldn't call it [a public lobbying advertisement] . . . ." SUF 174. Bailey identified the Yellowtail ad as "a campaign ad." SUF 172. He was then asked to identify distinctions between the Yellowtail ad and WRTL's "Waiting" television ad (Exhibit 5) and made the following distinctions: (1) the Yellowtail ad is "over the top" and Waiting is "subtle"; (2) the Yellowtail ad mentions no specific legislative matter, but Waiting does so; (3) Waiting contains no reference to the candidate's character, qualifications or fitness for office, but the Yellowtail ad does; (4) Waiting

contains no words that promote, support, attack, or oppose the candidate, but the Yellowtail ad does. SUF 173.

Bailey was then presented with Exhibit 9, which was entitled "Filibuster Radio Ad: 60 Seconds" and is the ad that WRTL broadcast in January 2006 in opposition to a possible filibuster against now-Justice Alito (text set out in the Facts, *supra* at 12), and he agreed that this Filibuster Ad is a public lobbying advertisement. SUF 174. When asked whether it would be a campaign ad in accordance with Bailey's definition if this Filibuster Ad were run during an electioneering communication blackout period, Bailey said it would be a campaign ad. SUF 175. When asked why it would be a campaign ad, Bailey responded that "ads that . . . raise issues in relation to candidates are putting in the minds of the voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad." SUF 176.

As may be seen from this analysis by Defendants' expert, *McConnell* and BCRA are turned upside down and what is least like express advocacy is most in need of being regulated. The analysis of Defendants and their experts would justify regulating any form of communication, in total derogation of the people's rights to free expression, association, and petition. But that is not what *McConnell* held. Instead, it held open the door on "genuine issue ads" and this Court should now decide that they are not the functional equivalent of express advocacy.

Grassroots lobbying ads are not "sham issue ads" and have nothing to do with elections. They are about legislative action and effective participation by the people in self-government. Lobbying seeks to influence the exercise of government power by incumbent officeholders today, while electioneering seeks to influence who will exercise governmental power in the future. The people's right to influence their representatives on pending legislative matters today is more pressing and potentially more important than who might be their representative next year.

Further, if this Court were to accept the proposition that the people may be silenced now on upcoming votes in Congress because it might affect future elections, where would it end? Based on such a proposition, grassroots lobbying could be banned at all times because it might always have a remote effect on elections. There would be no constitutional way to limit such a ban to 30 plus 60 days in a year, or the 80 unbroken days in this case.

Throughout the *McConnell* litigation, grassroots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grassroots lobbying must be excluded from the "sham issue ad" category. He found that grassroots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, *genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate).

McConnell, 251 F. Supp. 2d at 802-03 (Opinion of Judge Leon) (emphasis added except as to "*unrelated*"). Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grassroots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.

C. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns.

Grassroots lobbying does not implicate *McConnell*'s expressed concerns about "sham issue advocacy." 540 U.S. at 132. *McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." *Id.* at 126.

First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.* at 126, and *McConnell* provided an immediate example of what the Court meant by that: "Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with the example of the Yellowtail ad. 540 U.S. at 193 n.78. The Supreme Court approved BCRA's solution of requiring disclosure and eliminating the use of corporate or labor union money for such ads, except as applied to *MCFL*-corporations, which could not be prohibited from using corporate money for "electioneering communications" because such corporations do not pose the corruption risks represented by business corporations. *Id.* at 209-11 (creating the first as-applied exception to the prohibition).

Grassroots lobbying ads implicate none of these concerns. Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and

public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31 ("The First Amendment rejects the 'highly 'paternalistic' approach . . . .").

And there will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." *Id.* at 206. As may be seen in the samples offered by WRTL, grassroots lobbying ads focus on passing or defeating pending legislation, not electioneering, and are of no (or only de minimis) value for the purposes of opposing or supporting candidates. But they are essential to self-government.

Further, the desirability of a "bright-line rule" does not defeat this as-applied challenge. The Supreme Court has already decided that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL* , 479 U.S. at 263 (emphasis in original).[12]

[12]In any event, the Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL* . *Id.* at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

D. If There Are Residual Concerns about Using Corporate General Treasury Funds for Grassroots Lobbying, a Segregated Bank Account Could Be Used.

The one possibly perceived residual advantage of requiring WRTL to do its grassroots lobbying through a PAC is that the use of donated corporate money would be eliminated.[13] In its strict scrutiny analysis, the Supreme Court in *McConnell* relied on the interest in regulating corporations with respect to candidate elections for the compelling interest prong. 540 U.S. at 205 (both "corporate form" advantage and "circumvention" are mentioned, but only as to "electoral involvement," which is absent here).

There is no "corporate form" compelling interest with respect to petitioning government (and consequently no "circumvention" interest) because corporate money may constitutionally be used for petitioning legislative and executive branches and the public about legislation. *See supra* at 20. Strict scrutiny requires a sufficient nexus between the sort of grassroots lobbying herein and candidate elections for the compelling interest in regulating corporations applicable to candidate elections to even apply. There is, however, an insufficient nexus here.[14] So there is no compelling interest to justify applying the prohibition on use of corporate funds to grassroots lobbying.

---

[13]The PAC option would also impose a $5,000 annual contribution limit on donations to the PAC, but contribution limits on organizations engaged in lobbying to support or oppose ballot measures (i.e., legislation) violates First Amendment rights of expression and association. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Given the extremely low likelihood that genuine grassroots lobbying would have a cognizable effect on an election, and given the offsetting self-governance interest of the people, there is no constitutional justification for contribution limits in this context.

[14]*See*, *e.g.*, *Riley v. National Federation of the Blind*, 487 U.S. 781, 793 & n.7 (1988) ("there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent" and "[e]ven if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous").

There is also no compelling interest in regulating corporations even as to candidate elections with respect to *MCFL*-type corporations. Although WRTL does not qualify for the exception to the prohibition (11 C.F.R. § 114.2(b)(2)) as a "qualified nonprofit corporation,"under the strict wording of 11 C.F.R. § 114.10,[15] SUF 7, WRTL is in fact quite like an *MCFL*-type corporation because it is an ideological, nonstock, nonprofit (§ 501(c)(4)) corporation. SUF 1. The fact that a corporation does not meet "qualified nonprofit corporation" status, because of some business activity or receipts from corporations should not matter for present purposes, however, because corporate money may be used for grassroots lobbying anyway. *See supra* at 20. So the lack of corruption threat attributed to *MCFL*-type corporations should be attributed to WRTL, even if it has receipts from business corporations.

Alternatively, WRTL would be willing to make disbursements for electioneering communications only "out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens, nationals, or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications." 2 U.S.C. § 434(f)(2)(E); 11 C.F.R. § 104.20(c)(7). This would eliminate all concerns about the use of business corporation funds for electioneering communications. As noted in the complaint:

> [¶ 67] The only remaining restrictions on PACs that would not apply to disbursements for grass-roots lobbying electioneering communications made from a segregated bank account are (a) the annual PAC contribution limit and (b) the requirement that a corporation first acquire "members" and then solicit funds only from these members. 2 U.S.C. § 441b(b)(4)(C). But as noted above, contribution

[15] 11 C.F.R. § 114.10(c) follows, in a somewhat wooden way, the requirements for the *MCFL*-type corporation created by the Supreme Court in *MCFL*, 479 U.S. at 263-64, by creating an exception for ideological, nonstock, nonprofit (§ 501(c)(4)) corporations that have no business income and receive no corporate contributions. The regulation makes no provision for de minimis business income (especially of the sort related to the organization's mission, e.g., book sales related to its issues) or de minimis corporate contributions, as have other federal courts. *See* note 41 (listing cases recognizing corporations as *MCFL*-type despite such de minimis activity).

limits are unconstitutional in the context of grass-roots lobbying because there is no potential for corruption, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), and any donors contributing in excess of $1,000 to the account would be disclosed to the public.

III. WRTL's Ads Are Not Electioneering.

A. WRTL's Ads Are Not the "Functional Equivalent of Express Advocacy."

WRTL's three grassroots lobbying ads are not express advocacy or its functional equivalent. In making this determination, the text of the ads themselves must be examined, not external factors. *Buckley*, 423 U.S. at 43 (express advocacy is "limited to *communications* that include *explicit words* of advocacy . . ." (emphasis added)). The ads do not, of course, contain explicit words expressly advocating the election or defeat of a clearly identified candidate, nor are they the functional equivalent.

The sole focus of the ads was imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL. The ads asked for calls to *incumbent* Senators who clearly had power to immediately affect the filibuster activity. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past.

The only reference to Sen. Feingold was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted, even the *McConnell* defendants' own expert concluded that an ad mentioning a candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

WRTL's ads asked constituents to call *both* Sen. Kohl and Sen. Feingold, lessening the focus on Sen. Feingold even more and indicating that the issue was filibustering, not Sen. Feingold. The

ads mentioned no election, candidacy, or political party, and said nothing about the Senators' character, actions, or fitness for office. The ads did not even say whether the Senators had both supported or opposed the filibuster or split on the issue. There were no words that promoted, supported, opposed, or attacked either Senator.

The ads dealt with non-candidate Kohl and candidate Feingold equally, not singling Sen. Feingold out in any way. The ads dealt with a long-time, natural concern for WRTL, which would like President Bush's judicial nominees to be appointed, so there is no question of a made-up issue. In fact, WRTL ran these same ads outside the blackout periods during which time there is no congressional or court finding that there is any equivalence with express advocacy. And the ads dealt with an unprecedented issue of vital national importance that was just then coming to a head at the end of the terms of President Bush and the Congress, which facts were a matter of public record and beyond WRTL's control.

Defendants' own expert revealed a fundamental, but not immediately obvious reason, why WRTL's ads were not functionally equivalent to express advocacy—the chosen target audience. Franklin stated in his declaration that, with a target audience of "'policy aware adults, ages 45+ with male skew,'" "it is unlikely that political ads will change opinions." SUF 201. If the ads would not change minds, then they were not suitable for electioneering. But in deposition, Franklin said that this audience would be precisely the audience you would try to reach to engage in grassroots lobbying: "these would be people that would be more likely to make the call than people who are the opposite, unaware, involved, yes." SUF 202. A citizen group and its advertising expert intent on having an electoral effect would not spend money to design an ad campaign for a demographic group unlikely to be affected. They would not run their ads on programs known to be watched by a demographic group unlikely to be affected. But the citizen group and its advertising expert would

target precisely this demographic and these programs if their intent was to achieve a grassroots lobbying effect.

In sum, WRTL's ads were not of the "functional equivalent of express advocacy." Prohibiting WRTL from running them with its general treasury funds would therefore be unconstitutional.[16]

B. Other Activity Does Not Create Functional Equivalence.

In dismissing this case earlier, this Court said that, even if it could consider an as-applied challenge, it could also consider whether the proposed ads would affect elections by looking at external factors, and WRTL would lose because it was really just trying to defeat one of the two senators named. Docket 26 at 6.

The Court found that "candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue," WRTL-PAC "endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority," "[i]n a news release . . . WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees," and "WRTL has used a variety of non-broadcast communications to convey its criticisms of Senate filibusters against judicial nominees in the months leading up to August 2004." *Id.* at 2, 6.

---

[16]The unique details of WRTL's ads do not reach the outer limits of what the Constitution requires. For example, WRTL believes that there is no constitutional justification for prohibiting a citizen group from stating a legislator's position (for, against, or undecided) on a pending legislative matter in a grassroots lobbying communication. But such questions are not necessary to decide on this record, although the Court may wish to cite them if the Court finds them essential to its decision in the manner that the Supreme Court did in *MCFL*. 479 U.S. at 263-64. But even without so doing, subsequent as-applied cases could refine the scope of the constitutional protection in finer detail in the same way that lower courts have found that de minimis business income or corporate donations do not prevent a corporation from qualifying as an *MCFL*-type corporation if they would otherwise qualify. *See FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 292 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994).

