United States District Court
District of Columbia

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

Plaintiff's Memorandum in Support of WRTL's Position in the *Joint Report of the Parties Pursuant to LCvR 16.3(d)*

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Argument

In the *Joint Report of the Parties Pursuant to LCvR 16.3(d)*, Wisconsin Right to Life, Inc. ("WRTL") took the primary position that no further discovery should be permitted and that the Court should expeditiously reinstate and decide the existing cross-motions for summary judgment. WRTL argued, in the alternative, that if discovery is granted, it should be limited and expedited. Part I below summarizes prior briefing citing several factors that militate against further discovery and for limitations promoting expedition.

Part II argues that if discovery is not altogether foreclosed, it must be limited, for the reasons of expedition already stated in Part I and for other reasons set out in Part II, which argues specifically that: (A) the Constitution limits government action infringing on the right to petition; (B) discovery must be as to relevant information and the Supreme Court's remand decision makes irrelevant discovery regarding such facts as the fact that proposed ads would be near an election, that a broadcast medium was chosen, and that WRTL chose not fo use PAC funds; (C) a proposed manageable rule exempting grassroots lobbying focuses on the content of the communication making other considerations irrelevant, and that WRTL offers to settle this case based on such a rule; (D) the proper scope of discovery is readily established, and WRTL has offered more than should be required, which should be the extent of any permitted discovery.

I. Statutory Expedition, Imminent Electioneering Communication Blackouts, a Waning Supreme Court Term, and Prior FEC Briefing on the Merits and Inactivity on Discovery Mandate That There Be No, or Limited, Discovery and Expedited Schedules.

Several factors require that there be no discovery or that it be limited in scope and time and that all briefing and other schedules be truncated. These factors include mandated

statutory expedition, looming electioneering communication blackouts (in Wisconsin and across the nation), the end of the Supreme Court's term at the end of June (affecting possible expeditious appeal), the FEC's prior briefing of the present merits on cross-motions for summary judgment and before the United States Supreme Court, and the FEC's long inactivity with regard to discovery and desire to now reset this case to the beginning.

In WRTL's opening and reply memoranda on the *Motion to Reinstate, Order Supplemental Briefing on, and Expedite Cross Motions for Summary Judgment*, Docket ##53, 55 (to which the Court's attention is respectfully directed), WRTL has already briefed these arguments for not permitting any discovery, and the same considerations apply, in the alternative, for limiting discovery and expediting all schedules in this case. WRTL briefly summarizes that briefing here.

The FEC fully briefed its own cross-motion for summary judgment — including the merits issue now before this Court on remand — acknowledging that this matter could be resolved without discovery. Having asserted that there were no material facts in dispute and the matter was ripe for legal resolution, and having briefed WRTL's summary judgment motion without asserting any inability to do so until discovery was completed, and having failed to ask the Supreme Court not to reach the merits issue because discovery had not been completed, the FEC now wants to do the discovery that it waived for most of a year, from July 28, 2004 (complaint) until May 10, 2005 (dismissal). It should be estopped from asserting now that discovery is required and its request for discovery denied.

The FEC pays lip service to the congressional mandate to expedite this case but tries to switch the meaning of "expedite *to the greatest possible extent*," BCRA § 4-3(a)(4), 116 Stat.

at 114 (emphasis added), to 'there's no big rush, August is five months away.' Five months is an exceedingly short amount of time for a decision by this Court and for expeditious review (if required) by the United States Supreme Court, which normally ends its term at the end of June, which is only three months away. Moreover, if WRTL is permitted to make its electioneering communications only from a special account to which only individuals may contribute, as it argues for in the alternative, the time is exceedingly short for fundraising into that account. Supreme Court Justices indicated at oral argument that they view this as a case of national importance, which it is, affecting groups not at bar, so this case involves not just a question about WRTL and three ads in 2004. Electioneering communication blackouts began in February and are widespread between now and August.

