UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, LFO)
	)	(Three-Judge Court)
v.	)	
	)	OPPOSITION TO PLAINTIFF'S
FEDERAL ELECTION COMMISSION,	)	MOTION FOR PRELIMINARY
	)	INJUNCTION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiff Wisconsin Right to Life, Inc. ("WRTL"), intends to use money from its general corporate treasury to finance unspecified "grass roots lobbying," including the television and radio broadcast of at least three political advertisements that identify by name Wisconsin's two United States Senators. These communications would be disseminated during the 30-day period before the upcoming September primary election in which one of the named Senators, Russell Feingold, is seeking his party's nomination, and during the 60-day period before the November general election. A provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 91-92 (2002), prohibits corporations from using their general treasury funds to pay for communications — called "electioneering communications" — that refer to a candidate for federal office during those periods prior to a federal election. BCRA § 203, codified at 2 U.S.C. 441b(b)(2). On July 28, 2004, WRTL filed both a complaint challenging the constitutionality of the provision as applied to it and a motion for a preliminary injunction to prevent the Federal Election Commission ("the Commission" or "FEC") from enforcing BCRA § 203 against it. The complaint also seeks permanent injunctive and declaratory relief. The Commission now opposes WRTL's motion for a preliminary injunction and will later respond to the complaint.

As we explain in detail below, WRTL has not shown that it is entitled to the extraordinary relief it seeks. Eight months ago, the Supreme Court upheld the constitutionality of BCRA § 203 against the claim that the electioneering communication provision on its face is either overbroad or underinclusive, and concluded that it survives strict scrutiny. McConnell v. FEC, 124 S. Ct. 619, 694-98 (2003). WRTL misreads McConnell, which considered and rejected many of the arguments that WRTL makes here and which forecloses the kind of as-applied challenge WRTL now brings. WRTL fails to give due weight to Congress's authorizing

the Commission to create through rulemaking any exemptions from the definition of "electioneering communication," and it provides no good reason to doubt the adequacy of the many options available to it under BCRA to communicate its views to the public. Finally, WRTL ignores its own history of vigorous, publicly proclaimed opposition to Senator Feingold and the likely electoral effect its corporate-financed advertisements would have on the upcoming senatorial elections in Wisconsin. WRTL cannot immunize itself from the lawful application of BCRA by labeling its communications "grass roots lobbying" when they meet the definition of "electioneering communication" that the Supreme Court has upheld.

I. BACKGROUND

A. The Federal Election Commission

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455, and other statutes. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules … as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7) and 437f.

B. Statutory and Regulatory Background

1. Regulation of Corporate-Financed Electoral Activities Prior to the Passage of BCRA

Federal law has long prohibited corporations, whether large or small, for-profit or not-for-profit, from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See, e.g., FEC v. Beaumont, 539 U.S. 146, 152-54 (2003).

The FECA makes it "unlawful … for any corporation whatever … to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The FECA does not, however, ban any corporation from speaking. Rather, it permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C). The fund "may be completely controlled" by the corporation, and is "separate" from it "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." FEC v. National Right to Work Comm., 459 U.S. 197, 200 n.4 (1982) (quoting Pipefitters v. United States, 407 U.S. 385, 414-17 (1972)). The fund comprises donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in this fund can, for example, be contributed directly to federal candidates or used to pay for independent expenditures to communicate to the general public the corporation's views on candidates for federal office.

In FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238 (1986), the Supreme Court held that section 441b's prohibition on using corporate treasury monies to finance independent expenditures for speech could not constitutionally be applied to a subgroup of corporations having three features in common with the corporation in that case: (1) the organization was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) it has "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." Id. at 264. See also McConnell, 124 S. Ct. at 699 ("Our decision in MCFL related to a carefully defined category of entities"); 11 C.F.R. 114.10 (implementing the MCFL exception).

The MCFL decision also narrowed the substantive scope of section 441b even as to corporations that do not come within the special subgroup. To avoid problems of vagueness and overbreadth, the Supreme Court in MCFL construed the provision's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. 479 U.S. at 248-49. See 2 U.S.C. 431(17) (pre-BCRA version). The Court had introduced the concept of express advocacy in Buckley v. Valeo, 424 U.S. 1, 43-44, 77-80 (1976), in narrowly construing other provisions of the FECA regulating independent campaign expenditures to avoid the same kinds of constitutional infirmities. Buckley provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." Id. at 44 n.52. "[T]hose examples eventually gave rise to what is now known as the 'magic words' requirement," McConnell, 124 S. Ct. at 687, which supposedly distinguished express advocacy from issue advocacy in campaign finance jurisprudence.

2. Regulation of Corporate-Financed Electoral Activities After the Enactment of BCRA in 2002

After the Supreme Court adopted those narrowing constructions in Buckley and MCFL, Congress became aware that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." McConnell, 124 S. Ct. at 650. Corporations and labor unions crafted political communications that avoided explicit words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. Id. at 651. "[A]lthough the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." Id. at 689 (footnote omitted). "Moreover, the conclusion that such ads were specifically intended to affect

election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." Id. at 651 (footnote omitted).

"Congress enacted BCRA to correct the flaws it found in the existing system," McConnell, 124 S. Ct. at 689, and section 203 of BCRA amended 2 U.S.C. 441b(b) by barring corporations and unions from paying for an "electioneering communication" with money from their general treasuries. 2 U.S.C. 441b(b)(2). However, as with contributions and expenditures, a corporation or union may establish a separate segregated fund and pay for electioneering communications from that fund. 2 U.S.C. 441b(b)(2)(C).

BCRA defines the new term "electioneering communication" in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), codified at 2 U.S.C. 434(f)(3)(A)(i).[1] Because the definition specifies communications distributed by "broadcast, cable, or satellite," the expanded regulation in amended section 441b(b)(2) does not apply to corporate-financed or union-financed print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills or to telephone or Internet communications. McConnell, 124 S. Ct. at 636; 67 Fed. Reg. 65191-92, 65196 (2002) (Explanation and Justification of Final Rules).

3. The Commission's Rulemaking Regarding Electioneering Communications

BCRA authorizes the Commission to promulgate regulations that exempt

[1] BCRA excludes from this definition (i) a news story, commentary, or editorial by a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), codified at 2 U.S.C. 434(f)(3)(B)(i)-(iv).

communications in addition to those the statute itself exempts, so long as no advertisement that promotes, attacks, supports, or opposes an identified federal candidate can fall within any such exemption. See BCRA § 201(a), codified at 2 U.S.C. 434(f)(3)(B)(iv). In August 2002, the Commission issued a notice of proposed rulemaking to implement BCRA's electioneering communication provisions. 67 Fed. Reg. 51131 (Aug. 7, 2002). The notice discussed, among other topics, whether the Commission should exempt additional communications from the definition of "electioneering communications." 67 Fed. Reg. 51136. Although the notice had presented a number of possible exemptions for public comment, the Commission promulgated only two: one for State and local candidates and another for certain nonprofit organizations operating under 26 U.S.C. 501(c)(3). See 67 Fed. Reg. 65190, 65196 (Oct. 23, 2002).

WRTL did not participate in the Commission's deliberations: It did not submit written comments or send a representative to testify at the hearing the Commission held. See Exh. 1. In the two years since that rulemaking began, WRTL has not petitioned the Commission to adopt any additional exemptions from the statutory regulation of electioneering communications. Nor has it invoked 2 U.S.C. 437f and asked the Commission for an advisory opinion about broadcasting advertisements that would serve the organization's alleged purposes but would not "clearly identify" a candidate such as Senator Feingold. The advisory opinion process is a "chill-reducing" and "relatively riskless" mechanism, Martin Tractor Co. v. FEC, 627 F.2d 375, 388 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980), and "in issuing advisory opinions, the Commission fulfills its statutorily granted responsibility to interpret the Act." FEC v. National Rifle Ass'n of America, 254 F.3d 173, 185 (D.C. Cir. 2001). See also McConnell, 124 S. Ct. at 675 n.64 ("[S]hould plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification … and thereby 'remove any doubt there may be as to the meaning of

the law'" (internal citation omitted)). WRTL could have inquired, for example, whether it could use its general treasury to finance broadcast advertisements that urged the audience to "Contact the U.S. Senate" or "Call your Senator" and provided the relevant telephone number or Internet address. If the Commission had concluded that one or more of the proposed advertisements did not refer to "a clearly identified candidate," see 2 U.S.C. 434f(3)(A)(i)(I), then WRTL could have acted without risking that it might later be subject to sanction under the FECA for those actions. See 2 U.S.C. 437f(c). The advisory opinion also would have augmented the record on which this Court will base its decision.