This Court said in effect that if a citizen group exercises one constitutional freedom, such as speaking out on a public issue or using a PAC to oppose a candidate, then it gives up its constitutional right to do grassroots lobbying. That is an unconstitutional condition, i.e., if you want this benefit you must give up that right (*see*, *e.g.*, *Healy v. James*, 408 U.S. 169, 180-84 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958)), in this case requiring a tradeoff of constitutional rights instead of benefits. The Court also said in effect that if a citizen group thinks it may ever want to participate in representative government by petitioning its representative, it must make certain it never says anything about the issue first and make sure its PAC never supports or opposes any of its representatives, and if it wants to make an issue of something that other people care about, so that it becomes a campaign issue, forget it.

This position is hostile to the rights of free expression, association, and petition, and to a republican form of government and would seriously undermine the ability of the people to participate in their government. And the very fact that an incumbent candidate makes a pending legislative action a campaign issue, using the bully pulpit of public attention resulting from his or her candidacy, increases, rather than diminishes, the constitutional interest of the people in participating in that public debate. Candidates may not be granted a veto over the people's right to lobby incumbent politicians about upcoming votes in Congress by making that issue a campaign issue. This Court's position is also contrary to clearly-established law, which defines both independent expenditures and electioneering communications based on what the communication itself says, not on what the organization says elsewhere, or what its PAC says, or what else an organization does. These are considered in turn.

An independent expenditure is determined by looking to the communication itself, not extrinsic factors. "'Independent expenditure' means an [uncoordinated] expenditure by a person

. . . expressly advocating the election or defeat of a clearly identified candidate . . . ." 2 U.S.C. § 431(17). "'Clearly identified' means that—(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18). So whether a communication constitutes an independent expenditure turns solely on whether the communication *itself* contains explicit words expressly advocating a clearly identified candidate's election or defeat. What an organization's PAC said, what the organization's press releases said, and whether some candidate cares about the same issue so as to make it a campaign issue are not part of the analysis. There is express advocacy, or there is not, based on the communication itself. *Buckley*, 423 U.S. at 43 (express advocacy "limited to communications that include explicit words of advocacy . . . .").

As to electioneering communications, the law again requires examination of the communication itself, not extrinsic factors. "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Nowhere in the definition is there any instruction to see whether the organization's PAC said anything or what the organization's press releases said. In fact, *McConnell* upheld the definition because it introduced none of the vagueness posed by the statute at issue in *Buckley*. *McConnell*, 540 U.S. at 192, 194. The problem identified in *Buckley* was how to separate electioneering from participatory democracy. *Buckley* noted that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42. And the Supreme Court pointed out that there could not be a test that depended on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for

> free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (internal quotation marks and citation omitted).

As noted above, a necessary implication of the Supreme Court's reversal of this Court in the present case in *WRTL*, 126 S. Ct. 1016 (2006), is that neither the mere facts of (a) proximity to an election and (b) some possible effect on elections is cognizable in the present analysis because those very arguments were advanced by Defendants as eliminating the possibility of as-applied challenges to the electioneering communication prohibition. The Supreme Court necessarily rejected those factors as controlling when it held that an as-applied challenge could not be forbidden.

Moreover, the Noerr-Pennington line of cases agrees that where the right to petition is involved intent and effect cannot be considered in a situation such as the present. The right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (*quoting United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)). Grassroots lobbying is a quintessential exercise of the right to petition. *Eastern R.R. President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *Liberty Lobby, Inc. v. Pearson*, 390 F. 2d 489, 491 (D.C. Cir. 1968). In addition, as general advocacy of positions in matters of public import, grassroots lobbying is protected under the First Amendment as part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Even in the context of federal antitrust and labor relations law[17], where no additional First Amendment rights attach, the government cannot prohibit activities that would otherwise violate antitrust or labor law when those actions are "'an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.'" *BE & K*, 536 U.S. at 525 (*quoting Noerr*, 365 U.S. at 136). The right to petition trumps the provisions of such laws, even where the petitioners seek to affect the debate over how those very laws do or should apply.

The *Noerr-Pennington* doctrine includes an exception to immunity from prosecution only when the right to petition is not genuinely at issue because the efforts to petition are "sham." *See Noerr*, 365 U.S. at 144 (in the antitrust context, immunity does not extend to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually . . . an attempt to interfere directly with the business relationships of a competitor."). The exception to *Noerr-Pennington* petitioner immunity has *two* elements, including a key threshold inquiry. Even in the antitrust and labor relations contexts, where no separate First Amendment speech concerns attach, petitioners' immunity generally applies regardless of the petitioners' subjective intent or purpose. In *Professional Real Estate Investors v. Columbia Pictures Industries*, the Court held that whether litigation asserted to be an exercise of the right to petition was "sham" must be determined by a two-part test:

---

[17]The *Noerr-Pennington* line of cases demonstrates that, in whatever context the right to petition is affected, it enjoys powerful constitutional protection. *Noer* and *Penninton* established that the right to petition trumps otherwise applicable antitrust law. The principle of immunity from prosecution when petitioning government was extended to "situations where groups use . . . courts to advocate their causes and points of view" in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 511. The Court later applied the *Noer-Pennington* doctrine in the context of labor relations law in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737, 743 (1983). It was applied to a situation where groups used the court to advocate in the context of labor relations law in *BE & K*, 536 U.S. 516.

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. [footnote omitted] Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationship of a competitor" through the "use [of] the governmental process — as opposed to the *outcome* of that process — as an anticompetitive weapon."

508 U.S. 49, 60-61 (1993) (citations omitted; emphasis in original); *accord*, *BE & K*, 536 U.S. at 526. A petition, whether by lobbying or litigation, is *subjectively* a sham if, for example, the intent is to interfere directly with the business relationships of a competitor, *Noerr*, 365 U.S. at 144, or to penalize or retaliate against a protected labor activity, *Bill Johnson's*, 461 U.S. at 743. However, an improper subjective intent, while necessary, is not sufficient to make a petition a sham and trigger the exception to petitioner immunity because there is a threshold requirement. Protection of the exercise of the right to petition still exists where there is "'a concerted effort to influence public officials *regardless of intent or purpose*." *BE & K*, 536 U.S. at 525 (2002) (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added). "For a suit to [be excepted from petitioners' immunity], then, it must be a sham *both* objectively and subjectively." *Id.* at 526 (*citing Professional Real Estate Investors*, 508 U.S. at 60-61) (emphasis in original). The Supreme Court has accordingly held that unless no reasonable litigant could expect success on the merits, even if a labor law litigator intended by his litigation "to retaliate against the defendant for exercising rights protected by the [NLRA]," *Bill Johnson's*, 461 U.S. at 743, the petition effort was not sham and the protection demanded by the federal constitution for the right to petition prevented application of the NRLA. *BE & K*, 536 U.S. at 526.

The transferable concept to the present application of the right to petition is that unless WRTL's grassroots lobbying ads themselves are objectively without merit as exercising the right to petition, then any finding of a subjective intent to influence elections would not be enough to deny the ads immunity from the electioneering communication prohibition. As the Supreme Court said in *Professional Real Estate Investors*, "only if challenged litigation is objectively meritless may a court [even] *examine* the litigant's subjective motivation." 508 U.S. at 60 (emphasis in original). The threshold objective test must be overcome before inquiry may be made into subjective intent. But Defendants cannot show that the proposed grassroots lobbying is objectively meritless. It is objectively a genuine exercise of the right to petition by the plain terms of the communication.[18] Accordingly, as the Court held in *Professional Real Estate Investors*, questions about the possible underlying "motivations in bringing the suit" are "rendered irrelevant by the objective legal reasonableness of the litigation [or, in this case, the exercise of the right to petition through communications]." *Id.* at 65-66.

As to PAC activity, the very statutory *prohibition* at issue in this case, expressly *excludes* any consideration of PAC activity in determining whether a corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)). The courts have never held that what a citizen group says through a PAC is attributable to its connected corporation or is a factor in

[18]Moreover, it also objectively looks nothing like the "sham issue ads" identified as being the "functional equivalent" of express advocacy in *McConnell*. The necessary implication of the *WRTL* remand is that there may be "genuine issue ads," *McConnell*, 540 U.S. at 206 n.88, that are broadcast within prohibition periods. *See infra*. So inquiry into intent must be rejected.

determining whether a communication made with general treasury funds constitutes express advocacy, or its functional equivalent.

In *MCFL* , MCFL had a PAC, 479 U.S. at 255 n.8, but the Supreme Court never asked what the PAC had said or done in its analysis of whether MCFL's communication contained express advocacy. *Id.* at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But the Supreme Court never considered any such activity in determining whether there was an independent expenditure. Instead the Court noted that the "Special Edition" of MCFL's *newsletter* said to vote prolife and then identified which candidates were prolife. *Id.* at 249. So the Court said that if A=B and B=C, then A=C. But the sole focus was on the particular *communication* in the newsletter and what its words said, not MCFL's other activities.

If what a PAC says is attributable to a connected corporation itself, then every PAC's independent expenditure and electioneering communication would constitute a violation *by the corporation* of the prohibition on corporate independent expenditures and electioneering communications at 2 U.S.C. § 441b. The PAC is legally and logically separate from the corporation. It's actions are not attributable to its connected corporation.

Buckley and *McConnell* both stand for the proposition that express advocacy and its functional equivalent must be determined by a bright-line test to protect fundamental freedoms and core functions of participatory democracy. There can be no vagueness, and introducing external factors, such as things said in an unrelated prior press release, reintroduces vagueness.

IV. Other Options Are Inadequate.

This court previously acknowledged that the loss of First Amendment freedoms is irreparable harm, but declared the harm "not nearly so great as plaintiff argues" because other means of communication are open and there is the option to use PAC funds. Docket 26 at 7.

A. The PAC Option Imposes an Unconstitutional Burden on Grassroots Lobbying.

Congress may tell WRTL how to run its ads only if the electioneering communication prohibition is narrowly tailored to a compelling state interest *as applied* to grassroots lobbying. Until that is demonstrated, and the burden for demonstrating it is on the FEC, *see Austin*, 494 U.S. at 657-58, WRTL is constitutionally harmed if it must confine itself to PAC funds.[19]

This Court previously said that *McConnell* "has already determined that the provisions of the BCRA serve compelling government interests." Docket 26 at 9. But that was as-applied to sham issue ads, not grassroots lobbying. As noted above, *supra* at 20 corporations are free to engage in lobbying, so the exclusion of corporate funds is not a compelling interest as to grassroots lobbying. Since WRTL does not challenge the disclaimer and disclosure requirements relating to electioneering communications, the public would be fully informed.

---

[19]The FEC has argued here that *McConnell* held that a PAC option was a constitutionally sufficient means for corporations to pay for election-related advocacy, but that assertion ignores the fact that *McConnell* never held that "genuine issue advocacy" in the form of grassroots lobbying constitutes election-related advocacy. Rather, *McConnell* applied *Broadrick*'s substantial overbreadth facial-challenge test and left for another day the sort of as-applied challenge brought today. To the extent that *McConnell* considered the PAC option sufficient, it did so only in the context of the "sham issue ads" that it considered to be the "functional equivalent of express advocacy," which is not the case with the present ads.

This Court's prior reliance, Docket 26 at 7, on *FEC v. Beaumont*, 539 U.S. 146 (2003), was inapposite because *Beaumont* only said that the PAC option was adequate with respect to contributions, for which the Supreme Court has always applied a lower standard. By contrast, in *MCFL* , the Supreme Court said that the PAC option was not adequate with respect to independent expenditures (containing express advocacy) for *MCFL*-type corporations and catalogued some of the burdens inherent in PAC funding. *MCFL*, 479 U.S. at 252-55. Justice O'Connor concurred, highlighting especially the PAC-option burdens on MCFL. *Id.* at 265 (O'Connor, J., concurring) *Austin* also noted that requiring the PAC option is a burden on First Amendment rights that must be narrowly tailored to a compelling governmental interest. *Austin*, 494 U.S. at 657-58. Applying the PAC option to WRTL's proposed ads, or to grassroots lobbying generally, is not narrowly tailored to a compelling governmental interest. The FEC has failed its burden to prove it so under strict scrutiny.