The only way to expedite this case "to the greatest possible extent" is to return to the status quo immediately before the dismissal, when this case had already consumed nearly ten months and there were fully-briefed cross-motions for summary judgment before the Court. This would not deprive the FEC of anything. It already had the opportunity of fully briefing the cross-motions (and WRTL proposes a supplemental brief). It already had the option of deciding whether to file its own summary judgment motion, based on the already-established facts, and engaging those facts and the very merits issue now before this Court in its briefing. It already had the option of pursuing discovery, but it chose to waive that option for nearly a year and to file its own summary judgment motion, based on the existing factual record. To now allow the FEC to turn the calendar back to July 28, 2004 (complaint) instead of May 10, 2005 (dismissal, Docket #49) would not "expedite *to the greatest possible extent*" this case.

There already is a full record, with ample facts already in the record about the merits

issue that the FEC has argued to this Court and the Supreme Court, such as the fact that WRTL has a PAC, that the PAC opposed Sen. Feingold, that the judicial filibustering was a campaign issue, etc. The FEC thought the record was full enough to (1) file a motion for summary judgment, (2) brief WRTL's summary judgment motion, (3) not ask the Supreme Court to avoid the merits issue because the record was not sufficiently full, and (4) brief and argue the merits before the Supreme Court on this very record.

The additional areas that the FEC proposes for discovery are not relevant to any manageable test that this Court might formulate in response to the Supreme Court's direction to consider the merits of WRTL's claim. Most of the areas identified have to do with subjective intent, but subjective intent is not properly a part of any other similar test in the First Amendment area. As discussed below, there is no intent requirement in determining whether a communication is an "independent expenditure" or an "electioneering communication." Nor does "actual malice" include subjective ill will in defamation cases. Nor is subjective intent a factor in the *Noerr-Pennington* cases. The FEC should not be permitted to engage in a punitive, scorched-earth policy (by requiring of an organization thousands of dollars of legal fees and lost productivity and weeks or months of being subjected to FEC prying into private, First Amendment-protected details of an organization's inner workings), with regard to anyone wanting to engage in grassroots lobbying in an attempt to prove the group's 'real intent.' As to discovery having to do with context, that is also irrelevant, but in any event there is already a full record on which the FEC has relied to indicate that filibusters were a campaign issue, that WRTL PAC had opposed Sen. Feingold, and so on. There is no need for irrelevant and merely cumulative discovery.

Most importantly, any rule to distinguish genuine grassroots lobbying from sham issue ads cannot be based on subjective intent. Such a rule would be judicially unmanageable (in addition to violating First Amendment rights). Basing a rule on subjective intent would permit the FEC to engage in scorched-earth discovery tactics every time a citizen group dared to do genuine grassroots lobbying. Cases based on such a theory would tie up this and other federal courts for extended periods of time. Both the FEC and WRTL agreed in briefing before the Supreme Court that an intent-based test would be unworkable. *Brief for the Appellee* 39 (The FEC said: "A constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable as a workable application; at a minimum, it would invite costly, fact-dependent litigation."); *Reply Brief for Appellant* 16-17 ("WRTL has never proposed an *intent* test and rejects such a test as truly unworkable; it would lead to the 'fact-intensive' litigation that the FEC claims to despise.").

The Supreme Court did not invite development of a fuller record. The FEC deceptively argued that the Court did so based on its use of the words "the facts of this case" and "in the first instance." Opp. 4. But when the Supreme Court spoke of "the facts of this case" it was merely citing what *this* Court said in its *Memorandum Opinion and Order* (Aug. 17, 2004), namely, that "[t]he facts suggest WRTL's advertisements may fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating." *See WRTL*, 2006 U.S. Lexis 1070, at *1. The facts that this Court referenced were those already before it, not some additional facts to be dredged up through discovery. So there is no support in this reference by the Supreme Court for further discovery. The Supreme Court's statement, "We . . . remand the case for the District Court to consider the merits of WRTL's as-applied challenge in the

first instance," makes absolutely no reference to discovery and provides no indication of an intention that there be such.