C. The Supreme Court's Decision in McConnell v. FEC

In McConnell, the Supreme Court broadly upheld the constitutionality of the provision at issue in this case. The Court initially noted that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view … [section 203] as a 'complete ban' on expression rather than a regulation." McConnell, 124 S. Ct. at 695 (citing Beaumont, 539 U.S. at 162-63, and Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658 (1990)). "'The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.'" McConnell, 124 S. Ct. at 695 (quoting Beaumont, 539 U.S. at 163). The Court stated that it "respect[s]" the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." McConnell, 124 S. Ct. at 695 (internal quotation marks and citations omitted). It concluded that the compelling governmental interests that support requiring corporations to finance express advocacy communications from a PAC apply equally to their financing of electioneering communications. Id. at 696.

The Court found unimportant the dispute among the parties about the "precise percentage

of [past] issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose." McConnell, 124 S. Ct. at 696. Although, in the past, "the vast majority of ads clearly had such a purpose," the Court found it decisive that, "whatever the precise percentage may have been in the past, in the future [under BCRA] corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." Id. (footnote omitted).

The Court also addressed the constitutionality of a related provision, BRCA § 204, which explicitly applies the ban on the use of general treasury funds to pay for electioneering communications to not-for-profit corporations. McConnell, 124 S. Ct. at 698-99. Consistent with MCFL, the Court construed that provision to exempt only "MCFL organizations" from its reach. Id. See infra pp. 11, 23 n.6.

D. Plaintiff Wisconsin Right to Life, Inc.

In its complaint, WRTL describes itself as a nonprofit, nonstock Wisconsin corporation that was organized to protect "individual human life from the time of fertilization until natural death." Complaint ¶¶ 19, 21. The corporation also asserts that it is tax exempt under 501(c)(4) of the Internal Revenue Code. Id. at ¶ 19. It alleges no other facts about its finances, including the source of its funds, and no affidavits providing evidence to support any of WRTL's factual allegations were included with its moving papers.

The FEC's records, however, reveal that WRTL administers its own separate segregated fund, the Wisconsin Right to Life Political Action Committee ("PAC"). See Exh. 2 (Statement of Organization); 2 U.S.C. 431(4), 441a(a)(4), 441b(b)(2)(C). The fund is registered with the Commission as a multicandidate political committee under the FECA. Although the yearly limit

on individual contributions to such a political committee is $5,000, publicly available reports that the PAC filed with the Commission from January 2003 through June 2004 show that, during that period, the PAC received contributions from no individual that totaled more than $1,000. Exh. 3.

Publicly available information shows that in early March 2004, WRTL's PAC endorsed three candidates, each of whom is seeking the Republican nomination in the September 14, 2004, party primary to challenge Senator Russ Feingold in the November general election. Exh. 4-5 (WRTL/PAC announcements); see also Exh. 6 (Wisconsin Right to Life Committee Endorses 3 of 4 Feingold Rivals, The Milwaukee Journal Sentinel at 3B (March 5, 2004)); Exh. 7 (3/4/2004 press release by Welch campaign stating that "Wisconsin Right to Life Endorses Bob Welch"). WRTL's PAC actively opposed Feingold's election in 1992 and his re-election in 1998, Exh. 8-9 (independent expenditure reports filed with the FEC), and has already made independent expenditures in his race this year, Exh. 3. One of the PAC's announcements of its endorsement of the Republican candidates explained that "'[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees.... [T]he defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections.'" Exh. 4 (quoting PAC Chair Bonnie Pfaff).

For months prior to their endorsement by WRTL's PAC, the three candidates had been attacking Senator Feingold for allegedly blocking or filibustering against some federal judicial nominees. See, e.g., Exh. 10-13 (press releases dated 9/4/2003, 11/12/2003, 11/14/2003, and 1/16/2004, by candidate Robert Welch); Exh. 14 (3 Seeking Feingold Seat Attack Him on Judges Issue, The Milwaukee Journal Sentinel at 2A (Nov. 18, 2003)). That theme remains key in each of their campaigns. See, e.g., Exh. 22. The Republican Party of Wisconsin also emphasizes that issue in criticizing candidate Feingold. See Exh. 15 (Party's online poll asks "What is the #1

reason why Russ Feingold should be voted out of office in 2004?" and offers "His obstruction of President Bush's judicial nominees" as one of four possible answers; site visited 7/29/2004); Exh. 14 (news article quoting Wisconsin State Republican Chairman).

In its communications to the public, WRTL itself has voiced the same criticisms made by Feingold's Republican opponents and by WRTL's PAC. See Exh. 16, 18, 24-25. For example, on July 14, 2004, WRTL issued a news release entitled "Wisconsin Right to Life Urges Sens. Feingold, Kohl to Stop Filibustering Judicial Nominees and to Act With Fairness." Exh. 16. The news release quotes extensively from a letter the organization's Executive Director and Legislative Director had sent that day to Senators Kohl and Feingold. The letter stated in part: "We are writing on behalf of the entire Wisconsin Right to Life organization to express our grave concerns regarding your efforts to prevent an up or down vote on various qualified and well-qualified judicial nominees.… You have voted 16 out of 16 times to filibuster judicial candidates." Id. In fact, some of the communications that set out WRTL's view of Feingold's record on judicial nominees and that criticize that record are found at a special web site WRTL has created — www.befair.org — and the three advertisements that WRTL plans to finance with money from its corporate treasury during the primary and general elections ask the listener or viewer to "visit" that web site. Exh. A-C to WRTL's complaint.

II. WRTL HAS NOT SHOWN THAT IT HAS ARTICLE III STANDING TO SEEK A PRELIMINARY INJUNCTION

An applicant for preliminary injunctive relief, like all litigants who invoke federal court jurisdiction, must first show that it has standing to pursue its claims in federal court. See, e.g., Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912, 915-18 (D.C. Cir. 2003) (remand to dismiss case where plaintiff who had appealed denial of its motion for a preliminary injunction lacked Article III standing to bring the action). As we have explained, the Supreme Court in McConnell

interpreted BCRA to exempt "MCFL organizations" from the requirement that corporations use sources of money other than their general treasuries to finance electioneering communications. See supra pp. 3, 8. Therefore, if WRTL is an MCFL organization, it can pay for its broadcast advertising with its corporate treasury funds, and BCRA § 203 can cause it no harm.

In paragraph 22 of its complaint, WRTL asserts that it does not qualify for any exception permitting it to pay for electioneering communications from corporate funds, but it offers only legal conclusions, not supporting facts for this assertion. This Court "is not bound by the complaint's legal conclusions," Western Assoc. Ltd. P'ship v. Market Square Ass'n, 235 F.3d 629, 633 (D.C. Cir. 2001), and WRTL must "adequately ple[a]d facts supporting its standing." Taylor v. Resolution Trust Corp., 56 F.3d 1497, 1508 (D.C. Cir.), amended on other grounds on reh'g, 66 F.3d 1226 (D.C. Cir. 1995). "[T]he necessary factual predicate may not be gleaned from the briefs and arguments." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990) (citation omitted). See also LCv.R 65.1(c) ("An application for a preliminary injunction … shall be supported by all affidavits on which the plaintiff intends to rely."). As noted above, WRTL has filed no affidavits with its motion to provide evidence to support its allegations.

III. WRTL CANNOT CARRY ITS HEAVY BURDEN OF SHOWING THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION

A. The Requirements for a Preliminary Injunction

The party seeking a preliminary injunction bears a heavy burden to establish that it is entitled to that relief. To prevail, it must demonstrate (1) a "substantial likelihood of success on the merits"; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995).

In this case, WRTL must shoulder a particularly heavy burden. First, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). However, WRTL is attempting to change the status quo by seeking an exemption from BCRA's requirement that corporations either finance an electioneering communication through a separate segregated fund or avoid clearly identifying a candidate in the communication.

Second, as we explained supra pp. 7-8, the Supreme Court recently upheld the constitutionality of BCRA § 203 on its face. Although WRTL is challenging the constitutionality of the provision as applied, the McConnell decision greatly strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). That presumption "'is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of … [the government] in balancing hardships.'" Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (quoting Walters, 468 U.S. at 1324; bracketed words added). In McConnell, Chief Justice Rehnquist relied on that very presumption in denying the application of those plaintiffs who were represented by counsel for the plaintiff here to vacate the stay of judgment entered by the three-judge court that had held portions of BCRA unconstitutional. Exh. 26 (citing Bowen v. Kendrick).