Moreover, (although it should not matter) on the facts of this as-applied case, the PAC alternative is simply inadequate. WRTL had only a limited time to engage in grassroots lobbying. A lost opportunity at the critical time is an opportunity lost forever. These were highly important matters to WRTL and its members and were not "mere" theoretical deprivations of First Amendment rights to speak on matters of public concern.

When a legislative issue arises on short notice, as it did here, there is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of first acquiring FECA-compliant "members" (who must fit certain criteria to qualify for solicitation and may not be solicited for PAC money until they respond to a prior solicitation to become members of the organization and the organization responds indicating acceptance)[20] and then raise PAC money from the members through the multiple appeals required for successful fundraising. SUF 81.

And even though WRTL had a PAC already, the PAC alternative was untenable for there was inadequate time to raise sufficient funds by appeals to existing members (usually multiple efforts are required), *id.*, and taking the multi-step process of recruiting new members, expressly acknowledging their acceptance as members, and then soliciting them for contributions. And it has become increasingly difficult to raise PAC funds for a variety of reasons beyond WRTL's control, including the exhaustion of available lists to use for solicitation. SUF 83-89. The PAC alternative in such

[20]A "membership corporation," 11 C.F.R. § 114.1(e)(1), such as WRTL, may not solicit contributions to its PAC from non-members (unless they are "executive or administrative personnel, and their families"). 11 C.F.R. § 114.7(a). To acquire "members," a membership corporation must comply with 11 C.F.R. § 114.1(e)(1), i.e., have a prescribed organizational structure, have prescribed language in its organic documents, "expressly solicit[] persons to become members," and "expressly acknowledge[] the acceptance of membership," and comply with § 114.1(e)(2), i.e., the member must have "some significant financial attachment to the membership organization" (described), or "pay membership dues at least annually," or "have a significant organizational attachment to the membership organization" (described). While a membership corporation may solicit members as desired, other corporations may only solicit their employees for a PAC contribution twice a year. 11 C.F.R. § 114.6.

situations is effectively a complete ban and also amounts to having to obtain an advance government license before being permitted to speak, which is a prior restraint. As discussed above, the governmental interests advanced by use of a PAC are inapplicable on the facts of this as-applied challenge.[21]

B. Other Forms of Communication Are Inadequate.

Other alternatives, such as newspaper ads and letters, are also inadequate. The obvious reason why Congress banned only broadcast ads is that they are the most effective, which is why WRTL chose broadcast ads. Barbara Lyons, the long-time executive director of WRTL, with many years of experience in promoting WRTL's issues, SUF 73-74, verified that broadcast advertising is the most effective means of grassroots lobbying for WRTL and that "non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message." SUF 69, 111, 119-24. Jason Vanderground, WRTL's advertising consultant, confirmed this. SUF 210-12, 227-28. The FEC has not shown otherwise, and it is not the role of government to tell citizens how best to communicate: "The First Amendment protects [WRTL's] right not only to advocate [it's] cause but also to select what [it] believe[s] to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The most effective means of reaching constituents quickly (often on very short notice as legislative issues arise abruptly, e.g., by amendment to an existing bill) and getting their attention is by broadcast ads on their favorite shows and commuting programs, not in dwindling-circulation newspapers and time-consuming, readily-discarded direct mail.

[21]Nonprofits organized under IRC § 501(c)(3) are not permitted to even have a PAC, making grassroots lobbying in prohibition periods a total and absolute ban for them.

C. Requiring That a Group Not Incorporate Burdens the Freedom of Association.

The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. *See Buckley*, 424 U.S. at 22 (association permits amplified speech). The most effective form for these groups is the nonprofit corporation, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one's right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group's speech, association and petition activities.

D. Other Times Are Inadequate.

Requiring grassroots lobbying to be conducted before the blackout periods severely compromises the effectiveness of the lobbying. If 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. In those advertising campaigns where one is attempting to get the public to lobby legislators, it is important to run the advertising close in time to when the legislative vote will occur so that it sticks in people's minds a little bit more. SUF 213. 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.

E. Not Naming a Candidate Is Inadequate.

Grassroots lobbying is ineffective without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of Congress, so would not know whom to call. A statute requiring

that grassroots lobbying ads ask listeners to simply "Call your member of Congress," without naming the legislator needing calls, would render grass-lobbying ineffective. As the evidence in this case shows, naming a candidate is typical in grassroots lobbying and is needed. SUF 23, 26, 125, 147, 149. It would not have been as effective for WRTL to not name Senators Kohl and Feingold but instead to simply to have directed recipients to the Senate switchboard or to the BeFair.org website prepared as part of WRTL's grassroots lobbying campaign. SUF 108, 125 (73, 119), 126, 214, 234-35.[22]

---

[22]Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293.

McConnell, 251 F. Supp. 2d at 794 (emphasis in original).

Conclusion

Grassroots lobbying is essential to a republican form of self-government and poses none of the constitutional concerns identified in *McConnell*. It is different in kind from the "sham issue ads" considered in *McConnell* and is not the functional equivalent of express advocacy. The people may not be prohibited from employing the most effective means to lobby their members of Congress about upcoming votes. Further, on these facts, the prohibition "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Citizens Against Rent Control*, 454 U.S. at 299. "Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

As a result, this Court should find the electioneering communication prohibition unconstitutional as applied to grassroots lobbying generally, or as applied to the three broadcast advertisements here. Alternatively, the prohibition should be declared unconstitutional as applied, if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals). An appropriate injunction should be issued to limit FEC enforcement in violation of constitutional authority.

Respectfully submitted,

/s/ James Bopp, Jr.

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

James Bopp, Jr., D.C. Bar #CO0041
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

United States District Court
District of Columbia

Wisconsin Right to Life, Inc., *Plaintiff*, *v.* **Federal Election Commission,** *Defendant*, *and* **Sen. John McCain** et al., *Intervenor-Defendants.*	**Civil Action No. 04-1260 (DBS, RWR, RJL)** THREE-JUDGE COURT Oral Argument Requested

Plaintiff's Statement of Undisputed Material Facts

Wisconsin Right to Life, Inc. has moved for summary judgment in its favor. Fed. R. Civ. P. 60. In support of that motion, WRTL provides this statement of material facts with references to supporting evidence. LCvR 7(h).[23]

1. Plaintiff Wisconsin Right to Life, Inc. ("WRTL"), is a nonprofit, nonstock, Wisconsin, ideological corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. AVC ¶ 20; Lyons Dep. 15:6-8.

[23]**Key to Evidentiary Citations.** Excerpts of discovery materials are appended hereto. LCvR 5.2(b). The following abbreviations are used herein: Amended Verified Complaint (Docket #30) = AVC; Affidavit of Barbara L. Lyons (Docket # 10) = Lyons Aff.; Second Affidavit of Barbara L. Lyons = 2d Lyons Aff.; Transcript of Deposition of Barbara L. Lyons = Lyons Dep.; Declaration of Douglas L. Bailey = Bailey Decl.; Transcript of Deposition of Douglas L. Bailey = Bailey Dep.; Declaration of Charles H. Franklin, III = Franklin Decl.; Transcript of Deposition of Charles H. Franklin, III = Franklin Dep; Transcript of Deposition of Jason Vanderground = Vanderground Dep.

2. WRTL is the Wisconsin state affiliate of the National Right to Life Committee, Inc. and was organized and exists for the ideological purpose of promoting respect for, and legal protection of, innocent individual human life from the time of fertilization until natural death. AVC ¶ 22; Lyons Dep. 15:10-13.

3. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing 2 U.S.C. § 441b(b)(2). AVC ¶ 21.

4. 2 U.S.C. § 441b(b)(2) prohibits the use of corporate funds for "electioneering communications" (hereinafter "the prohibition"), which was contained in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, 91-92.

5. As presently applicable, "'electioneering communication' means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and] is made within . . . 60 days before a general . . . election for the office sought by the candidate; or . . . 30 days before a primary . . . election . . . for the office sought by the candidate; and . . . is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i). *See also* 11 C.F.R. § 100.29 (definition of "electioneering communication").

6. The prohibition provides that "[i]t is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any [Federal] election. . . . For purposes of this section . . . , the term 'contribution or expenditure' includes . . . any applicable electioneering communication . . . ." 2 U.S.C. § 441b(a)-(b). *See also* 11 C.F.R. §§ 114.2 and 114.14 (regulatory ban on corporate funding of electioneering communications).

7. WRTL does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R.

§ 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A). AVC ¶ 23.

8. WRTL paid to broadcast the radio advertisement at Exhibit A, and planned to run the paid advertisements at Exhibits B and C when the original complaint was filed. AVC ¶ 6, 12, 13.

9. The transcripts at Exhibits A-C are true and accurate transcripts of then-current versions of the advertisements that WRTL had broadcast or proposed to broadcast at its expense in Wisconsin. AVC ¶ 6.

10. The grass-roots lobbying advertisements at Exhibits A-C encouraged Wisconsin listeners to contact their U.S. Senators (Sen. Russell Feingold and Sen. Herb Kohl) and to ask them to vote against anticipated filibusters of President Bush's federal judicial nominees that would occur during electioneering communication prohibition periods in the summer and fall of 2004. AVC ¶ 6.

11. The Federal Election Commission considered creating an exception to this prohibition in its regulations implementing BCRA for grass-roots lobbying broadcasts but decided it was beyond the exception-making authority granted it by Congress to do so. 67 Fed. Reg. 65190, 65200-02. AVC ¶ 7.

12. The issue of judicial nominations became an issue in Senate politics almost from the moment Republicans reclaimed the majority in January 2003 because Democrats could no longer block judicial nominations by simply not bringing them up for a vote. Franklin Decl. 6-7.

13. In 2003, conservatives, and especially pro-life groups, saw the transformation of the judiciary as key to achieving their political goals in general and overturning *Roe v. Wade* in particular. Franklin Decl. 7.

14. Between March 2003 and June of 2004, Senate Democrats had blocked confirmation votes sixteen times. Franklin Decl. 7.

15. The Senate Republican leadership attempted to break the impasse several times, including a forty hour marathon session in November 2003, but the Democrats remained sufficiently united to continue the filibusters. Franklin Decl. 7.

16. The Republican leadership made another attempt at ending the deadlock in July 2004, holding four votes on stalled nominations between July 20 and 22, ending with the twentieth failed attempt. Franklin Decl. 7.

17. On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, which would have closed debate and stopped the filibuster of a confirmation vote on the nomination of William Gerry Myers III to be a United States Circuit Judge for the Ninth Circuit. Because a three-fifths vote to invoke cloture was required, the motion failed and the filibuster continues. 150 Cong. Rec. S8459-60. AVC ¶ 8.

18. On information and belief, the filibuster of William Myers was the 17th time such a filibuster had prevented an up or down vote on a federal judicial nominee since March 2003, and Senate "Judiciary Chairman Orrin Hatch . . . predicted that the number of Democratic filibusters would hit double digits before the Senate adjourns in the fall." Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1. AVC ¶ 9.

19. In fact, the number of filibusters of judicial nominees reached "double digits" just a day after the cited Roll Call article, on July 22, when three more judicial nominees were denied up-down votes by a Democrat filibuster: nominees Henry W. Saad, Richard A. Griffin and David W. McKeague. Helen Devar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05. AVC ¶ 10.On information and belief, at the time the original complaint

was filed the Senate leadership intended to bring up for vote additional judicial nominees throughout the fall and "by year's end Democrats could have to filibuster as many [as] 16 nominees for the entire 108th Congress." Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1. AVC ¶ 11.