It is much more likely that the Supreme Court did *not* intend further discovery and delay, but rather that this Court expeditiously decide the fully-briefed cross-motions for summary judgment. WRTL expressly called to the Supreme Court's attention the existence of these motions, *Jurisdictional Statement* 3, 8, 30, *Brief for Appellant* 7 n.7, and expressly requested, as an alternative to the Supreme Court deciding the merits, that it summarily reverse this Court on the as-applied issue and remand so this Court could expeditiously decide those motions. *Jurisdictional Statement* 3, 8, 30. While the Supreme Court did not summarily reverse on the first issue, it decided it very quickly after briefing and argument and remanded, most likely with the understanding that this Court would act with similar expedition in deciding those existing dispositive motions. This path complies with the mandate to expedite this case "to the greatest possible extent" and permits this Court the opportunity to "in the first instance" fashion a manageable standard for a grassroots lobbying exception, giving the Supreme Court the benefit of its consideration.

II. If Not Foreclosed, Discovery Must Be Limited to Relevant Scope.

If discover is not excluded for the reasons stated in Part I and the prior briefing cited, then it must be limited to a relevant scope. The remand presents two central issues on the merits: (1) what is the standard for identifying genuine grassroots lobbying and (2) whether WRTL's proposed ads fit the standard. This Court does not need to establish the precise details of the standard for purposes of the present motion (or whether WRTL's ads meet the standard), but it is crucial to consider the *nature* of the standard now to determine what sort

of facts are relevant. Discovery should not be permitted that would only gather facts irrelevant to any legitimate issue.

Also, legitimacy of a discoverable issue here is limited by WRTL's right to petition. Any application of the electioneering communication prohibition must respect the limits imposed by this fundamental constitutional right. The FEC seeks to discover WRTL's intent in running the advertisements giving rise to this suit, ostensibly on the theory that the electioneering communication prohibition rightly applies if the requisite intent or motive should be shown. But when the right to petition is at issue, in whatever context it arises, questions of intent or motive are irrelevant in situations such as the present one, as discussed next.

A. The Constitution Limits Government Action Infringing on the Right to Petition.

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[1], where no additional First

[1]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

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 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)). 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 FEC seeks to discover WRTL's intent in running the advertisements at issue here, ostensibly on the theory that information it gleans will establish that the electioneering communication prohibition rightly applies to WRTL's grassroots lobbying, despite the First Amendment's protection of the right to petition. In short, the FEC seeks here to establish an exception to the right-to-petition immunity in the context of the electioneering communication prohibition, and it can do that only if WRTL's grassroots lobbying is "sham petitioning."

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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. 508, 511 (1972). 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 it to a situation where groups used the court to advocate in the context of labor relations law in *BE & K*, 536 U.S. 516.

But 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:

> 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.[2] Accordingly, as the Court held in *Professional Real Estate Investors*, discovery as to possible underlying "motivations in bringing the suit" should be denied

[2]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.

because such questions "were 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. This Court should likewise deny irrelevant discovery.

B. The Supreme Court's Remand Decision Makes Irrelevant Discovery Regarding Such Things as Proximity to an Election, Possibility of an Effect on Elections, Choice of Broadcast Media, or Burden of PAC Use.

The Supreme Court's remand opinion ("*WRTL*") in the present case makes irrelevant some matters into which the FEC (and presumably Intervenors, collectively "Defendants"[3]) have indicated an interest in conducting discovery, such as why WRTL wanted to run its ads during the electioneering communication blackout period and why WRTL chose the broadcast medium. The same is true of the Defendants' proposed expert testimony on the fact that ads run near elections might have some effect on elections.

