IN THE SUPREME COURT OF THE UNITED STATES

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No. 04-A194

WISCONSIN RIGHT TO LIFE, INC., APPLICANT

v.

FEDERAL ELECTION COMMISSION.

_____

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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OPPOSITION OF THE FEDERAL ELECTION COMMISSION TO APPLICATION FOR INJUNCTION PENDING APPEAL

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This case concerns a constitutional challenge to Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. Under Section 203, corporations may not use general treasury funds to finance electioneering communications, but they remain free to use segregated funds, or PAC money, for that purpose. In McConnell v. FEC, 124 S. Ct. 619, 695-696 (2003), the Court rejected a facial challenge to Section 203, holding that it serves the compelling governmental purpose of curbing the corrosive effects of corporate spending on elections, while leaving corporations free to finance genuine issue ads by avoiding specific reference to a federal candidate or paying for the advertisement through a PAC.

Wisconsin Right to Life, Inc. (WRTL), filed suit against the

Federal Election Commission (FEC), challenging the constitutionality of Section 203 as applied to television communications that it wants to disseminate using corporate funds. WRTL refers to the ads as "grass roots lobbying." There is no dispute that the ads are within the statutory definition of "electioneering communications." WRTL wants to run the ads within 30 days of the primary election in which Senator Russell Feingold of Wisconsin will seek his party's nomination as a candidate for the United States Senate and 60 days of the general election for that office; the ads would be targeted to a Wisconsin audience; and the ads would specifically refer to Senator Feingold by name. A three-judge district court denied WRTL's request for a preliminary injunction to prevent enforcement of Section 203 as applied to those ads. The district court concluded that WRTL had not shown a likelihood of success on the merits, and it further determined that the balance of harms and the public interest cut against the grant of a preliminary injunction. For the same reasons, the district court denied WRTL's motion for an injunction pending appeal.

WRTL has filed a notice of appeal to this Court from the district court's order denying its motion for a preliminary injunction and has sought an injunction barring enforcement of Section 203 against it pending appeal. That request should be denied. Granting the motion would prevent the enforcement of an Act of Congress that the Court recently upheld; it would alter the status quo, rather than preserve it; and it would effectively give WRTL all the relief it seeks on its appeal -- the right to run its

ads pending the district court's resolution of its claim on the merits. WRTL has not cited a single case in which such relief has been granted by this Court or a single Justice in comparable circumstances. Relief is particularly unwarranted here, because the balance of harms cuts strongly against an injunction, and WRTL has failed to show any likelihood that it will be able to establish on appeal that the district court abused its discretion in failing to issue a preliminary injunction.

STATEMENT

1. Federal law has long prohibited corporations from using general treasury funds to finance expenditures in connection with any federal elections. 2 U.S.C. 441b(a); see FEC v. Beaumont, 539 U.S. 146, 152-54 (2003). At the same time, federal law has allowed a corporation to establish a "separate segregated fund," commonly called a political action committee (PAC), to finance those disbursements. 2 U.S.C. 441b(b)(2)(C). The PAC "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 Local Union No. 562 v. United States, 407 U.S. 385, 414-417 (1972)). PAC money can be used to pay for communications to the general public that express the corporation's views on candidates for federal office.

In FEC v. Massachusetts Citizens for Life, Inc. (MCFL), 479 U.S. 238 (1986), the Court interpreted the Federal Election

Campaign Act's (FECA) prohibition on 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) (2000) (pre-BCRA version). Under Buckley v. Valeo, 424 U.S. 1, 43-44, 77-80 (1976), express advocacy includes the use of such words as "vote for," "elect," "support," "defeat," and "reject." Id. at 44 n.52.

Based on years of experience, Congress determined that the line drawn by Buckley and MCFL was insufficient to vindicate the compelling governmental interest in curbing the distorting effects of corporate spending on elections. Congress specifically concluded 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 devised political communications that avoided express advocacy but that were "clearly intended to influence the election." Id. at 689 (footnote omitted). "[T]he 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 Section 203 of BCRA to correct the deficiencies in the express advocacy test. In place of that test, Congress substituted a restriction on corporations and unions

paying for an "electioneering communication" with money from their general treasuries. 2 U.S.C. 441b(b)(2). An "electioneering communication" is 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]

BCRA authorizes the Federal Election Commission to promulgate regulations that exempt communications from Section 203's restriction, but no ad that promotes, attacks, supports, or opposes an identified federal candidate can qualify for an exemption. See 2 U.S.C. 434(f)(3)(B)(iv). In 2002, the Commission promulgated two exemptions: 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 rulemaking, and, in the two years since that rulemaking began, WRTL has not petitioned the Commission to adopt any additional Section 203 exemptions.