B. WRTL Has Failed to Show That It Is Substantially Likely to Succeed on the Merits

1. McConnell Clearly Envisioned That BCRA's Electioneering Communication Restrictions Would Apply to the Political Ads That WRTL Calls "Grass Roots Lobbying"

Congress in enacting BCRA and the Supreme Court in fully upholding the "electioneering communication" financing restrictions clearly envisioned that those restrictions

would apply to the so-called "grass roots lobbying" WRTL has presented to this Court. McConnell upheld the primary definition of "electioneering communication" as to all communications it reached, not just "sham issue ads," as plaintiff contends. The Court thus precluded a flood of as-applied challenges based on any supposedly "genuine" issue ad that a claimant like WRTL could engineer, an eventuality that could wholly undermine the bright-line objective test BCRA employs. Indeed, if McConnell had opened the door to the kind of challenges that WRTL claims are necessary to flesh out the "full outline of permissible regulation" (WRTL Mem. at 18) under BCRA § 203, the electioneering communication definition as enacted and upheld would cease to exist; its crystal clarity would be shattered, for example, with 18-part tests (WRTL Mem. at 25-26) and vague definitions of "grass roots lobbying." The Court upheld the definition of electioneering communication as enacted, explicitly assuming that some "issue" speech might be covered, because it concluded that the effect on such speech was not substantial, and because in the future, independent groups could simply avoid naming federal candidates or could finance their ads using separate segregated funds.

a. By upholding "all applications" of BCRA's definition of electioneering communication, McConnell effectively forecloses as-applied challenges like this one

In McConnell, the Supreme Court made clear that it was "uphold[ing] all applications of the primary definition" of electioneering communication, and so it had no occasion even to consider the "backup definition." 124 S. Ct. at 687 n.73 (emphasis added). See id. at 715 (Court explains that it has upheld "stringent restrictions on all election-time advertising that refers to a candidate because such advertising will often convey [a] message of support or opposition" (emphasis in original)). Thus, WRTL's challenge cannot succeed.

It is important to clarify exactly what McConnell did, not only to correct WRTL's false

account of the decision, but because the Court actually considered and rejected many of the arguments WRTL makes here. The Court began its electioneering communication analysis by flatly rejecting the McConnell plaintiffs' principal argument "that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," 124 S. Ct. at 689. See id. at 687-89. The Court upheld the electioneering communication disclosure requirements of 2 U.S.C. 434(f) as serving the same informational, anti-corruption, and enforcement interests that prompted the Court in Buckley to uphold the original FECA disclosure requirements, 124 S. Ct. at 689-94. The Court then noted that, since Buckley, the separate segregated funds (or PACs) authorized by section 441b have "provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy," and that, likewise, though BCRA bars such entities from financing electioneering communications with general treasury funds, they "remain free" to use PACs for that purpose. 124 S. Ct. at 694-95. Thus, contrary to WRTL's references (Mem. at 12, 16-18, 28) to the financing restrictions as a "ban" or a "blackout period," the Court noted that "it is 'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation." 124 S. Ct. at 695 (quoting Beaumont, 539 U.S. at 162-63).

In addressing plaintiffs' claim that the electioneering communications financing restrictions were "overbroad," the McConnell Court considered whether a "compelling governmental interest" justified BCRA's burden on First Amendment expression. 124 S. Ct. at 695. The Court found the issue "easily" resolved by its prior decisions; it noted that it had "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" Id. at 695-96 (quoting Austin, 494 U.S. at 660). It also pointed out that recent cases had "recognized that

certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits.'" 124 S. Ct. at 696 (quoting Beaumont, 539 U.S. at 154). Noting that no one contended that "so-called issue advocacy" was "any more core political speech than are words of express advocacy," the Court completely rejected plaintiffs' overbreadth challenge, 124 S. Ct. at 696 (emphasis added):

> 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. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and the judges on the District Court. [Citations omitted.] Nevertheless, the vast majority of ads clearly had such a purpose. [Citations omitted.] Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.

The McConnell ruling was not (as WRTL argues, Mem. at 11-12, 17) somehow limited to ads that are shown, on an ad hoc basis, to be the "functional equivalent" of express advocacy. The Court never (as WRTL argues, Mem. at 16, 18) "conceded that the ban reaches protected speech that Congress may not regulate" or that some "issue ads [falling within the provision] … may not constitutionally be regulated by Congress." Far from suggesting that some genuine issue ads would be entitled to constitutional exemption from BCRA, the Court made it quite clear that "in the future" — that is, after its decision — even "genuine issue ads" would either have to be financed by corporations and unions "from a segregated fund" or else "avoid[] any specific reference to federal candidates." 124 S. Ct. at 696 (emphasis added).[2]

[2] Because the Court reasoned that these alternatives provided a constitutionally sufficient opportunity for a corporation's election-related speech, they were an integral part of its decision to uphold BCRA § 203. WRTL wrongly dismisses this reasoning (Mem. at 18) as a "bit of

Ignoring this dispositive language, WRTL relies upon a footnote (124 S. Ct. at 696 n.88) that it claims acknowledges that as-applied challenges will be needed and permitted. However, contrary to WRTL's interpretation (WRTL Mem. at 18), this footnote in no way sanctions a series of as-applied challenges that would "carve[] out a chip at a time … the full outline of permissible regulation under" BCRA. Rather, when the Court (124 S. Ct. at 696 n.88) "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," it was broadly emphasizing that its jurisprudence recognized two general categories of speech, and that the interests that justify regulation of one type might not apply to the other. In that context, the Court explained the quoted language and distinguished both First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); it specifically held that "BCRA's fidelity to [certain] imperatives [— preserving the integrity of the electoral process and citizens' confidence in government —] sets it apart from the statute[s] in Bellotti" and McIntyre, both of which were targeted directly at issue advocacy, not candidate elections. 124 S. Ct. at 696 n.88. McConnell thus precludes any chipping away at the electioneering communication provision with the kind of argument WRTL raises here. In fact, WRTL's reading of the Court's language is exceedingly strained in light of the Court's entire discussion. As the D.C. Circuit has emphasized, "'the language of an opinion is not always to be parsed as though we were dealing with language of a statute.'" Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1052 (D.C. Cir. 2000) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)).

Contrary to WRTL's apparent claims (Mem. at 12-18), the Court in McConnell clearly

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obiter dictum." Even if it were dictum, however, the lower courts are still bound by it, since "'[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" Natural Resources Defense Council v. NRC, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (quoting United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997)).

found that BCRA's electioneering communication restrictions satisfy strict scrutiny — that they are narrowly tailored to serve compelling governmental interests. Justice Kennedy commented in dissent that "[a]ll parties agree strict scrutiny applies" and expressed his view that the electioneering communication financing provision "is far from narrowly tailored." 124 S. Ct. at 766. When the Court rejected his view of BCRA § 203, however, its holding was not limited to what WRTL describes as "sham issue ads" — a pejorative term that neither the Court nor WRTL has clearly defined. As noted above, the Court itself explained that it had upheld "stringent restrictions on all election-time advertising that refers to a candidate because such advertising will often convey [a] message of support or opposition," 124 S. Ct. at 715 (emphasis in original) — a statement that in and of itself casts grave doubt on WRTL's likelihood of success here. Moreover, a statute can be "narrowly tailored" even if some of its applications do not advance compelling state interests; it is sufficient that "a substantial portion of the burden it imposes furthers the Government's interest, even though a less intrusive alternative might also exist." American Library Ass'n v. Reno, 33 F.3d 78, 88 (D.C. Cir. 1994).[3]

[3] WRTL's extended discussion (Mem. at 12-17) of whether McConnell employed an "overbreadth" analysis or a "narrow tailoring" analysis, and whether its reasoning was confused, is a red herring with no practical effect on this case. To the extent WRTL is arguing that McConnell's strict scrutiny analysis was flawed, such a claim is beyond the power of lower courts to address, and in any event makes WRTL's chances of "success on the merits" remote indeed. In particular, the law review article authored by WRTL's counsel to which WRTL directs the Court (Mem. at 11 n.1) for "a careful analysis of what the Supreme Court did and did not do" in McConnell makes clear that the authors believe McConnell was wrongly decided. Most of their arguments are designed to make that point, rather than explain the law as it now stands in light of McConnell's reasoning and holdings. For example, the law review article argues that the Court demonstrated "shocking disregard for the First Amendment," "ignor[ing]" arguments, "pretend[ing]" to avoid the teachings of Buckley and MCFL, and giving "disingenuous treatment" to the requirements of express advocacy in its "flawed analysis." James Bopp, Jr. & Richard E. Coleson, The First Amendment Is Still Not a Loophole: Examining *McConnell's* Exception to *Buckley's* General Rule Protecting Issue Advocacy, 31 N. Kentucky L. Rev. 289, 333, 340 (2004). Although the article concludes that, as a result of McConnell, "Lady Liberty sits defamed, disgraced, and destitute awaiting a champion to restore

As it has shown in McConnell itself and other cases construing the FECA, the Supreme Court knows very well how to signal the availability of as-applied challenges, and it did not do so regarding the definition of electioneering communication. For example, Buckley, in upholding FECA's disclosure requirements against a facial challenge, provided specific guidance as to what evidence would be required in later as-applied challenges by minor parties claiming exemption from the requirements, see 424 U.S. at 70-71, guidance that the Court itself followed in Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 92-102 (1982). In McConnell, the Court explicitly referred to the availability of as-applied challenges in at least three distinct contexts in upholding portions of BCRA Title I against facial attack, in at least one context in upholding part of BCRA Title V, and once regarding the disclosure requirements of Title II. See 124 S. Ct. at 668 n.52, 669, 677, 692, 718 (certain arguments as to BCRA § 323(a)'s solicitation restrictions "may be addressed in an as-applied challenge," and minor parties who are sufficiently affected by it "can bring an as-applied challenge," id. at 668 n.52, 669; "as-applied challenges remain available" to state and local parties who can make the required showing as to § 323(b), id. at 677; speakers adversely affected by Title V may challenge its constitutionality "as applied," id. at 718; "our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement," id. at 692). By contrast, no such language appears in McConnell's discussion of the definition of electioneering communication.