Defendants are really trying to relitigate the first issue of this case, which they lost by unanimous decision in the Supreme Court. Defendants argued to the Supreme Court that there could be no as-applied challenges to the electioneering communication prohibition because in *McConnell* that Court had noted that ads in proximity to elections that named candidates might influence elections and might even be intended to do so, which findings were sufficient to sustain the prohibition against a facial attack. But despite *McConnell*'s findings and Defendants' arguments, the Supreme Court decided that as-applied challenges must be permitted and remanded the case to this Court for assistance, in the first instance, in

[3]The Intervenors have not yet provided anything but amici curiae briefing in this Court and in the Supreme Court, but it is assumed for present purposes that their position on the scope of discovery is the same, or nearly so, as that of the FEC. As may be seen from the present Joint Report, Intervenors have consistently followed the FEC's positions on conduct of the case. So for efficiency, the FEC and Intervenors are referred to as "Defendants."

crafting a rule that would distinguish what *McConnell* called "genuine issue ads," 540 U.S. at 206 n.88, from what it elsewhere called "sham issue ads." *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. ___, No. 04-1581, 2006 U.S. Lexis 1070 (Jan. 23, 2006) ("*WRTL*").

Several guiding principles for the remand and the scope of discovery are implicit in the Supreme Court's *WRTL* decision. First, it doesn't matter that grassroots lobbying ads would be run within 30- and 60-day periods before primary and general elections. If that mattered, the Supreme Court would not have permitted as-applied challenges regarding communications that necessarily fall within the prohibition periods (or there would no as-applied challenge at all). Instead, the Supreme Court would have held what Defendants asked it to hold, i.e., that under the logic of *McConnell* there could be no as-applied challenges because by definition any exception to the electioneering prohibition must necessarily apply within the prohibition periods. So any effort by Defendants to put on evidence and to argue that genuine grassroots lobbying must be prohibited because it happens in proximity to elections must be rejected. That is a given fact in the very nature of an as-applied challenge to the prohibition and so is irrelevant. The Supreme Court has already decided that issue. Defendants lost it. They may not relitigate it.

Second, the mere fact that genuine grassroots lobbying might have some possible effect on elections was also implicitly rejected in *WRTL*. Defendants argued to that Court that *McConnell* had found that ads run near elections that mentioned candidates might have some effect on elections so there can be no as-applied challenges. Defendants lost. *WRTL* says that there may be as-applied challenges in the face of such evidence, i.e., it is not enough that some expert believes that genuine grassroots lobbying might have some effect on an election.

McConnell required more than that, namely that the ads must be the "functional equivalent of express advocacy," 540 U.S. at 206, not merely that they have some possible effect on elections. So evidence of a mere possibility of an effect on elections is already assumed in *WRTL* and is irrelevant for this case on remand.

Third, the fact that, and reasons why, WRTL chose the broadcast medium for its ads are also irrelevant because by the very definition of electioneering communication there would be no case if they were not broadcast ads. Any exception to the prohibition will necessarily be a broadcast ad. There were no findings in *McConnell* indicating that choosing to use broadcast ads, as opposed to print ads, was somehow any indication of wrongdoing. The simple fact is that Congress extended the prohibition to broadcast ads only (quite obviously because of the medium's effectiveness for communication), so an exception to the prohibition must necessarily be applicable to broadcast ads, and there is no relevant issue as to the use of, or reasons for choosing, any other type. The necessary implication of the *WRTL* remand is that there may be "genuine issue ads" that are broadcast ads within prohibition periods. So there is no relevance to the fact that WRTL wanted to do broadcast ads. Defendants try to create relevance by noting that the *McConnell* opinion indicated that the prohibition could be avoided by choosing non-broadcast communications, but that doesn't work because the necessary implication of the *WRTL* remand opinion is that there may be an as-applied exception precisely where the communicator did not choose the other media.[4]

Fourth, the same principle applies to questions about why WRTL did not use its PAC or

[4]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).

what burdens were entailed in using funds from the PAC. The short answers are that the PAC didn't have the money for the ads, what money there was available was planned for other uses, and WRTL does not believe that it is constitutionally required to use its PAC funds to exercise its right to petition by grassroots lobbying. But as to discovery, any information about the burden of using a PAC is necessarily irrelevant both because (1) as a matter of law *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), held that requiring expenditures to be made through a PAC is a constitutionally cognizable burden in and of itself and (2) the *WRTL* remand opinion implicitly assumes that there will be "genuine issue ads" that are not run with PAC funds. Again, there would be no issue on remand if WRTL chose to use PAC funds, and if the Supreme Court had intended that non-use of PAC funds was the deciding factor, then it would have said there could be no as-applied challenge because WRTL would have been limited to use of PAC funds.