20. From late March to May 23, 2005, some $8.5 million was spent by groups advertising for and against the filibuster issue because the Republican leadership had signaled that it was going to schedule a vote to change the rules to require only fifty-one votes to end debate on judicial nominations. Franklin Dep. 26:14-27:21.

21. During the national debate in the spring of 2005 over the so-called "nuclear option," a.k.a. the "constitutional option," in which the Republican senators indicated an intent to change the U.S. Senate rules to preclude judicial nominee filibusters, the central question was whether Senate Majority Leader Frist could get fifty *Republican* senators to support the rule change because it was certain that no Democrat senators would support it. Since Wisconsin had no Republican senators, there was no senator to lobby in Wisconsin. 2d Lyons Aff. ¶ 9.

22. A significant number of the ads in the spring of 2005 for and against judicial filibusters were designed to affect or influence the vote in the Senate on the filibuster issue, while some may have been more aimed at public opinion generally. Franklin Dep. 28:17-29:1.

23. Those ads that were directed or aimed at influencing the vote in the Senate, mentioned a specific senator by name, pointed to his or her role in the debate, and were broadcasted primarily in the states where those senators were from. Franklin Dep. 29:2-10.

24. Those ads aimed at public opinion generally, the second group described above, did not specifically mention the name of a senator who was involved in the issue, they didn't directly call

on people to contact their senator, and they said that nominees deserve an up or down vote. Franklin Dep. 29:11-30:6.

25. Ads in the second group, which do not mention an office holder, can be helpful in trying to influence votes in Congress by raising the salience of issues among the public and possibly by shifting public opinion, which could have the effect of also influencing those who pay attention to public opinion. Franklin Dep. 31:10-32:3.

26. To the extent that these ads do not directly identify or point to an elected official and ask that citizens contact that official, it would be reasonable to assume that they have less direct lobbying or effect by contacting than it they simply discussed the issue and take a position on the issue. Franklin Dep. 32:11-17.

27. Franklin testified that the two sorts of ads on the filibuster issue just described would both fall within the range of what grassroots lobbying covers and would both properly be considered issue ads. Franklin Dep. 32:18-33:17.

28. Franklin uses the term issue advertisement to mean any advertising by a group, usually not a candidate or a political party, but which discusses an issue, usually takes a position on the issue, and may or may not imply something or say something about candidates or office holders' positions on that issue. Franklin Dep. 34:7-14.

29. Grassroots lobbing is for the most part a subcategory of issue advocacy. Franklin Dep. 35:6-12.

30. Franklin agrees that the three elements – (1) relates to specific legislation, (2) reflects a point of view on the legislation's merits, and (3) encourages the general public to contact legislators – are characteristics of grassroots lobbying but don't exhaust the nature of it, and he would not say

that these three being present necessarily means that an effort is clearly only a grassroots lobbying effort. Franklin Dep. 36:7-38:22.

31. Grassroots lobbying on occasion is tied to upcoming votes in Congress. Franklin Dep. 39:1-4.

32. Congress is often in session in the fall of election years, including within sixty days of an election. Franklin Dep. 39:5-8.

33. Franklin believes that it is plausible that grassroots lobbying campaigns to influence votes in Congress would have occurred within the sixty days before an election, but he did not know of any specific cases. Franklin Dep. 39:9-20.

34. Organizations that want to influence government policy often engage in grassroots lobbying as a means to influence current office holders and how they vote in Congress. Franklin Dep. 42:18-43:3.

35. Senate Republican leaders decided in November 2004 not to press the predicted confrontation at that time. *See* Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004. Majority reelection of President George W. Bush and Republican increases in both houses of Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, *see 'Nuclear' Truce*, Roll Call, Nov. 17, 2004, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators. *See* Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, Roll Call, May 23, 2005.

36. The filibuster stalemate was broken on May 23, 2005, when a bipartisan coalition of fourteen senators agreed to vote for cloture on most of the President's most controversial judges in exchange for no changes to the filibuster rule and the ability to continue to block nominees that

Democrats could not agree to. Since that agreement, the filibuster has not been successfully used to block judicial confirmations. Franklin Dep. 7-8.

37. WRTL began broadcasting a radio advertisement (Exhibit A) on July 26, 2004, and was in the process of producing a second radio ad (Exhibit B) and one television ad (Exhibit C), at the time the original complaint was filed, which WRTL intended to run throughout August, for the purpose of influencing the votes of Senators Feingold and Kohl regarding filibusters of judicial nominees expected that fall before Congressional adjournment. Although the ads mention Sen. Feingold, who is a candidate in the upcoming primary and general elections, they were not electioneering communications when the original complaint was filed because they were not within the electioneering communication blackout periods before the Wisconsin primary, which to be held on September 14, or the general election, which was to be held on November 2. AVC ¶ 12.

38. Because of the timing of anticipated Senate filibusters and votes to invoke cloture concerning motions to confirm judicial nominees, WRTL intended to run the three ads (Exhibits A, B, and C) and materially similar ads between the time of filing the original complaint and the adjournment of Congress, including within the blackout periods if WRTL obtained the relief sought herein. The timing of these events was beyond the control of WRTL. AVC ¶ 13..

39. The radio ads that were at Exhibits A and B of the Amended Verified Complaint were broadcast in Milwaukee, Eau Claire, and Green Bay, Wisconsin between July 26 and August 14, 2004. Lyons Dep. 83:7-85:7.

40. The television ad that was Exhibit C of the Amended Verified Complaint was broadcast in the same media markets as the radio ads. Lyons Dep. 86:4-17.

41. From August 15 to September 14 (30 days before the primary) and from September 3 to November 2 (60 days before the general election), the then-current ads (Exhibits A, B, and C) and

materially similar ads WRTL proposed would become electioneering communications as to Wisconsin Senatorial candidate Russell Feingold, and WRTL would be prohibited from running these ads. AVC ¶ 14.

42. WRTL's then-ongoing advertisements would become electioneering communications from August 15 to November 2, because they meet the statutory and regulatory definitions found at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 110.29. AVC ¶ 24.

43. Specifically, the advertisements at Exhibit A, B, and C, and planned future advertisements, were being, and would continue to be, broadcast for a fee on television and radio. 2 U.S.C. § 434(f)(3)(A)(i); 2 C.F.R. § 100.29(a). AVC ¶ 25.

44. The advertisements at Exhibit A, B, and C, and planned future advertisements, would be broadcast within 30 days before the Wisconsin primary and/or within 60 days before the general election. 2 U.S.C. § 434(f)(3)(A)(i)(II); 2 C.F.R. § 100.29(a)(2). AVC ¶ 26.

45. The advertisements at Exhibit A, B, and C, and planned future advertisements, "refer[ed] to," and would continue to refer to, "a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I); 2 C.F.R. § 100.29(a)(1). AVC ¶ 27.

46. The advertisement entitled "Wedding" (Exhibit A) was a radio broadcast ad being broadcast, at the time of the original complaint, for a fee paid by WRTL that clearly referenced federal candidate Sen. Feingold by mentioning his name and asking listeners to contact him (and Sen. Kohl) to oppose the filibustering of judicial nominees. AVC ¶ 28.

47. The advertisement entitled "Waiting" (Exhibit C) was a television broadcast ad to be broadcast for a fee paid by WRTL beginning August 2 that clearly referenced federal candidate Sen. Feingold by mentioning his name and asked listeners to contact him (and Sen. Kohl) to oppose the filibustering of judicial nominees. AVC ¶ 29.

48. The advertisements at Exhibits A, B, and C, and planned future advertisements, were, and would continue to be, "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i)(III); 2 C.F.R. § 100.29(a)(3), meaning that the broadcast ads "can be received by 50,000 or more persons . . . in the State [Sen. Feingold] seeks to represent." 2 C.F.R. § 100.29(a)(3). AVC ¶ 30.

49. The advertisements at Exhibits A, B, and C, and planned future advertisements, were being, and would be, "publicly distributed," i.e., "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system or satellite system." 2 C.F.R. § 100.29(a)(3). AVC ¶ 31.

50. On August 15, 2004, when the electioneering communication prohibition period began, WRTL planned to be broadcasting a total of three radio and television ads, Exhibits A, B, and C, so that they would be "publicly distributed" on that date. 11 C.F.R. § 100.29(b)(3)(i). AVC ¶ 32.

51. On August 15, WRTL would have spent or contracted to spend more than $10,000 "for the direct costs of producing or airing one or more electioneering communications." 11 C.F.R. § 104.20(a)(1)(i). AVC ¶ 33.

52. The public distribution and disbursement amount would have triggered a "disclosure date" for WRTL on August 15, requiring it to file a report of its electioneering communication activity on FEC Form 9 "by 11:59 p.m. Eastern Standard/Daylight Time" on August 16. AVC ¶ 34.

53. WRTL intended, and intends in the future, to comply with all record keeping and reporting requirements for its electioneering communications as set out in the Federal Election Campaign Act ("FECA") and FEC regulations, 2 U.S.C. § 434(f); 11 C.F.R. § 104.20, providing accurate disclosure information as to the source and disbursement of funds at the levels at which Congress asserted a disclosure interest. AVC ¶ 35.

54. WRTL was also complying with, and would continue to comply with, the applicable disclaimer requirements for electioneering communications. 2 U.S.C. § 441d; 11 C.F.R. § 110.11. This may be seen on the advertisements' scripts at Exhibits A, B, and C, providing disclosure of the fact that WRTL was paying for the ads, that they were not authorized by any candidate or candidate's committee, and providing a World Wide Web address where a person hearing or viewing the ads could find contact information for WRTL and the Senators. AVC ¶ 36.

55. WRTL did not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements. AVC ¶ 37.

56. The ads at Exhibits A, B, and C expressed an opinion on pending Senate legislative activity, which was imminently up for a vote, and urged listeners to contact their Senators and to urge them to vote a certain way in the upcoming vote, so that these ads constitute bona fide grass-roots lobbying. AVC ¶ 38.

57. The ads dealt with concrete, imminent, legislative issues (while Congress was in session), beyond the timing and control of WRTL, with which the two incumbent Senators were dealing and would have to shortly deal with further. AVC ¶ 39.

58. The ads referred to both a candidate and a non-candidate and dealt with them equally. AVC ¶ 40.

59. The ads dealt exclusively with the legislative issue. AVC ¶ 41.

60. The ads focused on the legislative issue in question, not on any candidate. AVC ¶ 42.

61. The ads did not refer to any political party. AVC ¶ 43.

62. The ads dealt with an issue with which WRTL had a clear and long-held interest. AVC ¶ 44.

63. The ads did not expressly advocate the election or defeat of a clearly identified candidate for federal office. AVC ¶ 45.

64. The ads contained no words that promoted, supported, attacked, or opposed a candidate. AVC ¶ 46.

65. The ads did not reveal a candidate's record or position on the issue. AVC ¶ 47.

66. The ads did not comment on a candidate's character, qualifications, or fitness for office. AVC ¶ 48.

67. The ads did not mention any upcoming election. AVC ¶ 49.

68. The ads were broadcast independent of any candidate or political party in that they were not "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 109.20(a). AVC ¶ 50.

69. Broadcast advertisements were the most effective form of communication for the then-present grass-roots lobbying campaign, and non-broadcast communications would not have provided WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message. AVC ¶ 51.

70. This case sought declaratory and injunctive relief permitting WRTL to run both the then-current grass-roots lobbying advertisements (Exhibits A, B, and C) and materially similar ads in the future. AVC ¶ 15.

71. Absent the requested injunctive relief, WRTL would not, and did not, continue broadcasting the ads at Exhibits A, B, and C after August 15, 2004, because it was prohibited from doing so and because of its fear of enforcement by the FEC. AVC ¶ 52.