Finally, WRTL argues that so-called "grass roots lobbying" differs from other types of "issue advocacy" governed by McConnell, emphasizes that "grass roots lobbying was argued

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her honor," id. at 340, this Court is bound by McConnell, as "only [the Supreme] Court may overrule one of its precedents." Thurston Motor Lines v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

strenuously" to the McConnell Court, and then makes the astonishing claim that the fact that "the Court utterly ignored the argument indicates that such considerations were left for another, as-applied challenge." Mem. at 20.[4] However, the fact that the McConnell Court "utterly ignored" this "grass roots lobbying" argument actually indicates the reverse of what WRTL asserts, namely, that the Court did not consider that those contentions even merited separate discussion. Tellingly, Justice Kennedy in dissent discussed at great length a hypothetical example of conduct subject to the electioneering communications restrictions that presented a more compelling example of "grass roots lobbying" than WRTL's. See McConnell, 124 S. Ct. at 742, 768-69. Justice Kennedy described a situation in which a few Senators, eager to impress logging industry constituents just before an election, proposed a law that would "harm the environment by allowing logging in national forests." Id. at 768. Justice Kennedy objected strongly that under BCRA an "environmental group" would be "unable to run an ad referring to these Senators" in the relevant jurisdictions, and he argued that BCRA forces such groups to "contend with faceless and nameless opponents." Id. at 769. The Court did not dispute Justice Kennedy's conclusion that its decision upholding BCRA would have this effect, nor did it respond by suggesting that this was a question it was leaving open for a future as-applied challenge. Instead, the Court found it adequate that "in the future" corporations could finance "genuine issue ads" from a separate segregated fund or avoid "any specific reference to a candidate." 124 S. Ct. at 696.

[4] The National Right to Life Committee ("NRLC"), represented by WRTL's current counsel, did argue forcefully to the McConnell Court that BCRA could not constitutionally regulate "grass roots lobbying," not only in the opening brief WRTL cites, but especially in its reply brief. See Reply Brief of Plaintiffs-Appellants/Cross-Appellees NRLC et al., McConnell, 124 S. Ct. 619 (No. 02-1733) (filed Aug. 21, 2003), at 6-7.

b. The relief WRTL seeks would undermine the clear, objective standard on which McConnell's upholding of BCRA was based

In addition to the clear language in McConnell that forecloses as-applied challenges like the instant case, the broader rationale of both that decision and BCRA § 203 would be subverted if the statute's clear definition of electioneering communication were subjected to case-by-case exceptions. McConnell and BCRA should not be construed in a way that will undermine the decision's own fundamental reasoning and Congress's legislative purpose. Cf. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (rejecting party's construction of statute because it would introduce "complexity and uncertainty" and thereby "undermin[e] ... the [statute's] ... purposes and 'breed[ ] litigation from a statute that seeks to avoid it'").

In upholding the primary definition of electioneering communication, the Court in McConnell stressed that the four-part definition "raises none of the vagueness concerns that drove our analysis in Buckley." 124 S. Ct. at 689. On the contrary, "[t]hese components are both easily understood and objectively determinable. [Citation omitted.] Thus, the constitutional objection that persuaded the Court in Buckley to limit FECA's reach to express advocacy is simply inapposite here." Id. The definition's "bright line" quality, which gives speakers clear guidance, was critical to the Court's upholding of the restriction against the First Amendment challenge. This clarity serves compelling governmental interests and was a key concern of Congress when it drafted and enacted this definition. See 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords) ("the care we took in crafting these clear and narrow requirements"); Edward B. Foley, "'Narrow Tailoring' Is Not the Opposite of 'Overbreadth': Defending BCRA's Definition of 'Electioneering Communications,'" 2 Election L.J. 457, 465 (2003).

It is well established that such clarity is critical to the operation of prophylactic statutory rules, which cannot depend upon an in-depth analysis of the extent to which the interests underlying them are served in each particular situation. See Hill v. Colorado, 530 U.S. 703, 729 (2000) ("A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself"). For instance, in Buckley, the Court stressed that it "may be assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," but that the difficulty in isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified universal application of the $1,000 individual contribution limit. 424 U.S. at 29-30. See also California Medical Ass'n v. FEC, 453 U.S. 182, 198-99 (1981) (specific contributions to a political committee are subject to general FECA restrictions even if they were purportedly to be used for administrative support, rather than for affecting elections directly); Goland v. United States, 903 F.2d 1247, 1258-59 (9th Cir. 1990) (excessive contributions are subject to FECA restrictions even if a contributor kept his identity a secret by using numerous straw donors, which allegedly precluded the opportunity for corruption upon which Buckley upheld the restrictions).

WRTL's claims here present a similar situation. The potentially endless series of judicial "chips" that WRTL envisions (Mem. at 16-18) the courts making could undermine the basis for the Court's ruling. Beyond the fact that McConnell made clear that the regulation of electoral speech is not limited to "express advocacy," see 124 S. Ct. at 687-89, the highly subjective "functional equivalent" standard WRTL proposes would essentially mean that the courts would have to examine each potential ad in context on an ad hoc basis to decide if it functioned like express advocacy. The number and variety of challenges that WRTL's approach would create

would seem to be limited only by the imagination of groups like WRTL. Indeed, a system in which the courts were asked to test whether alleged "sham issue ads" somehow "functioned" like express advocacy would mark a return to just the sort of uncertainty that the Court found unacceptable in Buckley, where it was presented with a provision involving whether an ad was "relative to" a candidate. See 424 U.S. at 40-42.[5]

Finally, WRTL's view that the presence of "lobbying" in an ad somehow immunizes its electoral elements from regulation is also wrong. On the contrary, some of the most election-related "sham issue ads" could easily be called "grass roots lobbying," as they may urge action on pending legislative matters along with their electoral advocacy. Buckley itself recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," 424 U.S. at 42. MCFL held that a "pro-life" newsletter that unquestionably contained issue discussion fell within section 441b because it also included express advocacy. 479 U.S. at 249-50. Thus, WRTL's reliance (Mem. at 10, 31) on Bellotti and Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), is misplaced. Those cases, which involved statutes that regulated the financing of "lobbying" campaigns as to non-federal ballot measures, are obviously distinguishable since they did not involve candidate elections. Indeed, Bellotti itself stressed that the "risk of corruption perceived in cases involving candidate elections … simply is not present in a popular vote on a public issue," 435 U.S. at 790, and Berkeley quoted this very passage, see 454 U.S. at 298. See

[5] The "grass roots lobbying" exemption that WRTL requests here is particularly unwarranted because WRTL not only seeks to run the three specific ads it attaches to its Complaint, but also wants a ruling that it is unconstitutional to apply BCRA to "any of WRTL's grass roots lobbying." Mem. at 29. WRTL's Complaint likewise requests injunctive relief as to "any electioneering communications by WRTL that constitute grass roots lobbying." Complaint at 13. Though WRTL's brief contains much description of the features of its three ads, including an 18-factor comparative chart (Mem. at 25-26), WRTL nowhere supplies a definitive statement as to the exact scope of "grass roots lobbying."

also supra p. 16 (McConnell distinguished Bellotti on this basis).

In sum, McConnell clearly recognized that some advertisements included in the definition of electioneering communication might contain issue advocacy, and the Court upheld the definition in all its applications, thereby ensuring the efficacy of the bright-line rule and foreclosing the kind of as-applied challenge WRTL has brought here.

c. McConnell specifically upheld the application of the electioneering communication restrictions to nonprofit corporations like WRTL

The McConnell Court directly addressed the application of electioneering communication restrictions to nonprofit corporations like WRTL. The Court explained that BCRA § 203 appeared to grant a limited exemption for Section 501(c)(4) and Section 527 organizations to finance electioneering communications with funds collected only from individuals, but that § 204 then effectively withdrew it. See 124 S. Ct. at 698-99. This is a clear indication that Congress considered and rejected the idea that the activities of such organizations merited any general exemption.[6] The Court stated that it had recently affirmed that the requirement that express advocacy be financed from segregated funds was valid as to nonprofit corporations generally, citing Beaumont, 539 U.S. at 146, and it upheld the parallel requirement as to electioneering communications. 124 S. Ct. at 698-99. In doing so, the Court quoted Beaumont's recent statement that a "unanimous Court … did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions… There is no reason to

[6] The Court noted that the limited subcategory of organizations described in MCFL would not be subject to the electioneering communication financing restrictions, as the Government had conceded. 124 S. Ct. at 698-99. As noted above, WRTL has alleged that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, the regulation that describes the "carefully defined category of entities," McConnell, 124 S. Ct. at 699, the Court found exempt from restriction in MCFL. See Complaint ¶22.

think the burden on advocacy corporations is any greater today, or to reach a different conclusion here." McConnell, 124 S. Ct. at 698 n.91 (quoting Beaumont, 539 U.S. at 163; citations omitted). The Court has thus held that, unless WRTL can qualify as an MCFL corporation, it is entitled to no other constitutional exemption from BCRA's requirements. See also infra pp. 29-30 (explaining why WRTL is unlikely to succeed on Count 2 of its Complaint, which effectively alleges that WRTL should be permitted to comply only partially with BCRA's financing and disclosure requirements).