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[1] The definition does not include print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, or other non-broadcast media such as telephone or Internet communications. See McConnell, 124 S. Ct. at 636. BCRA also excludes from its definition of electioneering (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).

Any action for declaratory or injunctive relief that is filed by December 31, 2006, and challenges the constitutionality of any of BCRA's provisions must be filed in the United States District Court for the District of Columbia and heard by a three-judge court convened pursuant to 28 U.S.C. 2284. See 2 U.S.C. 437h note. Under BCRA § 403(a)(3), a "final decision" in such an action shall be reviewed by this Court. BCRA itself does not directly specify the court that has jurisdiction to review orders denying a preliminary injunction. That circumstance is governed by 28 U.S.C. 1253, which provides for review by this Court of any "order * * * denying * * * an interlocutory * * * injunction in any civil action * * * required by any Act of Congress to be heard and determined by a district court of three judges."

2. WRTL is a nonprofit corporation that administers its own separate segregated fund, the WRTL PAC. Memorandum Opinion and Order dated Aug. 17, 2004 (Mem. Op.) at 1 ¶ 1, 2 ¶ 6; Exh. 2 (Statement of Organization) to the FEC's Opposition to WRTL's Motion for a Preliminary Injunction ("Opp. P.I."). In March 2004, WRTL's PAC publicly endorsed three Republican candidates opposing Senator Feingold in the Wisconsin Senate race and announced that Senator Feingold's defeat was a priority. Mem. Op. at 2 ¶¶ 4, 7. WRTL's PAC specifically voiced its desire to "send[] Feingold packing." Id. at 6. WRTL's PAC had actively opposed Feingold's election in 1992 and his re-election in 1998, Opp. P.I., Exh. 8-9, and has made independent expenditures on the Wisconsin Senate election this year, id., Exh. 3. Beginning as early as September

2003, candidates opposing Senator Feingold have made his support of Senate filibusters against judicial nominees a campaign issue. Opp. P.I., at 2 ¶ 5. The Republican Party of Wisconsin has also emphasized that issue in its criticisms of Senator Feingold. Opp. P.I., Exh. 15. In communications to the public, WRTL itself has criticized Senator Feingold for filibustering judicial nominees. Mem. Op. at 2 ¶ 8; Opp. P.I., Exh. 18, 24-25. Until two days before filing its complaint in this case, WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters against judicial nominees. Mem. Op. at 2 ¶ 9.

The Wisconsin primary election for the office for which Senator Feingold is a candidate is scheduled to occur on September 14, 2004, and the general election is scheduled to occur on November 2, 2004. Mem. Op. at 2 ¶ 11. Section 203's restrictions on corporate electioneering therefore took effect on August 15, 2004, thirty days before the primary election, and remain in effect until November 2, 2004.

While opposition to Senate filibusters directed at judicial nominees has been an issue in Wisconsin since at least September 2003, Mem. Op. at 2, and WRTL's interest in that issue arose as least as early as March 2004, see Opp. P.I., Exh 4, WRTL waited until July 28, 2004, to file the present suit. WRTL sought to invalidate Section 203 of BCRA and its implementing regulations as applied to electioneering communications by WRTL that, it alleges, constitute "grass-roots lobbying." Complaint at 13, ¶¶ 1-4. Those communications include three ads that ask listeners to contact

Senator Feingold and Senator Herbert Kohl to express opposition to the filibustering of judicial nominees. Id. at 6 ¶¶ 27-28, 13 ¶¶ 1-4, Exhs. A-C.

WRTL filed a motion in district court seeking a preliminary injunction to prevent the FED from enforcing Section 203 against it. Preliminary Injunction Motion ("P.I. Mot.") at 2. Because WRTL wanted to air its ads within 30 days of Senator Feingold's primary election and within 60 days of the general election, the ads mention Senator Feingold by name, and the ads target a Wisconsin audience, WRTL conceded that the ads fall within BCRA's definition of "electioneering communications." Mem. in Support of P.I. Mot. at 6-7.