72. WRTL intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition periods before future primary and general elections in

Wisconsin when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Wisconsin. WRTL is concerned about a range of issues – such as embryonic stem cell research, cloning, permissive abortion, fetal pain legislation, unborn victims of crime legislation, abortion clinic regulations, partial-birth abortion, abortion funding, abortion in government facilities, government funding of abortion, abortion programs in foreign aid policy, infanticide, Medicare policy, health-care rationing, withdrawal of nutrition and hydration, assisted suicide, euthanasia, judicial appointments, judicial filibusters, non-discrimination policies with respect to medical training and practice, and the freedom to advance its issues in the public forum – that regularly have and will become issues in the legislative and executive branch. Because the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that WRTL's need to broadcast grass-roots lobbying ads will again coincide with the electioneering communications blackout periods. And given the limited funds in WRTL's PAC account, it is also highly likely that WRTL will at such times not have adequate PAC funds to pay for such ads and will be unable to raise the funds in the usual short time span available when hot issues are coming to a head. AVC ¶ 16.

73. Barbara L. Lyons, who verified the amended complaint and filed a factual affidavit in this case, is the long-time Executive Director of WRTL. Lyons Aff. ¶ 1; Lyons Dep. 7:10-14 (19 years as executive director), 7:22-24 (began in 1987), 8:6-17 (WRTL legislative director from 1977-1987; president of Milwaukee chapter from 1975-1977); 10:1-19 (confirmed that she verified the complaint and signed her affidavit).

74. Ms. Lyons is familiar with the facts about WRTL's activities and its finances, Lyons Dep. 7:17-21 (oversees all aspects of work), 7:10-14 (19 years as executive director), 7:22-24 (began in

1987), 8:6-17 (WRTL legislative director from 1977-1987; president of Milwaukee chapter from 1975-1977); 11:5-24; Pl's Resp. to Def's Interrog. 2, and provided the following statements of fact concerning WRTL's financial situation and intentions as of the date of her affidavit, August 9, 2004. Lyons Aff. ¶ 2.

75. As of August 6, 2004, WRTL had $13,766.90 in its federal political committee (WRTL-PAC) account. This money was raised subject to the source, amount, and disclosure requirements of the Federal Election Campaign Act ("FECA"), so that it could be used for "contributions" and "independent expenditures." 2 U.S.C. § 431(8) and (17) (definitions). Lyons Aff. ¶ 3.

76. Under FECA, no other WRTL funds could be used for making contributions and independent expenditures than those in WRTL-PAC. Lyons Aff. ¶ 4.

77. If WRTL-PAC funds were used for the electioneering communications at issue in the present case, those funds would not have been available for the independent expenditures and contributions that WRTL intended to make, and WRTL would have been deprived of the lawful use of the funds for the purposes for which they were raised and of the opportunity for First Amendment expression represented by the independent expenditures and contributions. Lyons Aff. ¶ 5.

78. WRTL planned to raise such additional funds as it could manage for WRTL-PAC, but such fundraising is unpredictable and WRTL intended to use all such funds for independent expenditures and/or contributions in connection with immediately upcoming federal elections. Lyons Aff. ¶ 6.

79. Historically, WRTL had used all or nearly all of the funds in WRTL-PAC for independent expenditures (primarily) and contributions, so that there were no excess funds available for electioneering communications. For example, according to FEC records, in the 2001-2002 cycle

WRTL-PAC raised $12,830 in receipts and disbursed $11,821. *See* <http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_02+C00173278> (visited on Aug. 6, 2004). In the 1999-2000 cycle, WRTL-PAC had $155,322 in receipts and $153,529 in disbursements. *See* <http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_00+C00173278> (visited on Aug. 6, 2004). Lyons Aff. ¶ 7.

80. PAC funds were (and are) difficult to raise, due to many factors, including (without limitation) contribution limits on the amount an individual may contribute annually to a PAC ($5,000 per year, 2 U.S.C. § 441a(a)(1)(C)); contribution limits on the amount an individual may contribute in an election cycle to all PACs ($37,500, 2 U.S.C. § 441a(a)(3)(B)); the fact that some individuals don't want to contribute to a fund labeled "political"; the fact that some individuals don't want to have their identities, addresses, occupation, and employer revealed on public forms because they have contributed in excess of $200; the fact that only WRTL executive or administrative personnel and their families and WRTL "members" (as defined by FEC regulations) may be solicited for PAC funds; the fact that as in all fundraising response rates are a small percentage of requests made so that multiple requests must be made, usually by multiple means to be effective; and the fact that fundraising for any significant amount of funds is itself an expensive enterprise. Lyons Aff. ¶ 8.

81. PAC funds were (and are) also difficult to raise because any expansion of the "member" base is a multi-step process. A person must be solicited for membership and respond in a prescribed manner before the individual may be solicited as a member for a contribution to a PAC. The solicitation to membership and for a contribution to the PAC cannot be made in the same communication. As with all solicitation efforts, multiple efforts are required because returns on solicitations are a small portion of the total solicitations made. Lyons Aff. ¶ 9.

82. WRTL's plan for the then-current election cycle was to raise approximately $71,000 in total (approximately $14,000 of which had been raised) to use primarily for independent expenditures. Consequently, there were no funds available to pay for the current grass-roots lobbying ads, and if WRTL were forced to use WRTL-PAC funds for grass-roots lobbying, it would be irreparably harmed by being deprived of the use of that money for independent expenditures. Lyons Aff. ¶ 10.

83. WRTL-PAC had intended to raise $71,000 in the 2003-2004 cycle, but according to its PAC reports for 2003 and 2004 it raised less than $17,000, the reason for which Barbara Lyons testified was "[b]ecause it's very, very difficult to raise PAC funds." Lyons Dep. 154:14-155:23.

84. It has become more difficult for WRTL to raise PAC funds in every election cycle, and Barbara Lyons testified that it was her impression that it was due to two main things: (1)"that people would rather give to issues" and (2) "that the limitations are very strict, and so a donor's limits force them to divide . . . their PAC funds between too many different entities/candidates, and generally, they don't have enough left over for an organization like ours." Lyons Dep. 156:1-13.

85. Some persons solicited for PAC contributions by WRTL do not want to give to a fund that is labeled "political," some do not give because they sometimes don't like a candidate that the contribution might be used for, some do not give because they have name recognition in their community and do not want to appear on the contribution list that would be publicized, and some do not give because they have reached their federal contribution limit. Lyons Dep. 158:3-25.

86. By the term "political" in the preceding fact statement, WRTL means explicitly partisan activity, rather than general government-related advocacy." Lyons Dep. 159:3-23.

87. In 2004, WRTL did its usual annual prospecting to increase the number of WRTL members, which it did by renting or purchasing lists of individuals that had the potential of becoming members and contacting them to ask them to become members. Lyons Dep. 161:7-162:7.

88. WRTL considered making additional efforts to increase the number of members beyond the normal, but it was limited by the lists that were available to it, and it could not find any more lists that were suitable for its purposes, both because WRTL believed they did not exist and because it would cost more money to find out if any more did. Lyons Dep. 162:8-25.

89. Because of the difficulties in acquiring both members and PAC funds, WRTL would not have been able to raise the funds it needed for the ads at issue in this case as PAC funds. Lyons Aff. ¶ 11.

90. WRTL planned to spend an estimated $100,000 on grass-roots lobbying communications that would have been electioneering communications if it had obtained a preliminary injunction allowing it to do so. If fundraising had been successful for the project, the expenditure level would have been higher. Lyons Aff. ¶ 12.

91. Based on past PAC fundraising experience, it would have taken approximately six months to raise an estimated $100,000, because multiple requests would have had to have been made using direct mail, telemarketing, and direct contacts. But it was not feasible to do this fundraising campaign on top of fundraising already being done for the PAC to be used for independent expenditures and contributions. And because many of the members were also contributors to WRTL, these donors could not be repeatedly asked for donations without jeopardizing the raising of ongoing operating funds for WRTL itself. Lyons Aff. ¶ 13.

92. The approximately $14,000 in funds then currently in the WRTL-PAC account would

not have been sufficient for the planned advertising expenditures, even if WRTL had not planned to use the $14,000 for independent expenditures and contributions. Lyons Aff. ¶ 14.

93. WRTL would not have had enough funds in the WRTL-PAC account from fundraising to pay for the planned advertising, even if WRTL did not plan to use the raised funds for independent expenditures and contributions. Lyons Aff. ¶ 15.

94. If it had been available for use for the ads at issue in this case, the then-current $14,000 in the WRTL-PAC account would only have paid for some limited radio advertising. The cost for television air time for running an ad one time averaged approximately $1,000, not including planning and production costs, which were substantially more than that. Lyons Aff. ¶ 16.

95. Consequently, PAC funds were not available to mitigate the harm of WRTL not being permitted to run the proposed ads with general funds. Lyons Aff. ¶ 17.

96. Judicial filibusters became an issue for WRTL when it became aware of a problem with President Bush's judicial nominees being filibustered in the U.S. Senate sometime in 2003 through news accounts and through communications from the National Right to Life Committee ("NRLC"). Lyons Dep. 20:8-21:4.

97. The idea of running grassroots lobbying ads was first discussed among WRTL staff in the spring of 2004. Lyons Dep. 22:5-24:21.

98. WRTL was opposed to judicial filibusters because judicial candidates are important to WRTL and because it believed that President Bush's judicial nominees should receive an up or down vote. Lyons Dep. 21:9-15.

99. WRTL's reason for running the ads at issue in this case was because WRTL was concerned about the filibusters and wanted to impact the problem in some way. Lyons Dep. 24:22-25:2.

100. At the June 21, 2004 Board of Directors meeting that approved developing and broadcasting ads opposing the filibustering of judicial nominees, the purpose of the ads was discussed and it was to do a grass-roots lobbying campaign to ask people to contact Senators Kohl and Feingold to urge them to oppose the filibusters, and no other purpose was discussed. Lyons Dep. 26:6-17, 27:14-25 (meeting date).

101. The timing of WRTL's anti-filibuster ads was chosen to allow creation and airing them before the filibuster votes would take place, which, according to WRTL's best information, was expected to be around September 2004. Lyons Dep. 29:20-30:24.

102. WRTL had no discussion of the impact that WRTL's anti-filibuster ads would have on Senator Feingold's campaign. Lyons Dep. 31:17-23.

103. WRTL did not think that running WRTL's anti-filibuster ads would have any effect on Senator Feingold's campaign because they were grassroots lobbying campaigns and did not speak about elections. Lyons Dep. 33:5-11.

104. WRTL collectively, i.e., within WRTL and in conjunction with its media consultant Hanon McKendry, came to the decision that running WRTL's anti-filibuster ads on TV and radio was the most effective means of reaching the most people. Lyons Dep. 60:13-25.

105. In addition to employing broadcast means, WRTL also planned to pursue its anti-filibuster campaign through official letters to Wisconsin's two Senators, news releases, newspaper op-ed pieces, and action alerts (which were WRTL communications that could be delivered in a variety of ways and, in this case, actually delivered by email and automated telephone messages), but no newspaper ads were actually done on this issue. Lyons Dep. 62:12-62:19, 63:8-10.

106. WRTL did not communicate with any political party, political committee, or political candidate regarding its grassroots lobbying ads. Lyons Dep. 65:1-4.

107. While including only Senator Kohl's name, without identifying Senator Feingold, would have eliminated the legal problem with the grassroots lobbying ads becoming electioneering communications during the prohibition periods, it would not have promoted the objective of WRTL's grassroots lobbying campaign, so it was never considered by WRTL. Lyons Dep. 68:6-70:13.

108. A WRTL consultant prepared a website at www.befair.org, as part of the grassroots lobbying campaign, which had the purpose of giving a full explanation of what was occurring in Congress and to give people information about where they could go, how they could send a grassroots lobbying communication to Senators Kohl and Feingold. Lyons Dep. 74:13-75:13

109. WRTL has a Legislative Information Center on its regular website, www.wrtl.org, which contains contact information for both state and federal legislators and information about pending legislative activity, to which persons receiving WRTL's grassroots lobbying emails are commonly referred for such information. Lyons Dep. 19:11, 74:19, 91:4-92:20.