2. Congress Intended That Any Exemptions to the Electioneering Communication Restrictions Be Adopted Pursuant to Notice-and-Comment Rulemaking, Not by Ad Hoc Adjudication

When it passed BCRA, Congress clearly intended that the Commission would, pursuant to its usual notice-and-comment rulemaking function, promulgate regulations to address whether there should be any additional exemptions to the general electioneering communications restrictions. See 2 U.S.C. 437d(a)(8); Buckley, 424 U.S. at 110-11. BCRA §§ 402 and 214 specifically required the Commission to promulgate regulations to implement the new statute under strict time limits, and the Commission did so. See 67 Fed. Reg. 49064-132 (July 29, 2002); 67 Fed. Reg. 65190-212 (Oct. 23, 2002); 68 Fed. Reg. 421-58 (Jan. 3, 2003). Moreover, 2 U.S.C. 434(f)(3)(B)(iv) provides that the term "electioneering communication" does not include "any other communication exempted under such regulations as the Commission may promulgate … to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if [it is one] described in" 2 U.S.C. 431(20)(A)(3), namely a "public communication that refers to a clearly identified candidate for Federal office … and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." The Commission did consider the possible exemptions that WRTL

describes (Mem. at 21-25) as "grass roots lobbying" exemptions, including one suggested by BCRA's congressional sponsors. But as WRTL concedes (Mem. at 23), the Commission concluded that it lacked the authority to promulgate the specific proposed exemptions because "such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner." 67 Fed. Reg. 65202. The Commission did not, however, conclude that no other exemptions would ever be appropriate in the future.

There is no support for WRTL's apparent contention that the post-enactment proposal of BCRA's principal sponsors for a regulatory exemption (related to contacting elected officials) establishes congressional intent that any such exemption be created by the courts on an ad hoc basis. This is particularly true of the specific exemption that WRTL proposes, which, unlike the sponsors' proposal, would allow the explicit naming of a federal candidate (WRTL Mem. at 27-29). In any event, the statements of a sponsor expressed as part of the consideration of a bill do not establish congressional intent. See United States v. McGoff, 831 F.2d 1071, 1090 (D.C. Cir. 1987). Here, the sponsors' post-enactment regulatory comments to the FEC did not even purport to represent the views of Congress in enacting the statute, and even if they did, such post-enactment comments of legislators are irrelevant to legislative intent. See Walsh v. Brady, 927 F.2d 1229, 1233 n.2 (D.C. Cir. 1991) ("oxymoronic 'subsequent legislative history' … can add nothing"); Gardner & North Roofing & Siding Corp. v. Board of Governors, 464 F.2d 838, 842 (D.C. Cir. 1972) (post-enactment letter of Congressman "cannot be considered on the question of congressional intent"). The primary evidence of congressional intent is BCRA itself. BCRA provides several specific exemptions to the definition of electioneering communication, such as the press exemption of 2 U.S.C. 434(f)(3)(B)(i), but no language in BCRA (and WRTL points to none) suggests that a so-called "grass roots lobbying" exemption is necessary.

Moreover, whatever the intent of Congress or BCRA's sponsors may have been as to such an exemption, and whatever other exemptions the Commission may have considered, that is not the issue the Court confronts here. This case is about whether the Constitution requires the specific exemption WRTL seeks. No exemption is constitutionally required simply because a regulatory agency or Members of Congress think it is good policy. WRTL is using the rulemaking and the 18-factor chart it has drawn up to suggest that its proposed exemption is a reasonable one, see Mem. at 25, 27-29, but a reasonable policy choice does not create a constitutional requirement. Of course, WRTL points to no Commission statement that any of these other potential alternatives was constitutionally required or consistent with the purposes of the statute. In the rulemaking, the sponsors actually stated that they believed "[a]n exemption of this kind is not necessary for Title II to operate fairly and effectively," but they proposed their alternative because, in their view, none of the other options offered for public comment was consistent with Title II's intent, not because they believed it was constitutionally required.[7] See Comments of McCain, Feingold, et al. at 7-8 (Ex. 17).

Finally, contrary to WRTL's characterizations, the sponsors' proposal was markedly different from WRTL's. The sponsors' proposal included a fundamental criterion at the heart of both this lawsuit and the ads WRTL is planning to broadcast: It would not permit the explicit naming of a candidate, an element that is likely to cause an electoral effect in a pre-election context, as WRTL's ads almost certainly will, see infra pp. 30-34. Therefore, although WRTL

[7] WRTL had the opportunity to participate in the Commission's rulemaking and make known its views as to "grass roots lobbying," but it chose not to do so. See FEC rulemaking excerpts (Exh. 1). Nor has WRTL ever suggested an alternative version of such an exemption to the Commission, or asked the Commission to reconsider its earlier conclusion that it was unable to draft such an exemption that would be consistent with the statutory purposes. Perhaps, in the future, the Commission may find a way to craft an exemption to address pre-election ads that urge people to contact their elected representatives regarding a pending legislative decision. But that would not occur because any particular exemption is constitutionally required.

tries to suggest that the sponsors would largely support its proposed exemption, the reverse is almost certainly the case since, in their view, identifying a candidate would allow precisely the kind of electoral advocacy that BCRA was intended to regulate.

3. WRTL's Proposed Ads Will Likely Have a Significant Electoral Effect, and WRTL Has Failed to Show That Its Many Other Means of Expression, Such as the Use of Its PAC, Are Inadequate

Even if the electioneering communication restrictions were subject to an as-applied challenge, WRTL has failed to show that applying those restrictions to WRTL does not serve the compelling interests upon which McConnell relied in upholding the restrictions on their face.

a. WRTL has failed to show that the many available communication options are inadequate for its stated purpose

The Supreme Court has already concluded that the alternatives available to WRTL here are adequate, finding in particular that separate segregated funds provide corporations with a "constitutionally sufficient" means of engaging in express advocacy, and likewise finding that option adequate under BCRA's electioneering communication restrictions. McConnell, 124 S. Ct. at 694-95. See supra pp. 14-19. WRTL provides no basis for this Court to find the Supreme Court's conclusion inapplicable to this case.

WRTL asserts (Mem. at 19) that newspaper ads and letters would be ineffective to express its views on the filibusters of judicial nominees, but it has made liberal use of press releases and e-mail alerts for months in pursuing the filibuster issue. See supra pp. 9-10; infra pp. 32-33. In fact, it is only with the coming of the election campaign period that WRTL decided that it needs broadcast ads, which it calls the "most effective means of reaching constituents quickly and getting their attention," Mem. at 19, to publicize its views on this issue. The suddenness of this change in WRTL's tactics suggests that the change is based on the issue's perceived usefulness as a campaign issue. In general, of course, WRTL has numerous means of

expressing its views on the issue without using broadcast media, including the various print media, the Internet, billboards and other public signs, direct mail, and telephone banks.

WRTL has also failed to show that it could not adequately express its position on judicial nominee filibusters to the public through the first method suggested by the Court, simply not naming Senator Feingold. WRTL argues (Mem. at 19, 27-28) that that option could result in comically ineffective ads, but this is not persuasive. The McConnell record contained many legislation-focused ads, such as those broadcast by Citizens for Better Medicare, that simply asked viewers to contact Congress or take similar action. See McConnell, 251 F.Supp.2d 176, 545-47 (D.D.C. 2003) (Kollar-Kotelly, J.). There are many ways for a group to direct people to a Senator through a broadcast ad without identifying the Senator. These include directing viewers to the Senate's own extensive web site (www.senate.gov), at which contact information is readily available; or directing them to "call the U.S. Senate at (202) 224-3121 and tell them to stop the filibuster," which would likely result in connection to the offices of Senators Feingold or Kohl in seconds. In sum, WRTL presents no evidence that, in devising such an ad, it faces any burden that McConnell did not foresee.