3. Pursuant to BCRA § 403 and 28 U.S.C. 2284, a three-judge court was convened. That court unanimously denied WRTL's motion for a preliminary injunction on August 12, 2004, and issued a Memorandum Opinion and Order on August 17, 2004. The court concluded that WRTL had failed to establish a substantial likelihood of success on the merits of its claim. The court began its analysis by emphasizing that the Court in McConnell had "upheld the electioneering communication provisions of the BCRA in their entirety." Mem. Op. at 4. While McConnell involved a facial challenge, the court explained, its reasoning "leaves no room for the kind of 'as applied' challenge WRTL propounds." Ibid. The court derived that understanding in part from the Court's statement in McConnell that there was no need to consider BCRA's backup definition of electioneering communications, because it was

upholding "'all applications' of the primary definition." Ibid. (citing McConnell, 124 S. Ct. at 687 n.73). The three-judge court also found it significant that the McConnell Court had expressly left open "as applied" challenges to certain BCRA provisions other than Section 203. Mem. Op. at 5 (citing McConnell 124 S. Ct. at 669, 677, 692, 717).

The three-judge court further determined that WRTL had failed to establish a likelihood of success because "[t]he facts suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating." Mem. Op. at 6. In particular, WRTL's PAC had announced that "sending Feingold packing" was a priority. Ibid. Feingold's record on filibustering had become a campaign issue. Ibid. And WRTL and WRTL's PAC had used non-broadcast media "to publicize its filibuster message during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media." Ibid.

The three-judge court concluded that the balance of harms favored denial of a preliminary injunction. The court found that "the actual restriction on [WRTL's] freedom of expression was not nearly as great as [WRTL] argues" because BCRA does not prohibit WRTL from disseminating its ads, but simply requires that they be funded through segregated funds. Mem. Op. at 7. The court also noted that WRTL has additional methods available for communicating its anti-filibustering message, including print media, electronic communications, and telephone calls. Id. at 7 n.1. The court

further concluded that the harm that a preliminary injunction would cause to the FEC was "evident" -- it would preclude the FEC from performing its statutory duty to enforce the statute. Id. at 8. Finally, the court concluded that a preliminary injunction would not serve the public interest because it would interfere with the enforcement of a statute that serves a compelling interest. Id. at 8-9 (citing McConnell, 124 S. Ct. at 695-696).

4. WRTL appealed the order denying a preliminary injunction to the United States Court of Appeals for the District of Columbia Circuit. On September 1, 2004, the court of appeals dismissed the appeal for lack of jurisdiction. WRTL filed a notice of appeal to this Court on September 2, 2004, and filed the present application for an injunction pending appeal on September 7, 2004.

ARGUMENT

WRTL's request for an injunction pending appeal should be denied for three reasons. First, an injunction preventing enforcement of an Act of Congress pending appeal to this Court is appropriate only in the most extraordinary circumstances. Second, the balance of equities strongly favors a denial of the extraordinary relief WRTL seeks. And third, WRTL has failed to show any likelihood that it will succeed in establishing on appeal that a unanimous three-judge court abused its discretion in failing to grant a preliminary injunction to prevent enforcement of a presumptively valid Act of Congress that this Court has already upheld.

A. The relief WRTL seeks is extraordinary. "Judicial power

to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires." Turner Broadcasting System, Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) (quoting Heart of Atlanta Motel, Inc. v. United States, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers)). Moreover, "all Acts of Congress" are "presumptively constitutional." Turner Broadcasting, 507 U.S. at 1302 (Rehnquist, C.J., in chambers). Accordingly, in all but the most extraordinary circumstances, an Act of Congress "'should remain in effect pending a final decision on the merits by this Court.'" Ibid. (quoting Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers)).

That principle has special force here. Section 203 is not merely "presumptively constitutional." This Court has already upheld its constitutionality in a facial challenge to Section 203. McConnell, 124 S. Ct. at 695-698. Moreover, a unanimous three-judge court has rejected WRTL's request for a preliminary injunction, finding that WRTL has not established a likelihood of success on the merits, and that court is in the process of adjudicating WRTL's claim on the merits.

Furthermore, in seeking an injunction against enforcement of a presumptively valid Act of Congress, WTRL does not ask for preservation of the status quo; instead, it requests "an order

altering the legal status quo." Turner Broadcasting, 507 U.S. at 1301 (Rehnquist, C.J., in chambers). (emphasis in original). In Turner Broadcasting, the Chief Justice emphasized that the applicants in that case had not cited "any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court." 507 U.S. at 1301. WRTL's application suffers from the same deficiency, which is only magnified by the Court's decision in McConnell.