110. WRTL commonly does three or four media interviews a day and received a lot of requests for such interviews on the filibuster issue in 2004 but not very many since then. Lyons Dep. 93:8-14.

111. WRTL does not typically run advertisements in the print media. Lyons Dep. 97:1-2.

112. WRTL ran a grassroots lobbying radio ad on the filibuster issue in 2006, relating to the potential of a filibuster of Supreme Court Justice Samuel Alito, which ad mentioned both Senators Kohl and Feingold and was run for a short time because there was a very short window of opportunity. Lyons Dep. 102:1-22.

113. Attached to the Second Affidavit of Barbara L. Lyons as Exhibit A is a document entitled "Filibuster Ad: 60 Seconds" ("Filibuster Ad"), which is a true and accurate transcript of the

grassroots lobbying ad that WRTL paid to broadcast on radio in Wisconsin in January 2006. 2nd Lyons Aff. ¶ 3, Exhibit A.

114. This Filibuster Ad was in the following words:

Filibuster Radio Ad: 60 Seconds

> Some Senators are at it again. Threatening to filibuster qualified judicial nominees. This time, the stakes are even higher. They want to use the filibuster to block a vote on the nomination of Judge Samuel Alito for the U.S. Supreme Court.
>
> Judge Alito has received the highest qualification rating for judicial nominees and deserves a simple "yes" or "no" vote to prevent gridlock in our judicial system.
>
> Contact Senators Feingold and Kohl at 202-224-3121 and tell them to oppose the filibuster of Judge Samuel Alito for the U.S. Supreme Court. That's 202-224-3121.
>
> Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

2d Lyons Aff. Exhibit A.

115. This Filibuster Ad would have qualified as an "electioneering communication" under the elements of the definition of that term in the Federal Election Campaign Act if it had been run during the 30- and 60-day prohibition periods described in that definition. Only because the Filibuster Ad was not run during such a prohibition period was WRTL lawfully able to broadcast this grassroots lobbying communication. 2nd Lyons Aff. ¶ 4.

116. Attached to the Second Affidavit of Barbara L. Lyons as Exhibit B is a WRTL News Release entitled "Yesterday's U.S. Senate Vote Shows Grassroots Lobbying Is Alive and Well: *Senator Kohl Got the Message!*," which is a true and accurate transcript of a communication that WRTL sent by email to constituents and news media contacts on January 31, 2006. 2d Lyons Aff. ¶ 5, Exhibit B.

117. This News Release accurately reflects WRTL's opinion, and that of Barbara Lyons based on her many years of experience in dealing with legislative matters, that as stated therein WRTL's broadcast ads alerted the Wisconsin public to the judicial nominee filibusters and that "Senator Herb Kohl got the message from his constituents and voted to end the filibuster of Judge Alito," as recorded at 152 Cong. Rec. S308 (Jan. 30, 2006). 2d Lyons Aff. ¶ 6, Exhibit B.

118. It is WRTL's belief, and that of Barbara Lyons based on her many years of experience in dealing with legislative matters, that WRTL's grassroots lobbying ads concerning judicial filibusters also affected Sen. Kohl's vote for cloture, which ended the filibuster of Brett M. Kavanaugh, as recorded at 152 Cong. Rec. S5191 (May 25, 2006). 2d Lyons Aff. ¶ 7.

119. Barbara Lyons oversees ongoing television (and some radio) advertising, about the abortion issue, that is done by the Veritas Society, an IRC § 501(c)(3) fund of WRTL. Lyons Dep. 105:6-23.

120. Barbara Lyons testified that although WRTL used many communications media, it would not be as effective to use all the other non-broadcast media to get WRTL's message across on the filibuster issue, without the broadcast ads, because "[w]e are a television-oriented organization, and we are – we do place ourselves in that mode because we know from survey and research that television is the place where most people get their information. That's the most highly-rated sources of information fro people to get information." Lyons Dep. 116:8-20.

121. WRTL uses radio as "supplementary" to television, although it is not as highly rated as television. Lyons Dep. 116:21-24.

122. WRTL relied on general industry surveys, from consultants and other sources, going back for many years in WRTL experience to formulate its belief that broadcast media are the most effective to communicate WRTL's message. Lyons Dep. 116:25-117:10.

123. WRTL does a lot of broadcast advertising, much of it prior to 2004, because WRTL recognizes that it is the most effective way to reach the most people. Lyons Dep. 117:16-20.

124. WRTL produced to Defendants a 2006 document from a Milwaukee advertising agency called Nonbox, WRTL's current advertising agency and which it has used off and on since 1998, which stated the superiority of broadcast media over other forms of media. Lyons Dep. 118:2-119:5, Exhibit 18.

125. Barbara Lyons testified that it would not be as effective for grassroots lobbying communications to simply direct recipients to call the Senate switchboard (as opposed to naming the Senators) because "[i]f you don't identify who the person is calling, they're much less likely to do it because they're left with that information gap," and "[b]ecause you're not telling them who has the ability to impact the issue about which they're calling," which she said was a general rule based on over thirty years of grassroots lobbying experience, so that the "gold standard" in grassroots lobbying was to tell recipients who they can contact to do something about the issue and how to reach them. Lyons Dep. 119:11-120:15.

126. Barbara Lyons testified that it would not be as effective for grassroots lobbying communications to simply direct recipients to the befair.org website for information about the names of their Senators for the same reasons as in the preceding statement of fact. Lyons Dep. 121:2-16.

127. Grassroots lobbying is intended to influence public officials to vote or act in a way preferred by the communicator in three situations: (1) when the official is undecided, in order to steer him or her in the preferred direction, (2) when the official is opposed to the preferred position, in order to encourage a change of mind, and (3) when the official supports the preferred position, in order to encourage the official to maintain that position and to provide the official the ability to cite constituent support for the position. 2d Lyons Aff. ¶ 8.

128. Douglas L. Bailey was designated by Defendants as an expert witness and submitted a declaration. Bailey Dep. 8:19-9:1-3.

129. Bailey employs the term "campaign ad" to refer to"anything that is run in the midst of the campaign that is likely to have political impact"; that "it is possible for . . . campaign ad and an issue ad to be the same thing"; that "[i]t's possible to talk about issues in a campaign and try to have some impact on issues in the midst of a campaign"; that "an issue ad is something that is hopefully going to have an impact on issues"; and that "an issue ad run in a campaign is a campaign ad." Bailey Dep. 11:6-12:5.

130. Bailey testified that "[a]nything that happens in the course of a campaign is, potentially has some impact on the campaign so that any ad run that relates to candidates or the issues in a campaign is going to have some impact on the campaign," which may be "little" or "big,"and so "an ad that is run that has impact on a campaign is, in [his] mind, a campaign ad." Bailey Dep. 14:12-22.

131. Bailey applies the principle in the immediately preceding statement of fact both to ads mentioning candidates and to ads that do not do so. Bailey Dep. 15:1-7.

132. Bailey testified that "[a]ny issue that is related in any way to the offices that are on the ballot or the candidates that are on the ballot" are "political issue[s]." Bailey Dep. 15:8-14.

133. Bailey acknowledged that he also submitted an expert witness declaration in the case of *McConnell v. FEC*, 540 U.S. 93 (2003), and when asked to identify an unsigned copy provided as Exhibit 1 in his deposition, which declaration was taken from the defense evidence submission in *McConnell*, he testified that "[t]his certainly appears to be similar. I can't swear to it word-for-word, but it seems right." Bailey Dep. 15:15-17:3.

134. In his *McConnell* declaration, Bailey identified the following as a problem:

> The sad truth is that people now need to be convinced that they can have a meaningful effect on the political process. . . . I have no doubt that the rise in the quantity and importance of soft money has shifted power away from local networks of citizens to the big contributors and the campaign consultants who orchestrate massive national media campaigns, and to the national media itself.

Bailey Dep. Exhibit 2 ¶ 17.

135. Bailey acknowledged that he had filed an amicus curiae brief in the present case, *WRTL v. FEC*, when it was before the United States Supreme Court, and when asked to identify a copy provided as Exhibit 2 in his deposition he testified that "presume[d] that it is." Bailey Dep. 19:3-9.

136. Bailey testified in his declaration for the present case, at ¶ 3, as follows: "I also have extensive experience consulting with various citizens' initiatives and other grassroots issue campaigns. For example, I have advised, among others, Handgun Control, Inc., Floridians Against Casinos, and League of Conservation Voters." Bailey Dep. 29:2-7 (quoting Bailey Decl. ¶ 3).

137. As to Handgun Control, Inc., Bailey did not consult with the group as to grassroots lobbying in the sense of "reaching the public, to reach the public officials in some way," but rather in the sense of building membership and advancing issue understanding: "I'm just using my own part of the communications effort of any such organization, has some grassroots lobbying, my term, grassroots lobbying impact if you are trying to build the membership, if you are trying to build the understanding of the issue among the public without necessarily causing them to take any specific actions." Bailey Dep. 30:7-20.

138. According to Bailey, "you could call grassroots lobbying the building of an organization of supporters who subsequently might be asked to contact, but the building of that grassroots organization is another form of grassroots lobbying. . . . My recommendations and consulting for the

group related to how do you build the organization, how do you grow the members." Bailey Dep. 31:14-32:2.

139. Rather than using the term "grassroots lobbying" for public communications to the general public, or portions of it, asking members of the public to contact governmental officials, such as legislators, to vote for or against a particular bill or to take some public action, Bailey employed the term "public lobbying advertising." Bailey Dep. 32:3-11.

140. Bailey did not consult with Handgun Control, Inc. about public lobbying advertising. Bailey Dep. 32:12-19.

141. Bailey could not remember whether Handgun Control, Inc. had engaged in public lobbying advertising, and if there might have been any, "[he] was not involved in it." Bailey Dep. 32:20-33:4.

142. As to Floridians Against Casinos, Bailey consulted concerning a ballot measure, and he conceded that "[i]t didn't involve legislature in any way." Bailey Dep. 33:5-14.

143. As to the League of Conservation Voters, Bailey consulted pro bono with a friend on how to "expand the membership" and did not "remember any instance where [he] was involved in advising them or working with the on any, on any advertising for them." Bailey Dep. 33:15-34:5.

144. Bailey did not consult with any group on public lobbying advertising. Bailey Dep. 34:6-35:9.

145. When asked when public lobbying advertising is "customarily done," Bailey replied, "For the most part, I think it happens when a bill or a matter or an issue is directly before the Congress and it tends to be when votes are scheduled so that the week before it varies, but that's my – it's not my experience in the sense of having done it, but that's clearly when it happens." Bailey Dep. 35:10-17.

146. Bailey said that as to the ballot measure campaign of Floridians Against Casinos there would be no reason to mention to mention candidates or office holders. Bailey Dep. 36:10-19.

147. When asked whether public policy advertising "customarily mention[s] the name of particular office holders that . . . the public is being asked to lobby," Bailey replied, "In some instances it does. Often it does not. I think increasingly it does. It's targeted in particular districts or particular states." Bailey Dep. 35:18-36:2.

148. In his declaration for the present case, Bailey said, "the logical and unavoidable implication of [WRTL's ads at issue in this case] is that Senator Feingold (the only Senator mentioned who was up for reelection) supports the filibuster, and thinks that 'politics' are more important than saving courts from a 'state of emergency' or allowing qualified candidates to serve in the federal judiciary. Indeed there would be no reason to tell voters to contact Feingold and Kohl urging them to oppose the filibuster if they were already opposed to it." Bailey Decl. ¶ 17.

149. When asked at his deposition why public policy advertising would "mention the names of specific office holders," Bailey responded, "if it is in advance of an issue, generally it's because that office holder is undecided on the issue or it is taking on a position and you want the public to weigh in with them to cause them to take the other issue." Bailey Dep. 36:3-9.