In sum, the Supreme Court in unanimously holding that WRTL may bring an as-applied challenge to the electioneering communication prohibition — on the basis of WRTL's choice to use broadcast grassroots lobbying ads within the prohibition period and without funding them with PAC funds — already took into account both the evidence in *McConnell* and the language of the Court's own opinion in *McConnell* (including the fact that broadcast ads not using PAC funds that are run close to elections might have some effect on elections) and nonetheless said that there could be "genuine issue ads" requiring constitutional protection specifically in the context of the grassroots lobbying protected by the First Amendment right to petition. Defendants should not be permitted to delay this case and burden WRTL and this Court with an effort to relitigate both *McConnell* and *WRTL*. They should be required to

promptly join debate on the real issue, which is the proper scope of an exception to the prohibition that would provide the constitutionally required protections for genuine grass-roots lobbying, i.e., petitioning incumbent representatives of the people on critical matters of the day.

C. A Manageable Rule Exempting Grassroots Lobbying Focuses on the Content of the Communication Making Other Considerations Irrelevant, and WRTL Offers to Settle Based on Such a Rule.

On February 16, 2006, the FEC was petitioned by a broad-spectrum coalition for an expedited rulemaking, in light of the Supreme Court's remand opinion in this present case (which noted the FEC's authority to resolve the matter by rule), to establish a proper rule to protect genuine grassroots lobbying for use in the 2006 elections. On March 9, the FEC published a notice of availability, permitting comments until April 17, instead of the expeditious ten days requested by the petitioners. 71 Fed. Reg. 13557 (Notice 2006–4). The Petition was filed by counsel for the Chamber of Commerce of the United States, AFL-CIO, Alliance for Justice, OMB Watch, and National Education Association.

As discussed below, WRTL has offered to agree to both a stay of proceedings and to dismissing this case, based on the FEC's agreement to preliminary and permanently adopt the proposed rule. The offer is set out below.

The Petition's arguments and proposed rule are worth noting. The rule supported by this broad-based coalition provides this Court further guidance on how to expeditiously resolve the present matter in a way that will assist the Supreme Court, as that Court requested.

In the Petition, the coalition noted first the need for timely action "[b]ecause the relevant periods of time when the Act's proscription attaches are already upon us." Petition at 1

(available at http://www.fec.gov/agenda/2006/ mtgdoc06-13.pdf). The Petition noted that the FEC had conducted a previous rulemaking but "declined at that time to adopt any lobbying communications exemptions." Petition at 2. It then observed that the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), had facially upheld the electioneering communications provision in a way that "suggests . . . that a particular 'electioneering communication' is the 'functional equivalent of express advocacy,' and therefore constitutionally subject to regulation, if it both pertains to an individual's candidacy or an election and seeks to persuade a voter to make a particular voting decision with respect to that candidate." Petition at 3.

As to the Supreme Court's remand opinion in the present case, the Petition observed that the Supreme Court unanimously pointed to the fact that the FEC had authority to make a rule in this area: "'[a]lthough the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.'" Petition 4 (citation omitted).

As "[g]rounds for a [r]egulatory [e]xemption," the Petition stated first that the Supreme Court in *WRTL*, "confirm[ed] that there is a class of legislative 'genuine issue ads,' in *McConnell*'s terminology, *see* 540 U.S. at 206 n.88, that remain constitutionally immune from regulation." Petition at 5. Second, the Petitioners noted that they could not know the scope of their rights in this area "without bringing or defending costly and possibly lengthy litigation" and that the FEC had an institutional interest in getting a clear rule established to avoid complaints and litigation. Petition at 5. Third, the Petition noted that the congressional

authority left broad room for fashioning an appropriate rule.

The petition proposed five "principles of a proposed exemption":

> 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) call 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.

Petition at 6-7.