In addition, if the Court were to grant an injunction pending appeal, it would effectively give WRTL the very relief it seeks on appeal -- the right to run its ads pending the district court's resolution of its constitutional claim on the merits. Granting the relief that WRTL seeks would therefore amount to summary reversal of a unanimous three-judge court's refusal to grant a preliminary injunction against a presumptively valid and previously upheld Act of Congress. It is difficult to imagine the circumstances in which such relief would be appropriate.

B. The equities also strongly counsel against granting the extraordinary relief that WRTL seeks. "The presumption of constitutionality that 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 [the government] in balancing hardships." Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, J., in chambers) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, C.J., in chambers)). Any time an Act of Congress is enjoined, the

government "suffers a form of irreparable injury." See New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J.). See also Opp. P.I., Exh. 26 (Chief Justice Rehnquist denying the application to vacate the stay of judgment entered by the three-judge court in McConnell).

That factor takes on added significance here. As experience demonstrates, corporations and unions have both an overwhelming desire to spend money from their treasuries on elections and the ingenuity to devise ads that superficially appear to be issue ads, but in fact are intended to influence elections. If an injunction pending appeal is granted in this case, it would not escape the notice of the regulated community. Numerous other corporations and unions would likely flood the courts seeking seek similar relief, claiming that their ads are genuine issue ads and that they have a constitutional right to escape Section 203's restrictions as well. The concrete damage to the government that would be caused by an injunction pending appeal could not be more apparent. Granting the injunction would invite an enforcement nightmare in the immediate run up to a national election and undermine the effectiveness of Congress's carefully considered and recently upheld restriction on corporate electioneering.

In contrast, WRTL's delay in filing suit "vitiates much of the force of [its] allegations of irreparable harm." Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers). Opposition to Senate filibusters directed at judicial nominees has been an issue in Wisconsin since at least September

2003, and WRTL's interest in that issue arose as least as early as March 2004. Mem. Op. at 2; Opp. P.I. Exh. 4. Yet WRTL waited until July 28, 2004, less than three weeks before Section 203's restrictions would take effect, to file the present suit. In doing so, WRTL also bypassed the opportunity the statute affords to petition the FEC for an exemption from Section 203's electioneering restrictions. Indeed, the FEC conducted a rulemaking devoted to the consideration of possible exemptions to Section 203 in which WRTL chose not to participate.

Furthermore, WRTL retains ample means to express its opposition to the filibustering of judicial nominees in ways that are consistent with Section 203. WRTL can run the very ads at issue here using PAC money. It can use money from its corporate treasury to fund those very ads, minus the reference to Senator Feingold. And it can use corporate funds to disseminate the same anti-filibustering message through newspaper ads, magazine ads, press releases, pamphlets, mailings, billboards, e-mail, Internet postings, and telephone calls.

WRTL asserts (Appl. 22) that it "has neither the PAC money to do the ads nor the time to raise it on short notice." But WRTL's inability to attract sufficient contributions to its PAC to finance all the political activities that WRTL wishes to undertake can hardly be attributed to Section 203. Nor is Section 203 responsible for WRTL's decision to wait until now to raise PAC money to disseminate ads on an issue that arose as early as September 2003. And, in any event, as discussed above, WRTL may

use corporate funds to disseminate its opposition to judicial filibusters, as long as it does so in a way that does not run afoul of Section 203. The balance of hardships therefore overwhelmingly favors denial of an injunction pending appeal.

C. WRTL's request for an injunction pending appeal should also be denied because it has failed to show a likelihood of success on its appeal. The sole issue on appeal is whether the district court abused its discretion in failing to issue a preliminary injunction against enforcement of Section 203 while it resolved the merits of WRTL's constitutional claim. See Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2783, 2790 (2004). WRTL has fallen far short of showing that it is likely to establish such an abuse. And it certainly has not established an "indisputably clear" abuse of discretion. Turner Broadcasting, 501 U.S. at 1303. To obtain a preliminary injunction, WRTL was required to establish, at a minimum, that it was likely to prevail on the merits of its claim. Doran v. Salem Inn, 422 U.S. 922, 931 (1975). The unanimous three-judge court did not abuse its discretion in concluding that WRTL failed to make that showing.