150. Bailey later in his deposition agreed again that "one circumstance when a group might do advertising is when the position of the officeholder is undecided." Bailey Dep. 43:21-44:4.

151. Bailey later in his deposition agreed again that "public lobbying advertisements are run when a particular office holder has a position on an issue or a bill, and the attempt is to persuade them to change that position." Bailey Dep. 48:9-14.

152. Bailey was asked to review a series of storyboards for six broadcast advertisements taken from Appendix J of the expert witness report of Goldstein in the *McConnell* litigation, which

story boards were marked as Exhibit 4 and internally identified as GIA 1-6. Bailey Dep. 37:1-38:13, Exhibit 4.

153. In his report in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), Intervenor Defendants' expert Kenneth M. Goldstein reported on analysis by a team of student coders of advertisements on CMAG storyboards and said: "In this report, I refer to ads coded as providing information or urging action as 'Genuine Issue Ads," and ads coded as generating support or opposition for a particular candidate as 'Electioneering Ads.'" Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants 7.

154. The six ads in Exhibit 4 were considered "genuine issue ads" by Goldstein's coders and he decided they were genuine issue ads. *McConnell*, 251 F. Supp. at 747-48 (opinion of Judge Kollar-Kotelly).

155. The sixth ad in Exhibit 4 that was recognized by Goldstein as a genuine issue ad in *McConnell*, *id.* at 748 (opinion of Judge Kollar-Kotelly), was a National Pro-Life Alliance advertisement entitled "Feingold Kohl Abortion 60" that was broadcast within sixty days of the 2000 election and mentioned Wisconsin Senators Kohl and Feingold; it was quoted in Judge Henderson's opinion as follows:

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist

> they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

Id. at 312 (opinion of Judge Henderson).

156. Bailey was then asked to review Exhibits 5-7, which were WRTL's ads that were attached as exhibits to the Amended Verified Complaint, but in the following sequence: Exhibit 5 (AVC Exhibit C: TV Script entitled "Waiting"); Exhibit 6 (AVC Exhibit A; Radio Script entitled "Wedding"); Exhibit 7 (AVC Exhibit B; Radio Script entitled "Loan") . Bailey Dep. 38:15-39:9, Exhibits 5-7.

157. Bailey was then asked to assume that all nine ads presented in Exhibits 4-7 were to be broadcast within federal electioneering communication prohibition periods. Bailey Dep. 39:11-15.

158. In answer to the question of whether the six advertisements in Exhibit 4 (GIA 1-6) would "influence an election," Bailey agreed, saying that were "all campaign ads" and would "inevitably . . . have some impact, maybe a little, maybe a lot, on an election that is in process, sure." Bailey Dep. 39:16-22.

159. Bailey was then asked to compare the six advertisements in Exhibit 4 (GIA 1-6) with WRTL's one television and two radio ads at Exhibits 7-9 in the deposition and indicate if there was "any material difference in the message or how the message [wa]s conveyed." Bailey Dep. 40:1-6.

160. Bailey responded to this question by indicating that he thought there was a difference in that WRTL's ads "are probably more effective campaign ads" because "they are not so obvious" and "are a little more subtle." Bailey Dep.40:12-22.

161. Bailey was next asked to compare for "material content" the last ad in Exhibit 4, namely GIA 6 (which was a television ad by the National Pro-Life Alliance asking hearers to contact

Senators Kohl and Feingold to ask the Senators to "change their vote and oppose partial birth abortion"), with WRTL's television ad "Waiting" at Exhibit 5. Bailey Dep. 41:3-9.

162. Bailey observed the difference that the partial-birth abortion ad stated the position of the Senators on the partial birth abortion issue while WRTL's "Waiting" ad did not on the filibuster issue, and he declared WRTL's ad the more effective because it was "more subtle" and so "would perhaps have more impact than the other one." Bailey Dep. 42:10-43:6.

163. Bailey acknowledged that broadcasting WRTL's ad "in the midst of the campaign," "could have, could have, it might have no impact, but could have substantial impact on the election itself." Bailey Dep. 43:7-17.

164. Bailey indicted his belief that WRTL's "Waiting" television ad implied the positions of Senators Kohl and Feingold, although he again agreed with the statement that "one circumstance when a group might do or individuals might do public lobbying advertising is when the position of the office holder is undecided." Bailey Dep. 43:18-44:4.

165. When asked what words in the text of WRTL's "Waiting" television ad (deposition Exhibit 5) were not "perfectly consistent with the proposition that the position of one or more of the senators might have been undecided," Bailey insisted "But it wasn't." Bailey Dep. 45:1-6.

166. When pressed as to where in the text of the ad itself there was anything inconsistent with the idea that one or both of the Senators might have been undecided, Bailey replied, "These words are the entire ad. That's what the ad says. That's why the ad is being run." Bailey Dep. 46:1-14.

167. Bailey acknowledged that the partial birth abortion ad at Exhibit 4, GIA 6, was public policy advertising, Bailey Dep. 47:5-13, as were all three of WRTL's ads. Bailey Dep. 47:14-48:8.

168. Bailey acknowledged that public lobbying advertising "can be" successful in persuading a public official to change his position, adding that "[g]enerally, frankly, it's not, but it can be." Bailey Dep. 48:9-18.

169. Bailey was then presented with Exhibit 8, which was labeled as being taken from the Supreme Court's *McConnell* decision at page 193, note 78, and was entitled in the exhibit as "Citizens for Reform "Yellowtail ad." Bailey Dep. 48:22-49:3, Exhibit 8.

170. Bailey was asked to assume that the Yellowtail ad was being run during an electioneering communication prohibition period and that Yellowtail was a member congress and a candidate. Bailey Dep. 49:5-16.

171. Bailey said that "[o]n the face of [the Yellowtail ad], he wouldn't call it [a public lobbying advertisement] . . . ." Bailey Dep. 49:21-50:2.

172. Bailey identified the Yellowtail ad as "a campaign ad." Bailey Dep. 50:8-12.

173. Bailey was then asked to identify distinctions between the Yellowtail ad and WRTL's "Waiting" television ad (Exhibit 5) and made the following distinctions: (1) the Yellowtail ad is "over the top" and Waiting is "subtle"; (2) the Yellowtail ad mentions no specific legislative matter, but Waiting does so; (3) Waiting contains no reference to the candidate's character, qualifications or fitness for office, but the Yellowtail ad does; (4) Waiting contains no words that promote, support, attack, or oppose the candidate, but the Yellowtail ad does. Bailey Dep. 51:2-54:15.

174. Bailey was then presented with Exhibit 9, which was entitled "Filibuster Radio Ad: 60 Seconds" and is the ad that WRTL broadcast in January 2006 in opposition to a possible filibuster against now-Justice Alito (text set out in text *supra* at Paragraph 93), and he agreed that this Filibuster Ad is a public lobbying advertisement. Bailey Dep. 54:19-55:6.

175. Asked whether, if this Filibuster Ad were run during an electioneering communication blackout period, it would be a campaign ad in accordance with Bailey's definition, Bailey said it would be a campaign ad. Bailey Dep. 55:7-14.

176. Asked why it would be a campaign ad, Bailey responded that "ads that . . . raise issues in relation to candidates are putting in the minds of the voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad." Bailey Dep. 55:15-21.

177. Bailey was unaware that Senator Kohl had voted in opposition to the judicial filibustering of now-Justice Alito (i.e., Kohl voted to invoke cloture) after WRTL ran its Filibuster Ad (Exhibit 9). Bailey Dep. 56:8-16.

178. Bailey was unaware that Senator Kohl had voted to invoke cloture in May 2006 as to the confirmation of Brent Kavanaugh for the D.C. Circuit. Bailey Dep. 56:17-57:5.

179. In response to a question about whether Kohl's votes against filibuster as to Alito and Kavanaugh "would reflect a change in [Sen. Kohl's] position as to the filibuster generally," Bailey responded, "I can't answer that. I don't know that that's true, but I assume it's true." Bailey Dep. 57:6-12.

180. Charles H. Franklin, III, was designated by Defendants as an expert witness and submitted a declaration (deposition Exhibit 1). Franklin Dep. 7:14-18, 22:10-14.

181. Franklin relied on newspaper articles in his report, and it is customary and appropriate for experts in Franklin's area of specialty to rely on newspaper new reports and to credit the truthfulness as to the dates when things happened and in general statements that were made in public forums that are quoted. Franklin Dep. 25:6-26:13.

182. Franklin stated that Exhibits 6-13 set before him at his deposition appeared to be newspaper articles reporting on grassroots lobbying efforts by specific organizations and their

reporting of their purported success in influencing the government on what public policies they would adopt. Franklin Dep. 45:21-46:9.

183. Franklin stated that Exhibits 14-16 appeared to be reporting by organizations on their specific grassroots lobbying efforts. Franklin Dep. 47:20-22.

184. Franklin agreed that Exhibit 17 purported to be to be a press release from Sen. Charles Schumer of New York about his kicking off a grassroots lobbying effort to influence the U.S. Postal Service Stamp Advisory Committee. Franklin dep. 48:9-19.

185. Franklin agreed that Exhibits 18-24 appeared to be web pages from various organizations encouraging their supporters to engage in grassroots lobbying regarding issues that are of concern to that organization. Franklin Dep. 53:3-11.

186. Franklin agreed that if he were to do a research project on the involvement of organizations in grassroots lobbying the Journal of Politics would be a very reputable professional journal within his area of expertise. Franklin Dep. 53:13-54:5.

187. Franklin agreed that Exhibit 28 purported to be an article from the Journal of Politics entitled "Interest Niches and Policy Bandwagons: Pattern of Interest Group Involvement in National Politics." Franklin Dep. 54:9-15.

188. Franklin agreed that the work of the Wisconsin Advertising Project is a reliable authority that would be relied upon by those in his field of expertise. Franklin Dep. 62:8-15.

189. Franklin agreed that it is fair to summarize his report as saying that the discussion of public policy issues can affect elections, which is true even if particular candidates or public officials are not identified in the discussion, meaning in a public communication. Franklin Dep. 62:16-63:6.

190. The degree of effect of such a public communication on an election cannot be determined by the examination of the communication itself, i.e., the words on the page from the

script, because the effect of a particular communication is . . . affected by other communications in the environment. Franklin Dep. 63:7-16.

191. As long as it is a public communication, i.e., a communication to members of the public through some means, that communication can have an effect on the election that is not dependent on the mode of communication, although the effect might vary by mode, exposure, and repetition. Franklin Dep. 63:17-64:4.

192. So phone calls, newspaper advertising, direct mail, website information, radio and television advertising, discussions on radio talk shows, or news broadcasts could in principle affect an election, although it is would be an empirical question how much any of the would. Franklin Dep. 64:5-65:1.

193. A communication that deals with politically relevant issues need not mention the candidates in order to have an electorally relevant impact. Franklin Dep. 65:7-10.

194. Franklin did no research on the grassroots lobbying efforts of Wisconsin Right to Life generally or specifically, was not asked to do any such research, and was not asked to opine on the effectiveness of grassroots lobbying in influencing votes in Congress, although he was aware that affecting votes in the U.S. Senate on the filibuster issue was WRTL's purpose in running its ads (and he said he was also aware of the issue of challenging the BCRA restrictions). Franklin Dep. 72:3-75:21.

195. Franklin did not find any studies that provided empirical evidence on the ultimate effect of public messages on voters in a time period of greater than two weeks, so that there were specifically no studies that examined such effects out to two months before an election. Franklin Dep. 83:11-84:4.

196. In terms of the impact that ads have on voters, important areas are characteristics of the voters, how attentive they are to politics. Other characteristics of the voters, their predispositions, partisan or ideological, those are the most prominent. And those affect or influence the extent to which voters are, in the first place, exposed to advertising and, secondly, the extent to which they accept the message of the ad conditional on them having been exposed to the ad. Franklin Dep. 76:12-77

197. Where there are competing public messages, the net effect is likely to be reduced as they tend to cancel each other out. Franklin Dep. 81:11-82:13.