Significantly for present considerations, the Petitioners correctly concluded: "We believe that these principles are reasonably derived from the Court's analysis in *McConnell* and *WRTL*." Petition at 7. And also of great significance for present considerations, "[t]he proposed standard is administratively practicable because it turns almost entirely upon the text of the communication, requiring an examination of context only to determine whether or not the issue discussed in the ad is a "particular current legislative or executive branch matter.'" Petition at 8.

The Petition concludes with another appeal to the urgency of the matter, which is applicable here:

> In light of the imminent electoral calendar and the ongoing federal executive and legislative dockets that are replete with profoundly important matters of national and international security and economic and other domestic policy, which petitioners and other subject to the "electioneering communications" proscription may wish to address in broadcast advocacy, petitioners respectfully request . . . an expedite rulemaking.

Petition at 8.

As stated in the Petition, this is an urgent matter and *McConnell* and *WRTL* clearly indicate the necessity of constitutionally protecting genuine issue advocacy in the form of authentic grassroots lobbying of the sort readily definable based on the six principles outlined. Such a rule can, and should be, derived from *McConnell* and *WRTL* and should be expeditiously recognized without delay or further discovery.

WRTL has offered to stay proceedings and settle this case based on this proposed rule, derivable from *McConnell* and *WRTL*, in a letter dated March 23, 2006, stating the following:

> While we do not believe that this rule goes as far as the U.S. Constitution would extend protection to grassroots lobbying, we believe that 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. Therefore, we are willing to compromise and make the following offers.
>
> (1) We offer to agree to stay all proceedings in the district court while the FEC decides whether to do a rulemaking if the FEC promptly adopts and publishes in the Federal Register a temporary statement of policy excluding from the definition of "electioneering communication" all communications having all the characteristics set out in the quoted, proposed rule. Moreover, we would agree to continue the stay until a rulemaking is completed if the FEC agrees to a rulemaking as proposed[5] and the statement of policy is officially extended to apply until the completion of the rulemaking.
>
> (2) We then offer to dismiss this case if the FEC adopts the proposed rule when the rulemaking is completed.

---

[5]Footnote 1 to the March 23 letter stated the following:

> The FEC has often employed such a statement of policy as a temporary (pending a rulemaking) or indefinite measure. *See*, *e.g.*, Notice 2003-25, 68 Fed. Reg. 70426, as an example. The FEC has previously adopted a policy of not enforcing subpart (b) of its definition of "expressly advocating" at 11 C.F.R. 100.22 in the First and Fourth Circuits. *See Virginia Society for Human Life v. FEC*, 263 F.3d 379, 382, 386, 388 (4th Cir. 2001).

Whether or not Defendants agree to settle this matter as offered, this rule clearly identifies the sort of rule that this Court should adopt, as the U.S. Supreme Court adopted the exception for *MCFL*-type corporations in *MCFL*. 479 U.S. 238. WRTL asks the Court to find that this rule is properly derivable from *McConnell* and *WRTL* and adopt it as the analysis of this Court in holding that an exception for such a communication to the electioneering communication prohibition is constitutionally required.

For present purposes, all discovery should be limited (as set out in the following discussion) because such an objective rule, based on the content of the communication itself is what is required in this case.

D. The Proper Scope of Discovery Is Readily Established, and WRTL Has Offered More, Which Should Be the Extent of Any Permitted Discovery.

Based on the preceding discussion of relevance, the proper scope of discovery is readily discernible, and discovery should be limited as set out here.

Preliminarily, WRTL notes that it understood this Court's instructions to be that the FEC should set out what discovery it thought it required and that the parties should negotiate the scope of discovery instead of simply dumping the matter back on this Court to sort out. Consequently, WRTL provides the following brief discussion to indicate the FEC's refusal to cooperate with WRTL's effort to achieve this. In an email to FEC counsel, WRTL counsel sought from the FEC a statement regarding the required scope of discovery:

> I have consulted with Jim Bopp about the 1:30 p.m. Wednesday time for our consultation. He is agreeable to setting that as a tentative time, subject to your sending us in a timely fashion a detailed list of items you want to discover, so that we can consider them before the meeting. The meeting will not be fruitful without our ability to review the list in advance, so please send the list for review as soon as possible and then we can firm up the meeting time. Thank you. - Rich Coleson

Email from Richard Coleson to David Kolker & Harry Summers (Mar. 21, 2006).

> FEC counsel responded as follows:
>
> Thanks for your message agreeing to set tomorrow at 1:30 p.m. as a tentative time for our conference pursuant to LCvR 16.3 in the above matter. We are puzzled, though, by your apparent effort to condition a conference that is required by the rules on our providing you with "a detailed list of items [we] want to discover" in advance of the conference. Rule 16 requires no such disclosure before or at the conference. Instead, Rule 16.3(c)(8) merely includes among the topics to be discussed the "anticipated extent of discovery" along with any general parameters or limits that may be appropriate.
>
> Of course, the Commission has already provided information about the subjects of discovery it anticipates taking. See FEC's Opposition to Motion to Reinstate, filed Feb. 7, 2006, at 3-4. We are aware of no obligation to provide detailed information about the specific "items" we may later seek in discovery prior to a Rule 16.3 conference, and as a practical matter, doing so would require us to draft specific discovery requests prematurely.

Email from Harry Summers to Richard Coleson (Mar. 21, 2006).

> James Bopp responded to his copy of the foregoing email with the following:
> Harry, I don't know if you were at the hearing, but if you were or if you would review
>
> the transcript, you would know that the judges asked us to do this so that we would inform the court on the extent of discovery that the Defendants desire and the extent to which Plaintiffs would agree to that discovery. This hide the ball effort on your part just frustrates this process. We are asking that you advise us specifically what discovery you seek, if any, before the conference, so that we can respond and more this forward. Since you say that you have already done so, it doesn't seem too much to ask that you affirm that this is all you want or tell us what else you have in mind. Jim

Email from James Bopp, Jr. to Harry Summers (Mar. 21, 2006).

> Mr. Summers responded to Mr. Bopp as follows:
> In your two messages of earlier this afternoon, we understand you to be asking that we
>
> send you immediately the kind of written detail that would appear in actual written discovery requests the Commission anticipates that it may serve some time after the status conference scheduled for April 10, before which no discovery can occur. We have not yet drafted our discovery requests, and in any case, we are not obligated to provide them to you in advance of service. We did not understand the Court to be directing us to do so at the February 17 status conference. Of course, it is difficult if not impossible to predict the exact scope and nature of all relevant discovery when no discovery has yet taken place. The initial results of discovery will naturally affect how

> the process proceeds, and there may be relevant specific subjects that we will need to pursue that we cannot envision now.
>
> Nevertheless, we can provide a good deal of information about areas we anticipate exploring under the expedited discovery schedule we will propose. As explained in our Opposition to Plaintiff's Motion to Reinstate, Mem. 3-4, the Commission seeks evidence about: the development of the 2004 WRTL advertisements at issue; WRTL's decisions about where, when, and how to run them; WRTL's historic use of broadcast and other media for its public communications; the specific electoral context in which the 2004 ads were planned to run, including the role of the judicial filibuster issue; and WRTL's history of opposition to Sen. Feingold. In light of the McConnell opinion and the evidence you have relied on previously, the Commission also expects to seek further information about the alleged burden on WRTL of using alternative advertising text that would fall outside the definition of "electioneering communication," as well as the finances and fundraising of WRTL and its PAC, including WRTL's attempts, if any, to raise funds for its PAC to pay for its advertisements. We anticipate that the sources of this evidence may include WRTL, WRTL's PAC, WRTL's political and media consultants, and possibly others with knowledge about the issues and campaign strategies in the 2004 election in Wisconsin. In addition, the Commission may rely upon expert testimony as to the likely impact of WRTL's ads in the 2004 Wisconsin pre-election environment, WRTL's alleged need to identify office holders in its grassroots lobbying advertisements, and the effect that a grassroots lobbying exemption like the one WRTL now seeks would likely have in future electoral contests. As discussed above, however, since discovery has not yet begun -- the parties have never even made initial disclosures -- the Commission reserves the right to develop facts about which we are currently unaware that are related to the topics described above.
>
> We believe the above statement provides you with an understanding of what discovery the Commission anticipates seeking that is more than adequate at this stage of the litigation. We would be happy to discuss these matters, along with our proposed discovery and briefing schedule, during our conference tomorrow afternoon.