1. First, WRTL failed to show a likelihood that its claim survives the Court's decision in McConnell. As the district court recognized, while McConnell resolved a facial challenge to Section 203, its reasoning effectively forecloses the kind of as-applied claim made by WRTL here. Of crucial importance here, the Court specifically focused on the bright-line nature of BCRA's definition of electioneering communications and held that the definition

establishes "an easily understood and objectively determinable" standard, curing the vagueness concerns that led the Court in Buckley to interpret the phrases "relative to" a candidate and "for the purpose of influencing" a federal election, when applied to independent expenditures, to mean "express advocacy." 124 S. Ct. at 688-689. It held that Section 203 serves the compelling governmental interest of curbing "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 corporations's political ideas." Id. at 695-696. And it held that while Section 203 may reach some genuine issue ads, "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." Id. at 696.

The import of that analysis is clear. While Section 203 may reach some advertising that addresses an issue without impacting an impending election, that feature of Section 203 is not constitutionally fatal because there is a pressing need for an easily understood and objectively determinable standard, because Section 203 serves a compelling governmental interest of eliminating the distorting effects of corporate wealth on elections, and because Section 203 leaves open constitutionally sufficient means for corporations to disseminate genuine issue ads. In other words, the Court in McConnell upheld BCRA's bright-line

definition even though it acknowledged that there might be a degree of prophylaxis. As the Court explained later in its opinion, 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." McConnell, 124 S. Ct. at 715 (emphases in original). McConnell therefore forecloses WRTL's argument that Section 203 is unconstitutional as applied to advertisements that fall within the statutory definition of electioneering communications without implicating the full range of statutory concerns.

WRTL's specific as-applied challenge also conflicts with the fundamental First Amendment principle that statutes that regulate First Amendment activity should strive for clarity and avoid vagueness. See McConnell, 124 S. Ct. at 687; Buckley, 424 U.S. at 40-42; Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). In place of Section 203's objective and easily administered standard, WRTL would substitute a case-by-case subjective inquiry into whether an ad is the "functional equivalent" of express advocacy. Appl. 18. WRTL fails to explain why its standard is constitutionally preferable to the one that Congress devised. The objective standard Congress devised permits corporations and unions to know whether an ad it proposes to run is covered by Section 203. And it does not create the inherent danger of arbitrary and discriminatory enforcement that arises when law enforcement officials and courts are required to administer a subjective standard on an ad hoc basis. Grayned, 408 U.S. at 108-109. WRTL's

proposed "functional equivalent to express advocacy" standard would not provide clear notice to corporations on what ads are covered, and it would require the FEC and the courts to make enforcement decisions on a subjective and ad hoc basis. Indeed, WRTL's "functional equivalent to express advocacy" standard would resurrect the very vagueness concerns that drove the Court in Buckley to impose the "express advocacy" gloss on the then-existing "relative to" a candidate and "intent to influence" the election standards. See McConnell, 124 S. Ct. at 687-688; Buckley, 424 U.S. at 40-42, 77-80.

WRTL also does not explain why the 16 factors it specifies (Appl. 5, 18) exhaust the factors that are relevant in deciding whether an ad is the functional equivalent of express advocacy. WRTL conveniently leaves off its list some key factors present in its ads. For example, WRTL excludes from its list any inquiry into whether (1) the corporation or its PAC has taken a public position supporting or opposing the candidate's election, (2) the issue discussed in the ad has become a campaign issue, and (3) the corporation has used other methods to disseminate its message on the issue at other times, and has switched to television ads only as election day approaches. Countless other factors would be relevant in deciding whether an ad is the functional equivalent of express advocacy. Moreover, while WRTL identifies as indicative of a non-electioneering ad a tag line urging the listener to call Senator "blank" (Appl. 5), the McConnell Court referred to that same tag line as a paradigmatic way to construct an electioneering

ad. 124 S. Ct. at 650-651. Because WRTL's test leaves off factors that are indicative of an intent to influence elections, and includes other factors that do not negate that intent, there is no assurance that the ads that pass its test will be "genuine issue ads," as opposed to electioneering ads posing as issue ads. Compare MCFL, 479 U.S. at 263.[2]

WRTL's standard also would effectively engraft onto Section 203 something akin to Section 203's backup definition, which defines electioneering as any broadcast communication that "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. 434f(3)(A)(ii). It is difficult to see how the McConnell Court would have had "no occasion to discuss the