Likewise, WRTL offers no reason why using its federal PAC, which has been in operation since 1983 (Exh. 2), would present any unconstitutional burden. WRTL argues (Mem. at 20) that some corporate charters forbid PACs, and that some issues arise so quickly that an organization without a PAC would have difficulty forming one in time. But those abstract assertions are irrelevant to this as-applied challenge, for WRTL faces neither of these alleged difficulties: It has an active federal PAC, and the judicial nominee filibuster issue in this case has been, in part because of WRTL's own activities, a public issue since as early as March 2003. See WRTL Mem. at 4-5. In fact, WRTL's position is notably weaker than that of the

environmental group in Justice Kennedy's McConnell hypothetical (see supra p. 19), which had no PAC and would assertedly have had difficulty in creating one in the "short time required" to respond to a proposed environmental measure that really was sudden and unexpected. See 124 S. Ct. at 768-69 (Kennedy, J., dissenting). WRTL also fails to provide any evidence why it has a particular need to run these ads with corporate treasury funds, with funds raised from outside its member class as defined in 2 U.S.C. 441b(b)(4), or with funds raised in amounts greater than the existing $5,000 PAC contribution limit in 2 U.S.C. 441a(a)(1)(c). See WRTL Mem. at 30-32. WRTL has been financing its PAC with contributions from its members for two decades, and its public disclosure reports, filed pursuant to 2 U.S.C. 434, show that no donor in this election cycle has so far given its PAC more than $1,000.[8] See Exh. 3. Thus, WRTL has provided no evidence that it suffers any unconstitutional burden under the segregated fund requirements.

WRTL asserts that it does not object to complying with the relevant PAC disclosure and disclaimer requirements, and in support of its alternative Count 2, see Complaint ¶¶ 63-68, states that if necessary it would use a "segregated bank account" containing only funds raised from

[8] The Commission understands that WRTL plans to file a motion on August 10, 2004 — to which the Commission objects — for leave to file an affidavit of its executive director, Barbara L. Lyons. The affidavit was first provided to Commission counsel after 2:00 p.m. today (August 9). In essence, it asserts new facts concerning the purported burden WRTL will face if it has to use its PAC funds to pay for its electioneering communications, i.e., that it would prefer to spend those funds on independent expenditures and contributions. Even if the Court were to consider this affidavit, WRTL fails to provide any evidence that it faces any burden that McConnell did not foresee in holding that a PAC was a constitutionally sufficient means for corporations to make electioneering communications, see 124 S. Ct. at 694-95. As the Court explained long ago in Buckley, the inherent effect of any contribution limit "is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." Buckley, 424 U.S. at 21-22. The Court has emphasized that for PACs in particular, section 441b "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." Beaumont, 539 U.S. at 163 (citations omitted). WRTL provides no reason for this Court to reach a different conclusion here.

individuals. See Mem. at 30-32. But even if WRTL did partially comply with BCRA in these ways, WRTL either would still be financing its ads with corporate treasury funds contrary to 2 U.S.C. 441b, or would be using funds raised outside the member class restrictions of 2 U.S.C. 441b(b)(4) and contribution limits of 2 U.S.C. 441a(a)(1)(c). As noted supra pp. 23-24, Congress clearly considered and rejected the option of allowing Section 501(c)(4) organizations to finance electioneering communications through such a segregated account. See 124 S. Ct. at 698-99. WRTL does not really argue otherwise, but simply repeats its broader argument (Mem. at 32) that the member and contribution limits are inappropriate "if the line drawn by the facts of this case truly identifies grass-roots lobbying." Moreover, WRTL's assurances that it will disclose its donations and disbursements for the ads "at the level at which Congress has asserted any disclosure interest" (Mem. at 32; see id. at 30) are inadequate. BCRA requires disclosure of electioneering communications for which an advertiser spends $10,000 or more, and the identity of donors who contribute $1,000 or more, 2 U.S.C. 434(f)(1), 434(f)(2)(E), (F). But political committees like WRTL's PAC are required to disclose all receipts and disbursements of $200 or more, 2 U.S.C. 434(b)(3), (6). See McConnell, 124 S. Ct. at 690 n.81 (new BCRA disclosure requirements are "actually somewhat less intrusive" than requirements for persons making independent expenditures under 2 U.S.C. 434(c)(2)(C)). Thus, by requiring financing from a separate segregated fund that must report as a political committee, Congress required much more extensive disclosure of the financing of electioneering communications by corporations and unions than those of individuals or unincorporated groups.

b. WRTL's ads contain electoral advocacy

Since 2003, Senator Feingold's role in the filibustering of judicial nominees has been one of the top issues in the Wisconsin United States Senate campaign, so there is little doubt that the

ads WRTL seeks to run with corporate treasury funds will have an electoral effect. While WRTL's ads may well be intended in part to affect congressional activity, it is impossible to believe that WRTL's professed goal of defeating Senator Feingold is not at least one of its motivations for these ads. Moreover, as the Supreme Court explained in McConnell, 124 S. Ct. at 651, the "conclusion that such ads [are] specifically intended to affect election results [is] confirmed by the fact that almost all of them [will be] aired in the 60 days immediately preceding a federal election."

WRTL's concurrent and explicit promotion of the filibuster issue as relevant to the campaign — much as a group with partisan intent might have done using "issue ads" prior to BCRA — discredits WRTL's claims (e.g., Mem. at 28-29) that its ads have nothing to do with the election. Instead, WRTL's actions indicate that the ads are actually one part of a broader effort to use the issue against Senator Feingold in the campaign, which is no surprise considering that WRTL's PAC made independent expenditures against Senator Feingold in his 1992 and 1998 campaigns, and that this year its PAC has endorsed his three main Republican challengers and again called for his defeat. Exh. 4, 8, 9. It makes no difference that WRTL's ads also include issue discussion; most electoral ads do, and "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Buckley, 424 U.S. at 42.

In fact, judicial nominations are rarely a pressing legislative issue in the late summer or fall of a presidential election year. See Geoff Earle, "Senators Spar Over 'Thurmond Rule,'" The Hill, July 21, 2004 (Exh. 27). However, this year there are (according to a press article cited by WRTL itself, Mem. at 4-5) plans to stage a "major floor action in the fall" as a tactic to

highlight alleged Democratic obstructionism and "energize base voters alienated of late on the GOP's inability to break through on the nomination front." Paul Kane, "Fall Showdown Seen on Judges," Roll Call, July 21, 2004 (Exh. 28). In this context, where even the legislative action may be staged for its electoral impact, "[t]he notion that [WRTL's] advertisement[s] were designed purely to discuss the issue of [filibustering of judicial nominees] strains credulity." McConnell, 124 S. Ct. at 689 n.78.

WRTL itself suggests (Mem. at 4-5) that the Senate filibusters were a public issue as early as March 2003. In September 2003, one of Senator Feingold's leading Republican challengers, State Senator Bob Welch, issued a press release harshly criticizing Senator Feingold for his participation in the "partisan filibuster" that allegedly led to the withdrawal of one judicial nominee. Exh. 10. Welch's November 2003 press releases continued this theme. Exh. 11-12; see also Exh. 13 (January 16, 2004, press release). In November 2003, the Milwaukee Journal-Sentinel reported on campaign statements by all three major Republican candidates on the judicial nominations issue; candidate Russ Darrow is quoted as saying that he "think[s] it will be a huge issue," calling Feingold a "leader in the stonewalling effort." Exh. 14. Wisconsin Republican Party Chair Rick Graber is quoted as saying that "[i]t's something the Senate candidates (against Feingold) are talking about at every stop. I think talk radio is talking about it around the state." Id. Republican candidate Tim Michels is quoted as saying nominees are entitled to up or down votes, and that the "issue is rising on people's radar screens." Id.

On March 5, 2004, WRTL's PAC endorsed all three of the above Republican primary candidates vying for Senator Feingold's seat. Exh. 4-7. Its press release stated: "Top Election Priorities: Re-elect President Bush … Send Feingold Packing" (emphasis in original). Exh. 4. The release stressed that the group did "not want Russ Feingold to be able to continue to have the

ability to thwart President Bush's judicial nominees." It also stated that all three endorsed candidates had stated that they "would oppose a filibuster of a judicial nominee" with a positive or neutral Judiciary Committee recommendation. On March 26, 2004, WRTL itself — not its PAC — issued a press release headed: "Feingold's, Kohl's and Kerry's Votes Against Unborn Victims Bill Demonstrates [sic] an Utter Disrespect for Human Life! Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush … Send Feingold Packing!" Exh. 20.[9]

Today, Senator Feingold's role in the filibusters of judicial nominees remains one of the top campaign issues. Republican candidate Bob Welch's web site notes that many "clearly qualified" judicial nominees had their nominations "stonewalled or killed by Russ Feingold" and his Senate allies. Exh. 21 at 6. On Republican candidate Russ Darrow's web site, the fourth of seven "issues" listed assures visitors that Darrow "will not hold judicial nominees hostage." Exh. 22; see also Exh. 23 (Republican Party of Wisconsin's web site). WRTL's own main web site (www.wrtl.org) — which is linked from the www.befair.org site to which the WRTL ads direct viewers and listeners — remains full of the press releases, "e-alerts" and other materials discussed above. WRTL's PAC endorsements of Feingold's opponents remain on the web site as well.

The record on which the Supreme Court and the District Court relied in McConnell amply supports the idea that pre-election ads can have a significant electoral effect even if, like

[9] The text of this release noted specifically that "Feingold is running for re-election in November," and quoted WRTL's "Legislative/PAC Director" as saying that the unborn victims bill "issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" Most recently, in July 2004, WRTL issued a flurry of press releases and "urgent e-alerts" criticizing Senator Feingold for his role in the filibusters. The July 14 and July 21 "e-alerts" and press releases decried the role of both Wisconsin Senators in filibusters of judicial nominees, and urged recipients to tell them to stop the filibusters, with the "e-alerts" providing detailed contact information for the Senators. Exh. 16, 18, 24, 25.

the WRTL ads at issue here, they do not discuss a candidate's record, because of the overall electoral context in which such ads appear. The District Court found, in a portion of its opinion relied on by the Supreme Court for the proposition that the vast majority of ads caught by BCRA had an electioneering purpose, that it was "unrebutted that advertisements naming federal candidates, targeted to their electorate, and aired in the period before the election, influence voters." McConnell, 251 F.Supp.2d at 573 (Kollar-Kotelly, J.). See 124 S. Ct. at 696. For this finding, the District Court relied in part on a prominent political consultant who testified that he did "not believe there are issue ads run immediately before an election that mention[] the candidate that aren't important in the decision-making process of the voter." 251 F.Supp.2d at 573 (Kollar-Kotelly, J.). This consultant elaborated:

> Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads — whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever — are each seen by voters as just one more ingredient thrown into a big cajun stew.

McConnell, 251 F.Supp.2d at 875 (Leon, J.). See also 124 S. Ct. at 696, citing Krasno & Sorauf Rep., McConnell, S. Ct. Joint App. Vol. III, at 1330-48 (at pages 1345-47, experts explain pattern of pure issue ads asking viewers to "call Congress" before September, and ads naming candidates airing after Labor Day) (available at www.supremecourtus.gov/bcra/bcra.html).

In sum, WRTL has failed to carry its burden of showing that it is substantially likely to succeed on the merits of this case.

IV. WRTL FAILS TO DEMONSTRATE IRREPARABLE INJURY

WRTL fails to meet its burden of demonstrating that it will suffer irreparable harm in the absence of a preliminary injunction: (1) it rests its claim of irreparable harm on its mistaken legal

assumption that any allegation of First Amendment harm shows sufficient irreparable harm; (2) ample alternative avenues exist for the communication WRTL wishes to disseminate; (3) WRTL's waiting to the last minute to seek this relief undermines its allegation of urgency; and (4) the relief that WRTL seeks would not remedy its purported fear of subsequent prosecution.

To show irreparable injury, "[a] litigant must do more than merely allege the violation of First Amendment rights." Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987). See also NTEU v. United States, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991). It must also "show that [t]he injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal citation and quotation marks omitted). This harm "must be both certain and great," and "actual and not theoretical." Id.

Moreover, if the requested relief "would alter, not preserve, the status quo … [a plaintiff] must meet a higher standard than [if] the injunction [plaintiff] sought were merely prohibitory." Veitch v. Danzig, 135 F.Supp.2d 32, 35 (D.D.C. 2001). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. at 395; accord KOS Pharmaceuticals v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). WRTL, however, seeks to alter the relative position of the parties while its request for permanent relief is pending by preventing the Commission from enforcing a statutory provision that the Supreme Court has already upheld.

A. WRTL Has Not Demonstrated Imminent And Actual Harm

1. BCRA Does Not Bar WRTL From Communicating Its Message

When it states (Mem. at 33) that "it is currently barred by BCRA" from running its

advertisements, WRTL is " 'simply wrong,' " because the "provision [is not] a 'complete ban' on expression…" McConnell, 124 S. Ct. at 695. As explained supra pp. 27-30, BCRA allows such corporate political speech to be financed through a separate segregated fund, so in the absence of a preliminary injunction WRTL can still speak as it chooses using funds from its PAC. In addition, WRTL has other ways to communicate its message. If WRTL suffers any harm at all, it will be self-inflicted.[10]

First, contrary to WRTL's claims (Mem. at 20), there is no barrier to its running the advertising it proposes, so long as it is financed from its PAC. As discussed supra p. 28, WRTL's abstract arguments about other corporations are irrelevant in this as-applied challenge; WRTL has been operating a PAC for more than two decades, and it has cash on hand. See WRTL PAC, July 2004 Disclosure Report (Exh. 3). It also appears that WRTL PAC's funding has come in amounts far below the $5,000 contribution limit from individuals to PACs. Id. Thus, there appears to be no reason why the same individual contributions WRTL plans to use to fund its advertising campaign could not have been made to its PAC instead.

Second, WRTL could use its corporate treasury to finance its proposed broadcast ads with only minor alterations. Each of the ad scripts, Pls. Exh. A-C, could be run simply by changing "Contact Senators Feingold and Kohl and tell them to oppose the filibuster" to "Contact the members of the Senate and tell them to oppose the filibuster," without mentioning Senator Feingold's name. WRTL objects to this option by asserting that the ads would not be effective if it did not identify specific individuals for the listeners, but it does not provide any

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[10] This case raises no question involving a prior restraint, since that term describes "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993) (internal citation and quotation marks omitted). WRTL does not allege that the Commission has taken any action against it, let alone one that would constitute an attempt to prevent it from broadcasting its planned advertisements.

proof or cite any evidence to support its conclusory claim. WRTL Mem. at 19.

Third, the broadcast ads can be aired as written using WRTL's corporate funds any other time except during the 30-day period before a primary and the 60-day period before a general election. The filibuster issue has been before the Senate for years. See John Cornyn, "Our Broken Judicial Confirmation Process and the Need for Filibuster Reform," 27 Harv. J. L. & Pub. Pol'y 181 (2003) (describing the judicial nominee filibuster issue dating back to 1997). WRTL has not demonstrated that there is anything unique about the electioneering communication time period that suddenly requires it to broadcast advertisements — other than that this is the most intense part of the Senate campaign. See also supra pp. 30-34 (timing of WRTL's ads casts doubt upon their status as bona fide grassroots lobbying).

Finally, the electioneering communication provision applies only to television and radio advertising, 2 U.S.C. 434(f)(3), which leaves open numerous other avenues of public expression for WRTL to use. WRTL complains that television and radio ads are the "most effective means," WRTL Mem. at 19, but again does not present any evidence to establish this claim. Indeed, WRTL does not even allege that it has ever relied on this type of media in the past, nor does it even speculate about why its targeted audience would respond more favorably to broadcast ads than to phone calls, print advertising, billboards, e-mail, or other media. See supra pp. 27-28. In short, what WRTL wrongly characterizes as a "ban" leaves open numerous avenues for WRTL and/or its PAC to disseminate its views and encourage support from the public.

2. WRTL's Alleged First Amendment Injury Does Not Constitute Irreparable Harm

The harm WRTL allegedly faces is, at most, theoretical, not irreparable. It has not demonstrated that it cannot finance its advertisements with money from its PAC, and it has not

even alleged that it is imminently threatened with any governmental action; it does not allege that a complaint has been filed with the Commission about its activities or that the Commission has even considered action of any kind against WRTL. Thus, WRTL is not seeking "merely to preserve the relative positions of the parties until a trial on the merits can be held," Camenisch, 451 U.S. at 395, but is instead seeking an abstract ruling that the Commission cannot even initiate an administrative enforcement investigation involving WRTL's activity in the next few months.[11]

This case is thus entirely different from Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality), the only case upon which WRTL relies in its argument concerning irreparable injury (Mem. at 33). In Elrod the Supreme Court held that employee dismissal based on political party patronage was an unconstitutional infringement on employees' First Amendment Rights. Id. at 372. But in that case, the Court found that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." Id. at 373. Here, however, WRTL has not alleged any governmental action against it of any kind, let alone the kind of imminent or actual threats that were present in Elrod.

Furthermore, the D.C. Circuit has clearly explained that Elrod did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or in fact being

[11] Moreover, because no preliminary injunction can immunize WRTL from the possibility that its planned advertisements may eventually be found unlawful, its perceived "chill" cannot be eliminated by a preliminary injunction that is, by definition, only a form of temporary relief. See infra pp. 40-42.

impaired. NTEU, 927 F.2d at 1254-55; Wagner, 836 F.2d at 576-77 n.76.[12] Specifically, in Christian Knights of the Ku Klux Klan Invisible Empire v. District of Columbia ("KKK"), 919 F.2d 148, 149 (D.C. Cir. 1990), the D.C. Circuit rejected the kind of argument that WRTL makes here, i.e., that the mere allegation of any First Amendment burden constitutes irreparable injury. Instead, the court described Elrod as applicable only to cases in which "First Amendment rights were totally denied by the disputed Government action." Id. at 149-50. In KKK, the Ku Klux Klan sought a preliminary injunction requiring the District of Columbia to issue a parade permit for a planned march from 14th Street to 3rd Street after the government had issued a permit providing only for a shorter march from 7th Street to 3rd Street. Id. at 149. The D.C. Circuit found that the shorter parade provided in the permit did not amount to a total denial of First Amendment rights and that Elrod was not dispositive on irreparable harm. Id. 149-50. In the instant case, where WRTL remains free to pay for its advertisements with PAC funds and use a variety of non-broadcast media to spread its message, and where the Commission has taken no action against it, WRTL has failed to meet its burden of demonstrating irreparable harm.

B. WRTL's Own Delay Belies Its Alleged Harm And Need For Expedited Resolution

Any purported need for immediate relief is belied by WRTL's own delay in bringing this action. SEARCH v. Pena, 1995 WL 669235, *3 (D.D.C. 1995) (when "no specific time frame exists within which plaintiffs need to conduct their [prohibited activities]" it "belie[s] the need

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[12] Other courts have also explained the limited reach of Elrod: An "assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir.), cert. denied 493 U.S. 848 (1989); see also Time Warner Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 924 (2d Cir. 1997) ("[It is often] more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights"); Piscottano v. Murphy, 317 F.Supp.2d 97, 102 (D. Conn. 2004).

for preliminary injunctive relief"); see also Anderson v. FEC, 634 F.2d 3, 5 (1st Cir. 1980) (denying preliminary injunction when "[p]laintiffs did not commence this action until late in the campaign"). BCRA was enacted more than two years ago, and the electioneering communication provisions were upheld by the Supreme Court on December 10, 2003. When "an application for [a] preliminary injunction is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required," Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 80 (4th Cir. 1989) (internal quotation marks omitted), even when First Amendment rights allegedly are at issue. See, e.g., Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 163 (1st Cir. 2004) (plaintiff's "cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief"); Tenacre Foundation v. INS, 78 F.3d 693, 695 n.2 (D.C. Cir 1996) (finding preliminary injunction unwarranted when district court found a seven month time lapse in filing for a preliminary injunction); Time Warner Entertainment Co. v. FCC, 810 F. Supp. 1302, 1307 (D.D.C. 1992).

As explained above, the Senate filibuster of judicial nominees has been a public issue in Wisconsin at least since March of 2003. WRTL has had ample time to seek and receive an advisory opinion from the Commission, see supra pp. 6-7, and its decision to wait until the last minute to file suit provides no basis for relief in the extraordinary form of a preliminary injunction. See Anderson, 634 F.2d at 5 (criticizing presidential candidate, who did not challenge constitutionality of statute and request preliminary injunction until late in the presidential campaign, for having failed to request advisory opinion from FEC).

C. A Preliminary Injunction Will Not Redress WRTL's Purported Harm

The preliminary injunction sought by WRTL provides no real benefit or protection to

WRTL and therefore should not be entered. Even if this Court were to enter the preliminary injunction sought by WRTL, if in subsequent proceedings 441b(b)(2) were found to be constitutional as applied to WRTL by this Court or the Supreme Court — or if the preliminary injunction itself were simply reversed on appeal — WRTL would be subject to a civil enforcement action by the Commission under the retroactivity doctrine. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 532 (1991); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97-98 (1993). Under that doctrine, if upon further review a court determines that a legislative enactment was in fact constitutional, it is applied as if it was always in effect. "[A]n opinion announcing a rule of federal law ... 'appl[ies] retroactively to the litigants then before the Court.'" Harper, 509 U.S. at 97-98 (quoting Beam, 501 U.S. at 539 (opinion of Souter, J.)).

Moreover, "when th[e] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Harper, 509 U.S. at 97. As Justice Scalia has put it, the decision of an Article III court announces the law "as though [it] were 'finding' it — discerning what the law is, rather than decreeing what it is … changed to, or what it will tomorrow be." Beam, 501 U.S. at 549 (Scalia, J., joined by Marshall, J., and Blackmun, J., concurring) (emphasis omitted). Thus, in this case, entry of a preliminary injunction would not remove the prospect of a civil enforcement action by the Commission that WRTL alleges will deter it from using corporate funds to pay for its broadcast advertisements.[13]

[13] Any expense associated with a prospective FEC enforcement proceeding cannot be factored into the irreparable harm analysis. The courts have long held that "'the expense and annoyance'" of agency proceedings do "not constitute irreparable injury," but are merely "'part of the social burden of living under government.'" FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980) (internal citations omitted). Moreover, if enforcement litigation were someday

More specifically, because a preliminary injunction is by its very nature a temporary remedy meant to preserve the status quo, it does not create a permanent or appeal-proof blanket of immunity for actions taken during the period in which it is in effect. "Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution. More fundamentally, federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." Edgar v. MITE Corp., 457 U.S. 624, 648-49 (1982) (Stevens, J. concurring).[14] See also Suster v. Marshall, 149 F.3d 523, 527 (6th Cir. 1998) ("If this Court were to determine that the district court erred in issuing the preliminary injunction, then the legal interests and positions of Plaintiffs … would be compromised as they have received no assurances that grievances will not be pursued.…") (citing Justice Stevens' concurrence in MITE), cert. denied, 525 U.S. 1114 (1999); Donaldson v. United States Dep't of Labor, 930 F.2d 339, 346 (4th Cir. 1991) (parties' action during the period of the preliminary injunction "was taken under the manifest legal and practical risk that their underlying claim might ultimately fail on the merits, thereby exposing them to whatever remedy, other than the preventive one they had forestalled, might then be available") (footnote omitted).

Finally, a preliminary injunction against enforcement by the Commission in this case would do nothing to prevent the Attorney General of the United States from exercising his independent authority to bring a criminal prosecution for knowing and willful violations of the

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commenced against WRTL, it would then have a full opportunity to present its constitutional argument de novo to a federal court before it could be subject to any penalties for its conduct. See 2 U.S.C. 437g(a)(4)-(6).

[14] Although Justice Stevens' concurrence was not joined by any other Justice, only Justices Marshall and Brennan, in dissent, expressed the view that the "injunction would have barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during [the] period" the preliminary injunction was in effect. Id. at 656.

Act. United States v. Int'l Union of Operating Engineers, Local 701, 638 F.2d 1161, 1163-68 (9th Cir. 1979), cert. denied, 444 U.S. 1077 (1980); United States v. Tonry, 433 F.Supp. 620, 622 (E.D. La. 1977); see 2 U.S.C. 437g(d) (criminal penalties for violating FECA); 2 U.S.C 437g(b)(1) ("The Commission shall have exclusive jurisdiction with respect to civil enforcement [of the Act.]") (emphasis added). Because WRTL has only sought a preliminary injunction restraining the Commission, and the Attorney General is not even a party before this Court, the injunction that WRTL seeks would be ineffective in preventing law enforcement proceedings against it even during the limited time a preliminary injunction would be in effect.

V. A PRELIMINARY INJUNCTION WILL CAUSE THE COMMISSION AND THE PUBLIC SUBSTANTIAL HARM

Even a temporary lifting of the electioneering communication requirements for a single entity would undermine the functioning of the 2004 elections, and thus harm the public interest. A preliminary injunction would also harm the Commission by preventing it from enforcing a congressional enactment. The statute has been in effect since 2002; that is the status quo. The administrative rulemaking process is the statutorily designated procedure for creating exemptions, see supra pp. 5-6, 24-26, and an injunction would radically change the status quo, without policy deliberation in the legislative and administrative processes.

As Justice Rehnquist explained in staying a federal court decision enjoining the enforcement of a state statute, "It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice, 1977). The same kind of irreparable injury is suffered nationally when a federal statute cannot be enforced.

"The presumption of constitutionality which attaches to every Act of Congress is not

> merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). "Given the presumption of constitutionality granted to all Acts of Congress," it is … appropriate that the statute remain in effect pending such review. Schweiker v. McClure, 452 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers).

Bowen v. Kendrick, 483 U.S. 1304, 1304-05 (Rehnquist, Circuit Justice, 1987) (staying a district court injunction against enforcement of the Adolescent Family Life Act, 42 U.S.C. 300z et seq.). Chief Justice Rehnquist applied these same principles to the provisions of BCRA at issue here when he denied a motion to enjoin enforcement of these provisions pending decision by the Supreme Court in McConnell. Even though the three-judge district court had already entered judgment finding these provisions unconstitutional in part, Chief Justice Rehnquist concluded:

> Applicants have filed an application to vacate the stay entered by the District Court. After consulting with other members of the Court, I shall deny the application to vacate the stay entered by the District Court. An act of Congress is presumed to be constitutional, see Bowen v. Kendrick, 483 U.S. 1304 (1987), and the Bipartisan Campaign Reform Act should remain in effect until the disposition of this case by the Supreme Court.

McConnell v. FEC, 02A989, 02A990, Slip Op. at 1 (May 23, 2003) (Exh. 26). In sum, both the public and the Commission have an overriding interest in having the statute enforced as it was written by Congress, and WRTL cannot justify a preliminary injunction that would harm that interest.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

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