Email from Harry Summers to James Bopp (Mar. 21, 2006).

> Mr. Bopp responded as follows:
>
> Thank you for your written response. I assume that you have provided me the extent of the discovery you seek and that there are no other discovery subjects which you have in mind. We will be prepared to respond during the conference call. Please provide me the proposed discovery and briefing schedule prior to our conference call. Jim Bopp

Email from James Bopp to Harry Summers (Mar. 21, 2006).

At the parties' meet-and-confer session on March 22, counsel for WRTL again tried to negotiate with FEC counsel the specific details of discovery, but the FEC declined to be

locked in to such a negotiated agreement. As a result, rather than a detailed negotiated statement of the discovery scope, WRTL is only able to offer the Court the following outline.

Based on the representation of the FEC in the email quoted above, the FEC is interested in engaging in overbroad discovery on the following topics:

1. the development of the 2004 WRTL advertisements at issue

2. WRTL's decisions about where, when, and how to run them

3. WRTL's historic use of broadcast and other media for its public communications

4. the specific electoral context in which the 2004 ads were planned to run, including the role of the judicial filibuster issue

5. WRTL's history of opposition to Sen. Feingold

6. information about the alleged burden on WRTL of using alternative advertising text that would fall outside the definition of "electioneering communication"

7. the finances and fundraising of WRTL and its PAC, including WRTL's attempts, if any, to raise funds for its PAC to pay for its advertisements

For reasons stated in this Memorandum, *supra*, WRTL believes that the discovery should be limited to the following two relevant areas and agrees to prompt document production (by April 17), limited depositions, and stipulation to facts concerning:

1. elements that make WRTL's proposed communications electioneering communications (if run within the blackout periods), e.g., broadcast scheduling, advertising scripts, what ads were done and which were planned, etc.; and

2. factual allegations made by WRTL, e.g., that it is a corporation, has a PAC; amount of money in PAC, etc.

In addition, WRTL would stipulate to

3. facts that the FEC has asserted in its briefing, such as the fact that WRTL has a PAC, that the PAC opposed Feingold and made statements to that effect, that filibusters were a campaign issue, etc.

WRTL does not agree to the propriety of discovery based on whether making its expenditures through a PAC is a burden, believing that is a legal question already resolved by *MCFL*, 479 U.S. 238, which objection would extend to discovery as to whether or not WRTL-PAC had enough money, what efforts it made to fundraise into the PAC for the advertisements in question, etc. However, in view of this Court's expectation that the parties negotiate discovery, despite these differing positions, WRTL has compromised on the following, to which it agrees:

4. The FEC seeks information on WRTL's use of other media for advocacy campaigns. WRTL agrees to a good-faith effort to produce, on or before April 17, what documents it has regarding advocacy campaigns in all media, including broadcast, print, email, and telephone script all from January 1, 2002 until the time when the complaint was filed. However, WRTL would object to witnesses being asked why one medium was preferred over another because it is not up to the government to decide what is and is not an effective means of communication.

This Court should limit the Defendants' discovery, if any, to the scope outlined here by WRTL. They should not be permitted to delve into that which irrelevant.

Conclusion

For the reasons stated above and previously, WRTL's motion requesting that this Court reinstate the fully-briefed cross-motions for summary judgment, permit one supplemental brief, and expedite consideration of those summary judgment motions should be granted. In the alternative, discovery should be denied and expeditious new briefing on cross-motions for summary judgment should be altered. In the alternative, discovery should be limited as outline herein, followed by expeditious briefing on cross-motions for summary judgment according to the schedule proposed by WRTL in the Joint Report.

Respectfully submitted,

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