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[2] In MCFL, the Court held that a restriction on the use of corporate money to fund independent expenditures cannot be constitutionally applied to corporations that are "formed for the express purpose of promoting political ideas, and [do] not engage in business activities"; have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and are not "established by a business corporation or a labor union, and do not "accept contributions from such entities." 479 U.S. at 264. The Court reasoned that "the concerns underlying the regulation of corporate political activity are simply absent" in those circumstances. Id. at 263. In McConnell, the Court held that Section 203 incorporates the MCFL exemption. McConnell, 124 S. Ct. at 699. Because WRTL concedes that it does not fall within the MCFL exemption, it is not at issue here. And because WRTL has not identified a clearly defined and easily administered category of communications as to which the concerns underlying Section 203 "are simply absent," WRTL's reliance on MCFL (App. 15-16) is entirely misplaced.

backup definition," 124 S. Ct. at 687 n.73 (emphasis added), if, as WRTL argues, that backup definition, or something like it, is constitutionally required.

Finally, the Court in McConnell explicitly left open the possibility of an as-applied challenge to other BCRA provisions, including Title I, part of Title V, and the disclosure requirements in Title II. See 124 S. Ct. at 668 n.52, 669, 677, 692, 718. In the context of an opinion that goes out of its way to explain when its holdings leave open an as-applied challenge, the Court's failure to leave open that possibility in the part of its opinion upholding Section 203 is telling.

WRTL errs in relying (Appl. 10-11) on a footnote of the McConnell decision, 124 S. Ct. at 696 n.88, as evidence that the Court left open an as-applied challenge to Section 203. That footnote simply drew a distinction between statutes that impose restrictions on campaign-related activity for candidate elections, like Section 203, and statutes that impose restrictions on advocacy of ballot measures, like the statutes at issue in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). Whatever the precise meaning of the footnote, nothing in it suggests that the Court meant to leave open the possibility that Section 203's clear, simple, and bright-line test of electioneering would be replaced by a multi-factor, ad hoc, subjective inquiry into whether each and every ad falling within Section 203 is the functional equivalent of

express advocacy.[3]

B. Even if McConnell did not entirely foreclose an as-applied challenge to Section 203, and even if it left open WRTL's particular claim that the Constitution requires an ad hoc and subjective inquiry into whether an ad covered by Section 203 is the functional equivalent of express advocacy, it would not assist WRTL. The district court specifically found that "[t]he facts suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating." Mem. Op. at 6. WRTL does not even attempt to show that the district court abused its discretion in reaching that conclusion. Nor is such a showing possible.

As the district court found, WRTL's PAC has announced that "sending Feingold packing" is a priority and has endorsed opponents seeking to unseat Senator Feingold. Mem. Op. 6. WRTL itself has criticized Senator Feingold's filibustering against judicial nominees. Id. at 2. Senator Feingold's participation in the filibustering of judicial nominees is a well-publicized campaign issue. Ibid. WRTL previously used other print and electronic

[3] In addition to proposing a 16-part multi-factor test, WRTL briefly refers to the proposed exemption that Senators McCain and Feingold submitted to the FEC (Appl. 20). Reliance on that proposal is misplaced for two reasons. First, the McCain-Feingold proposal did not allow the ad to name a specific candidate. Second, the FEC rejected the proposal on the ground that communications falling within it could be perceived to promote, support, attack, or oppose a candidate. 67 Fed. Reg. 65201-65202 (2002). No party, including WRTL, sought review under the APA to challenge that conclusion, and WRTL did not introduce any evidence below that would call the FEC's conclusion into question.

media to publicize its filibuster message, and only switched to television ads as the election approached. Ibid. While WRTL's proposed ads urge listeners to contact Senator Feingold on the issue of filibusters, rather than to vote against him, that tag line is a classic method to seek to influence an election without use of express advocacy. Adding a reference to Wisconsin's other Senator to the tag line does not negate that inference. Coming in the midst of a campaign for office in which WRTL and others have made Senator Feingold's record on judicial filibustering an issue, WRTL's tag line would almost surely be understood as an attempt to promote the defeat of Senator Feingold. And, in light of WRTL's long record of opposition to Senator Feingold, and its sudden desire to disseminate its anti-filibustering message through television ads, rather than other media, it is fair to infer that its ads were intended at least in part to further its stated goal of defeating him.

In sum, WRTL has fallen far short of showing that it should obtain the extraordinary relief that it seeks. Its application for an injunction pending appeal should therefore be denied.

CONCLUSION

The application for an injunction pending appeal should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

SEPTEMBER 2004