198. Over the course of a campaign leading up to an election, the total pro- and anti-candidate advertising, regardless of the particular issue, continuously updates voters' preferences, so that there is not a long-term persistence of the earlier ads. Franklin Dep. 84:10-85:18.

199. Franklin was unaware of any studies on such advertisements on a particular issue throughout a time period. Franklin Dep. 85:19-22.

200. When Franklin refers to "media message," he includes any public communication, such as ads news broadcasts, talk radio, and anything of that nature. Franklin Dep. 86:1-6.

201. In his report, Franklin wrote that for the target audience of WRTL's three ads, i.e., "public policy aware adults, ages 45+ with male skew," "it is unlikely that political ads will change opinions," Report at 36; Franklin Dep. 93:8-12, which Franklin said meant that persons in the target audience would notice messages "because they are politically aware and involved and interested," but "it should not be expected to convert someone who feels on the other side." Franklin Dep. 93:14-94:8.

202. However, in answer to the question of whether this would be an audience you would want to target if you were wanting the listener to respond by calling a senator about the issue and lobby them, Franklin responded affirmatively:

> As an empirical question, these would be the people that are probably most likely to be involved enough to make a phone call or a contact, though they may be people that would already be mobilized. So I think the answer is probably yes, these would be people that would be more likely to make the call than people who are the opposite, unaware, involved, yes.

Franklin Dep. 94: 9-20.

203. Exhibit 31 was an article by Ken Goldstein and Joel Rivlin, entitled "Political Advertising In the 2002 Elections," which was published online by the Wisconsin Advertising Project, and Franklin agreed that this would be a reliable authority that would be relied upon by experts in his field, specifically calling it a credible source of information. Franklin Dep. 98:20-100:4.

204. Hanon McKendry is an advertising and brand consulting firm, which involves marketing, communications, and promotions, that was employed by WRTL to prepare its grassroots lobbying ads at issue in the present case. Vanderground Dep. 4:17-20, 5:24.

205. Jason Vanderground is employed by Hanon McKendry, where he has worked for eight years, serving as a strategic planner, account executive, assistant account executive, and most recently for approximately three years as a lead consultant and represents primarily nonprofit advocacy groups as clients. Vanderground Dep. 4:15-16, 5:1-2, 6:24-25, 7:22-8:13.

206. Vandergound's nonprofit client accounts include Citizens for Compassionate Care, Kids First! Yes!, Michigan Catholic Conference, Massachusetts Catholic Conference, Right to Life, U.S.

Conference of Catholic Bishops, Life Ed, Alliance Defense Fund, Colorado Alliance for Reform in Education, and Focus on the Family. Vanderground Dep. 10:4-11.

207. Hanon McKendry had done work for other Right to Life clients and had a reputation for doing high quality communications, which reputation was passed on to WRTL by Barbara Listing at Michigan Right to Life. Vanderground Dep. 36:22-37:8.

208. A lead consultant is the point person between the firm and the client that is responsible for all the work that needs to be done by the agency for the client and then interacting with the client. The lead consultant is the person who leads a team of people that are working on a client's account and is a more senior account position. Vanderground Dep. 7:3-7, 8:10-13.

209. Vanderground was the lead consultant on WRTL's account in preparing WRTL's anti-filibuster grassroots lobbying ads. Vanderground Dep. 5:24.

210. Vanderground would advise a client to advertise on television because you can reach a lot of people in a short amount of time. It's high profile. The only typical situation in which he would not recommended TV is if a client cannot afford it. Vanderground Dep. 15:1-12.

211. Vanderground would recommend direct mail typically as a complimentary element to a broadcast campaign. It's a reinforcement tool. Vanderground Dep. 15:13-19.

212. Vanderground says that a lot of times radio is a good frequency medium, so that where with TV you can reach a large audience, radio helps you build up the frequency of that message so that people are seeing the campaign four, five, six times and then it ends up being more effective. He could think of no circumstances in which he would advise against the use of radio. Vanderground Dep. 16:22-17:5.

213. In those advertising campaigns where one is attempting to get the public to lobby legislators, it is important to run the advertising close in time to when the legislative vote will occur so that it sticks in people's minds a little bit more. Vanderground Dep. 30:19-25.

214. When creating an advertisement for an organization about an issue and not about a candidate election it can be advantageous to name an officeholder because it typically provides a very clear call to action for people. When one specifically says that one is asking for this action directed towards this person it's easier for people to remember and act on. Vanderground Dep. 34:3-35:1.

215. At no point in his work on the anti-filibuster grassroots lobbying campaign was Vanderground under the impression that WRTL expected him to develop the campaign in a way that would lead to a court challenge of the law. Vanderground Dep. 44:7-11.

216. Vanderground presented a proposal for an advertising campaign to WRTL approximately a month after he first heard of the possibility of Hanon McKendry being employed by WRTL. Vanderground Dep. 45:1-7.

217. Vanderground submitted his proposal for the ad campaign to WRTL on June 9, 2004. Vanderground Dep. 89:8-9.

218. In his research for the proposal, Vanderground did not look at all into the race for the Senate that was occurring in Wisconsin in 2004. Vanderground Dep. 45:25-46:2.

219. In the filibuster campaign, the result that WRTL wanted was to inform people about the issue and wanted to motivate them to get involved, to tell their friends, to make people aware, ultimately to call on their senators and exert enough influence on them to encourage them to vote yes or no on judicial nominees that were before the U.S. Senate. Vanderground Dep. 54:8-14.

220. Persuading and mobilizing people on and issue is two sides of a coin, so that one needs the first in order to achieve the second, and one needs the second in order to pay off on the first. Vanderground Dep. 53:15-54:5.

221. WRTL expressed to Vanderground the hope that the ad campaign would have the effect of making it more likely that the senators would vote against the filibusters. Vanderground Dep. 54:11-14.

222. WRTL indicated to Vanderground that they expected the filibuster issue to come to votes later in the year. Vanderground Dep. 54:15-20.

223. Vanderburgh researched when the filibuster votes were likely to occur in the Senate while he was preparing the advertising campaign, and he understood that it was later in the year. Vanderground Dep. 55:2-7.

224. No one from WRTL indicated to Vanderground the hope that the lawsuit over the filibuster campaign would lead people to become opposed to the McCain-Feingold law. Vanderground Dep. 56:18-22.

225. During the development of the ad campaign Vandergound was never told by WRTL that the ad campaign had any purpose of affecting the Senate race in Wisconsin in 2004, and there was no discussion about what the likely impact of the ad campaign would be on the Senate race in Wisconsin in 2004 – not even an off hand comment anywhere. Vanderground Dep. 63:14-64:2.

226. Vanderground included a website in the campaign because it is one of the best ways to share large quantities of information with people, including contact information for the senators, to email the senators or have phone numbers. Vanderground Dep. 76:1-11.

227. Vanderground included radio advertising in the campaign because it is an effective way to reach that audience and it was cost effective. There were good radio formats, types of situation that lined up with who WRTL was trying to communicate with. Vanderground Dep. 76:12-16.

228. Vanderground included television advertising in the campaign because it is high profile, has high visibility, is seen by a lot of people, is an effective way to connect with the target audience, and it permitted a more complete message by being able to use some visuals and audio and music, and permitted telling a fuller story than was possible in other mediums. It was just more compelling. It would get people's attention. Vanderground Dep. 76:23-77:5.

229. Vanderground did not consider using direct mail in WRTL's campaign. Vanderground Dep. 77:6-7.

230. Barbara Lyons had advised Vanderground that she would like to get the anti-judicial nominee filibuster campaign started as soon as possible, and Vanderground looked at how long it would take to develop TV and radio and the website and August 1, 2004 was the first date possible to launch the campaign based on making all the preparations. Vanderground Dep. 87:5-19.

231. The project could not be launched earlier because it was a large, integrated campaign and there just wasn't enough time to make preparations earlier, especially during the summer months, with people on vacation. So based on their schedules and the work that Hanon McKendry had to do the campaign could not be launched any earlier. Vanderground Dep. 88:7-20.

232. In urgent circumstances Hanon McKendry can create and air radio ads in about a week and television ads in about two weeks, Vanderground Dep. 25:5-23, 89:17-19, but WRTL's filibuster campaign required significantly more time because of the quality of the spots that was to be achieved, the required time for writing a good strategy, the need to allow for creative concepts to be developed, and to refine those ideas, to plan out all the production and the shooting and recording

and make sure that the desired people were booked, and then produce and get the ads out. Vanderground Dep. 89:21-90:9.

233. Barbara Lyons never indicated to Vanderground that the timing had anything to do with when the McCain-Feingold law would kick in or that a potential court case played any role in the timing, rather he said that the primary reason for the time frame was that the filibuster issue was very prevalent at that time and WRTL wanted to address it while it was being addressed in the media and WRTL wanted to address the judicial nominee filibustering as soon as they possibly could. Vanderground Dep. 91:14-92:12.

234. Vanderground did not consider running broadcast ads that did not name Sen. Feingold because the call to action was much more effective if it directed people towards a specific action that they could take, and because there were only two senators, it was easy to give people their name and then encourage them to contact their senators, so there was a specific piece of action that people could take after seeing the TV and radio spot, and that just made for a much more effective, much more compelling campaign. Vanderground Dep. 129:9-23.

235. WRTL's campaign was different from campaigns that Vanderground had done that did not name candidates because those involved maybe seventy state senators and representatives, making it impossible to list their names in a TV or radio spot, so the next best step was providing one memorable number that people could call to figure out who their elected official is. But in the WRTL campaign there were only two names and so it was much more memorable and much more compelling a spot, people already knew their names, they may have heard their senator before, so directing them to a specific action that they can take right away rather than a nonspecific action that would requires several steps on their part. Vanderground Dep. 131:7-132:4.

236. The use of a website, such as BeFair, is much more memorable, so it was picked knowing that people are listening to radio, driving their car, they don't have pen and paper, they're not in a position to write down a phone number, and then knowing that they are watching TV, which is a very passive medium where people kind of sit back and let the medium flow over them. The percentage of people that will see the ad and visit the site is just significantly higher than the number of people that would see an ad and then try to keep track of some long phone number and then make the call. So that was the lead teams's collective recommendation to WRTL, that they use a simple, quick, memorable web site address. Vanderground Dep. 132:9-133:6.

237. After the ads were run, Vanderground has never had a conversation with anyone about the effect that they may have had on the Senate race involving Sen. Feingold. Vanderground Dep. 133:11-14.

238. Vanderground was not aware of anyone involved with the filibuster ad campaign having conversations about the effect on the Senate race. Vanderground Dep. 133:13-18.

239. Vanderground did not believe that WRTL's grassroots lobbying ads affected the race for the Senate in any way because all that was done was to create spots that addressed an issue, judicial nominee filibustering, and the tone taken made the ads a quality spot that was very rational, very reasonable, and just encouraged people to contact their senator and encourage them to no filibuster. Vanderground Dep. 133:19-134:8.

240. If the ads had continued to run for a long time, Vanderground still did not believe they would have affected the Senate race for similar reasons. It did not pertain at all to politicking. It was just simply a straightforward message about an issue. And even if it had run right before the election or many weeks before the election, there is nothing to cause an effect on the election. There's no

shred of a reason why the ads would have any kind of bearing on actual election itself. Vanderground Dep. 134:13-135:6.

241. Even assuming that WRTL's PAC had opposed Feingold and that his opponents had criticized him for the judicial filibusters, and even if WRTL's had been run as long as it wanted to run them, Vanderground did not believe the ads would have any effect on the Senate election because there is nothing in the ads that should negatively affect any candidate in the election even in that environment. Vanderground Dep. 135:19-137:13.

242. Vanderground had no contact with any candidates or their campaigns that were running against Sen. Feingold in 2004. Vanderground Dep. 139:1-6.

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr., D.C. Bar # CO0041
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff