UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	
Plaintiff,	**Civil No. 04-1260 (DBS, RWR, RJL)**
v.	**THREE-JUDGE COURT**
FEDERAL ELECTION COMMISSION,	
Defendant.	

MEMORANDUM OF AMICI
SENATOR JOHN McCAIN, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, DEMOCRACY 21, THE CAMPAIGN LEGAL CENTER, AND THE CENTER FOR RESPONSIVE POLITICS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Certificate required by LCvR 7.1 of the Local Rules of the United States District Court for the District of Columbia:

I, the undersigned counsel of record for *amici*, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics which have any outstanding securities in the hands of the public:

None

These representations are made in order that judges of this court may determine the need for recusal.

/s/ Donald J. Simon
_____
Donald J. Simon

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Seven months after this Court denied plaintiff a preliminary injunction because its motion fell "far short" of establishing the basis for such relief, including "little likelihood of success on the merits," plaintiff Wisconsin Right to Life, Inc. (WRTL) now moves for summary judgment.

Plaintiff advances no new arguments entitling it to a different ruling on summary judgment than it received on its motion for a preliminary injunction. In fact, plaintiff's new motion is really just a rehash of the same points previously rejected by this Court, only re-cast as a summary judgment motion. Thus, this Court should reach the same result it did when it rejected plaintiff's motion for a preliminary injunction: "[T]he reasoning of the *McConnell* Court leaves no room for the type of 'as-applied' challenge WRTL propounds

before us." Memorandum Opinion and Order at 4. Accordingly, *amici* respectfully submit that the motion for summary judgment should be denied.

Introduction

A little over a year after the Supreme Court broadly upheld the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub.L. No. 107-155, 116 Stat. 81, WRTL now seeks a *de novo* constitutional review of the same statute as it applies, in Title II, to certain broadcast ads it wants to run. All of the reasons advanced by WRTL in support of its motion for summary judgment were considered and rejected by this Court last summer when it denied WRTL a preliminary injunction. That decision was correct and WRTL's position on these issues should again be rejected.

It is clear from the Supreme Court's opinion in *McConnell v. FEC,* 540 U.S. 93 (2003), that the Court upheld the statute *even as applied to the same types of broadcast advertisements that WRTL proposes here*. Substantively indistinguishable ads were before the Court in *McConnell,* and the Court made clear that, even as applied to such ads, the statute is constitutional. Nothing argued by plaintiff here displaces the disposition of these issues so recently decided by the Supreme Court.

Moreover, as the Supreme Court stated in *McConnell*, corporations like plaintiff WRTL have alternative ways to distribute their messages and still be in compliance with BCRA: they can pay for their broadcast ads, unaltered, to be aired at any time, with funds from a political action committee (PAC) account (which WRTL has long maintained), or they can broadcast ads without reference to a clearly identified federal candidate. *McConnell,* 540 U.S. at 205-06 . Additionally, WRTL can use its corporate treasury funds to disseminate its message through any non-broadcast media, such as newspapers. This

Court's earlier decision took note of these alternatives in concluding that WRTL is not precluded from communicating its message to the general public. See August 17, 2004, Mem. Op. at 7.

The compelling governmental interests cited by the Supreme Court in upholding Title II of BCRA also justify denying the motion for summary judgment . The relief WRTL seeks would set a dangerous precedent that would unravel the "bright line" test drawn by Congress, and upheld by the *McConnell* Court, to remedy the problem caused by the use of so-called sham "issue" ads to evade campaign finance laws that protect the integrity of the Nation's electoral process.

For all these reasons, plaintiff's motion for summary judgment should be denied.

I. Interests of the Amici

As set forth in greater detail in the accompanying Motion for Leave to file this Memorandum, Senator John McCain, Representative Christopher Shays and Representative Martin Meehan are all Members of Congress and are three of the four principal sponsors of the Bipartisan Campaign Reform Act of 2002.[1] They participated as intervening defendants in *McConnell v. FEC,*[2] and have remained active in other proceedings involving the interpretation and implementation of BCRA, including the rulemaking before the Federal

[1] The fourth principal sponsor of BCRA, Senator Russell Feingold, is not participating as *amicus* in this case since WRTL's ads refer to the Senator.

[2] *See* Order of May 3, 2002 in Civ. No. 02-582 (D.D.C.) (three-judge court) (Order granting intervention).

Election Commission on Title II of BCRA, the electioneering communications provision at issue in this case.[3]

Democracy 21, the Campaign Legal Center and the Center for Responsive Politics are all non-profit, non-partisan policy organizations that have long experience in political reforms relating to the role of money in the political process, and specifically to issues related to the enactment, constitutionality and implementation of BCRA. Democracy 21 and the Campaign Legal Center served as counsel to the intervening defendants in *McConnell;* the Center for Responsive Politics submitted an *amicus curiae* brief in that case.

II. Factual Background

Plaintiff Wisconsin Right to Life, Inc., is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code. Plaintiff's Statement of Material Facts ¶1. WRTL is the Wisconsin state affiliate of the National Right to Life Committee. *Id.*

WRTL has registered an affiliated federal political action committee (or PAC) with the Federal Election Commission.[4] The WRTL-PAC is required to raise and spend funds that comply with the contribution limits, source prohibitions and reporting requirements of

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[3] *See* Comments of Senators John McCain, Russell Feingold, Olympia Snowe, Jim Jeffords, and Representatives Christopher Shays and Martin Meehan re: FEC Notice 2002-13, filed August 23, 2002; *see also Shays and Meehan v. FEC,* 337 F.2d 28 (D.D.C. 2004) (challenging various regulations promulgated under BCRA).

[4] The website of the Federal Election Commission contains the statement of organization and public disclosure reports filed by WRTL-PAC dating back to 1993. *See* http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00173278

federal law.[5] It has filed periodic disclosure reports of its federal political activity with the FEC, as required by law.[6]

WRTL proffers the text of three broadcast ads it is aired in the summer of 2004, financed by its corporate treasury funds. It seeks in the future to use its treasury funds to pay for the broadcast of these or similar ads during the pre-election period covered by the electioneering communication provisions of BCRA.

All three ads concern a Senate filibuster against certain of President Bush's judicial nominees. The ads are all critical of "a group of Senators" who are "using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote."[7] The ads say the filibuster is "not fair," "causing gridlock," and resulting in a "state of emergency" in some courts because "qualified candidates aren't getting a chance to serve."[8] The ads urge voters to "contact Senators Feingold and Kohl and tell them to oppose the filibuster."[9]

The WRTL endorses candidates for public office, and participates in political campaigns. With reference to the 2004 elections, the WRTL website contained a page entitled "Endorsed Pro-Life Candidates."[10] That page stated that for the September 14, 2004

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[5] 2 U.S.C. §§ 441a(a) (contribution limits); 441b(a) (source prohibitions); 434 (reporting requirements).

[6] *See* note 5, *supra.*

[7] Text of "Wedding," appended as Exhibit A to Amended Complaint.

[8] Text of "Loan," appended as Exhibit B to Amended Complaint.

[9] Text of "Wedding," "Loan," "Waiting," appended as Exhibit C to Amended Complaint.

[10] *See* http://www.wrtl.org/Sept04%20Primary%20Endorsed%20Candidates.pdf (A copy was attached as Exhibit A to amici's memorandum opposing plaintiff's motion for preliminary injunction. All citations to attached exhibits in this Memorandum are to those exhibits appended to

(footnote continued)

primary election in Wisconsin, WRTL-PAC endorsed Bob Welch, Russ Darrow and Tim Michels, the three Republican candidates who sought the Republican nomination for U.S. Senate, to run against Senator Russell Feingold, the incumbent Senator who was a candidate for reelection last year. *Id.*[11]

The press release from WRTL-PAC announcing its endorsements, dated March 5, 2004, is headed, "Top Election Priorities: Re-elect President Bush . . . Send Feingold Packing."[12] The release states:

> [WRTL-PAC chair Bonnie] Pfaff also stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race. "No category of state or federal lawmaker has more influence on the fate of unborn babies than those individuals who are elected to serve in the United States Senate. Senators not only vote on legislation affecting the sanctity of human life but they have the power to confirm or not confirm the President's judicial nominations . . . . *We do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees*.
> . . . .
> "Russ Feingold is so extreme in his anti-life position and the U.S Senate is so important to the future of unborn babies that *the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections*" said Pfaff.

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amici's memorandum opposing preliminary injunction, which we have not duplicated here in the interest of economy).

[11] In addition, the WRTL-PAC endorsed President George Bush for reelection, and it endorsed a Republican candidate in seven of the eight Wisconsin House districts. (No endorsement is listed for the 7th CD in Wisconsin.) WRTL-PAC also endorsed 14 candidates in the 2004 elections for the Wisconsin State Senate (of whom 13 are Republicans), and 83 candidates for the Wisconsin State Assembly (of whom 80 are Republicans). *See* n.10, *supra.*

Furthermore, on February 11, 2005, the FEC found reason to believe that WRTL had violated campaign finance laws in 2004 by posting endorsements of a federal candidate (George W. Bush) on its corporate website without restricting access and without being reimbursed by its PAC for the costs of posting that endorsement. See MUR # 5522 available at http://eqs.sdrdc.com/eqs/searcheqs?SUBMIT=summary&key=0.

[12] This press release is available on the WRTL website at: http://www.wrtl.org/News04/030504.pdf (emphasis added) (Attached as Exhibit B).

The release also notes that WRTL-PAC asked the three Republican candidates it endorsed "if they would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee." According to the release, "The three candidates all stated they would oppose a filibuster under those circumstances."

A subsequent press release, dated March 26, 2004, issued by WRTL itself (not its PAC) is subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Feingold Packing!"[13] The release quotes WRTL legislative director Susan Armacost saying:

> One of the most important elections in the history of the right to life movement will take place in November," said Armacost. "The people who represent us in Washington should, at the very least, have some modicum of respect for human life. Apparently, Feingold, Kohl and Kerry do not. This issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!"

The WRTL-PAC has a history of opposing Senator Feingold's candidacies and making campaign expenditures to defeat him. In 1992, when Senator Feingold was first a candidate for the Senate, WRTL-PAC made a total of $8,742 in independent expenditures against Senator Feingold or for his opponent, then-Senator Robert Kasten.[14] In that same race, the National Right to Life PAC spent $10,237 for Senator Kasten. In 1998, when Senator Feingold ran for reelection, the WRTL-PAC made independent expenditures in that race of $32,052, about half of which were against Senator Feingold and the other half in

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[13] This press release is available on the WRTL website at: http://www.wrtl.org/News04/032604.pdf (Exhibit C).

[14] All campaign finance totals cited here are based on Center for Responsive Politics analysis of FEC data.

support of his opponent, Rep. Mark Neumann.[15] The National Right to Life PAC in 1998 spent an additional $75,157 in independent expenditures in support of Rep. Neumann. And in the 2004 election cycle, WRTL PAC spent over $7500 for mailings, radio ads and newsletters regarding the 2004 Wisconsin Senate race, with at least $2500 of those funds spent against Senator Feingold. In addition, in 2004, the National Right to Life PAC spent an additional $52,000 in independent expenditures in support of Rep. Michel, Senator Feingold's Senate opponent.

The Senate filibuster against certain judicial nominees selected by President Bush – the subject of the proffered WRTL ads – was an important campaign issue in the 2004 Wisconsin Senate race. For example, a news report in *The Milwaukee Journal Sentinel* in November, 2003, headlined, "3 seeking Feingold seat attack him on judges issue: Republicans see Senate fight as important to voters," noted,

> In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. Feingold and Senate Democrat Herb Kohl both sit on the Judiciary Committee.
>
> "I think it will be a huge issue," said GOP Senate candidate Russ Darrow.[16]

The same article quoted Darrow as calling Senator Feingold "a leader in the stonewalling effort" on judges, and saying, "I think it is the worst kind of politics. Its why many Americans want a new face." Republican Senate candidate Bob Welch is quoted as saying that the filibuster of judges "was a dangerous precedent that would lead to a political

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[15] This total consisted of expenditures of $15,947 against Senator Feingold and $16,105 in expenditures in support of Rep. Neumann, his opponent.

[16] Craig Gilbert, *3 seeking Feingold seat attack him on judge's issue*, THE MILWAUKEE JOURNAL SENTINEL, Nov. 18, 2003. (This article is attached as Exhibit D.)

backlash against Democrats." The third Republican candidate, Tim Michels, said the issue of judicial filibusters "is rising on people's radar screens."[17]

In early 2004, the Wisconsin state Republican Party Chairman, Rick Graber, said of the party's effort to unseat Senator Feingold, "When people in this state understand where he is on things like the Patriot Act, *judicial nominees* and taxes, you're going to see a different perspective, and you'll see numbers move."[18] A news article reporting on the filing of the complaint in this case notes:

> Wisconsin Right to Life has endorsed three of Feingold's potential opponents in the Sept. 14 primary. Those three – Russ Darrow Jr. of West Bend, Tim Michels of Oconomowoc and state Sen. Bob Welch (R-Redgranite) – also have been critical of Feingold's stand on abortion rights and *judicial nominees* and have mocked the reform legislation promoted by

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[17] All three Republican Senate candidates who vied for the nomination in Wisconsin to face Senator Feingold in November 2004 attacked him on the judges issue in the course of their campaign. For example, in a statement issued on January 16, 2004, Bob Welch said that "[i]t's a shame that the persistent obstruction of the President's judicial nominees by Russ Feingold and his left-wing allies has forced President Bush to take the step of using a recess appointment . . . . " and called Feingold's position "back room partisan politics at its worst." "Welch Campaign: Statement on the Recess Appointment of Charles Pickering to the US Court of Appeals" (Jan. 16, 2004) *at* http://WisPolitics.com, Press Releases (Attached as Exhibit E). A press release by Tim Michels said Senator Feingold's position on judicial nominees was "his usual partisan game playing," and that he "has a long history of talking out of both sides of his mouth on this issue." "Michels Campaign: Calls on Feingold to End Hypocrisy," (Nov. 11, 2003) *at* http://WisPolitics.com, Press Releases (Attached as Exhibit F). On his campaign website, Russ Darrow lists seven "issues" in the Senate race, including "The right Russ [i.e., Russ Darrow] will not hold judicial nominations hostage." (Attached as Exhibit G). In an interview, Darrow criticized Senator Feingold for "stonewalling the federal judges." He added, "I would never vote to stonewall any judge nominations. I would, if I were on the Judiciary Committee, as he is, I would want to see the vote go through to yes/no votes. That's our process in the United States." "Russ Darrow: Doing Retail Politics," (Jan. 26, 2004) *at* http://WisPolitics.com (Attached as Exhibit H).

[18] Stacy Forster, *Badger Poll gives Feingold 52%, but it's still awfully early*, THE MILWAUKEE JOURNAL SENTINEL, Feb. 9, 2004 (emphasis added). (This article is attached as Exhibit I.) In a poll on the state party website, the state party asks "What is the #1 reason why Russ Feingold should be voted out of office in 2004," and lists as one of the four possible responses, "His obstruction of President Bush's judicial nominees." http://www.wisgop.org/ (The website page is attached as Exhibit J).

> Feingold, which became law in 2002 and was upheld 5-4 by the Supreme Court last year.[19]

The role of judicial filibusters as a campaign issue in the Wisconsin Senate race also reflected a national political strategy to inject this issue into the 2004 Senate elections. In discussing the Republican efforts to stop the filibusters, for instance, then-Senate Majority Whip Mitch McConnell said, "I think it's probably most likely to be solved by the American people in the next election, given the difficulty of changing the rules here in the Senate."[20]

Initially, WRTL had planned to air its ads in a period that was either 30 days prior to the September 14 primary election in Wisconsin, or 60 days prior to the November 2 general election, or both. Amended Compl. ¶ 12 These ads referred by name to Senator Feingold, a candidate who was on the ballot in both elections, and they would have been aired within Wisconsin, to the electorate that voted for or against Senator Feingold in those elections.

As such, for the reasons explained below, WRTL's broadcast ads, when aired within the period 30 days prior to the primary or 60 days prior to the general election, are "electioneering communications" under section 201 of BCRA, 2 U.S.C. § 434(f)(3), and thus cannot be funded with WRTL's corporate treasury funds under section 203 of BCRA, *id.* at § 441b(b). WRTL could have, however, used its PAC funds to pay for these same ads.

WRTL sought a preliminary injunction from this Court last August that would have allowed it to fund those ads with its corporate treasury funds instead of its PAC funds, and to broadcast those ads within the proscribed blackout period. This Court denied WRTL's

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[19] G. Zielinski, *Group opposes campaign limits*, THE MILWAUKEE JOURNAL SENTINEL (July 27, 2004) (emphasis added). (This article is attached as Exhibit K.)

[20] Charles Hurt and Stephen Dinan, *Senate GOP sees little hope to snap judicial filibuster*, THE WASHINGTON TIMES, Aug. 6, 2003. (This article is attached as Exhibit L.)

motion for an injunction. In doing so, this three-judge Court found that the reasoning of the Supreme Court in *McConnell* left "no room for the kind of 'as applied' challenge WRTL propounds before us." Memorandum Opinion and Order at 4. This Court observed that WRTL had "little likelihood of success on the merits" because WRTL's advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id*., at 6 (citation omitted). Indeed, this Court stated that the *McConnell* "Court's deliberate declaration of its ruling as encompassing '*all applications* of the primary definition [of electioneering communications]' suggests little likelihood of success for an 'as applied' challenge to some applications of that definition, such as the one plaintiff brings before us." *Id*., at 4-5 (emphasis in original).

On the issue of whether WRTL had an alternative method to communicate its message, this Court's earlier decision correctly found that "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs)." Memorandum Opinion at 7 (footnote omitted). This Court also noted that WRTL also could communicate its message during the blackout period using print media (such as newspapers ads or billboards), electronic media (such as email and internet), or telephone calls. *Id*. This Court thus rejected WRTL's effort to declare 2 U.S.C. §441b unconstitutional, concluding that it is "[o]ur reading of *McConnell* that as applied challenges to 441 b are foreclosed[.]" *Id*., at 6. [21]

[21] On September 14, 2004, Chief Justice Rehnquist denied an application from WRTL seeking an injunction pending appeal of this Court's denial of its motion for a preliminary injunction, calling WRTL's request "an extraordinary remedy, particularly when this Court recently held the Act facially constitutional…." *Wisconsin Right to Life v. FEC*, No. 04A194, 542 U.S. __, 125 S. Ct. 2 (Sept. 14, 2004) (On Application for Injunction).

III. Summary of Argument

WRTL's motion for summary judgment should be denied. The Supreme Court has recently upheld the electioneering communication provisions of BCRA in their entirety. *McConnell v. FEC*, 540 U.S. at 188-211. This Court's August 18, 2004 decision correctly observes that the Supreme Court's opinion in *McConnell* leaves no room for the kind of "as applied" challenge that WRTL mounts here, for the Supreme Court expressly stated that it was upholding "all applications" of the statutory "bright line" test defining electioneering communications, 540 U.S. at 190, n.73, and noted that, "in the future corporations and unions may finance genuine issue ads during those time frames . . . by paying for the ad from a segregated fund." *Id.* at 206.

WRTL has a viable alternative means of communicating its message. "The ability to form and administer separate segregated funds. . .has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view . . . ." *McConnell, supra*, 540 U.S. at 203. Section 203 of BCRA, 2 U.S.C. § 441b(b)(2), extends this "constitutionally sufficient" alternative for corporate speech to "electioneering communications" – broadcast ads that refer to clearly identified candidates in the time period right before that candidate's election. Corporations such as WRTL "may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.*

This longstanding "PAC option," *FEC v. Beaumont*, 539 U.S. 146, 162-63 (2003), has applied not just to for-profit business corporations, but to non-profit advocacy corporations as well, for it " prevents such corporations from serving as conduits for the type

of direct spending that creates a threat to the political marketplace." *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 264 (1986).

Accordingly, WRTL has the "constitutionally sufficient" option to air its proffered advertisements, unaltered, in any media, at any time, by paying for those broadcasts using funds from a PAC account that it has long maintained. Alternatively, it can use its general corporate treasury funds, without limit, to broadcast ads that do not refer to a clearly identified candidate, or to disseminate in non-broadcast media its ads about candidates in the pre-election period. These available and viable alternative means of communication warrant rejection of WRTL's position that that its constitutional rights are being violated because it cannot broadcast its ads using general treasury funds during the pre-election period.

IV. Argument

A. Plaintiff Cannot Demonstrate a Substantial Likelihood of Success On the Merits.

1. The Supreme Court in *McConnell* upheld the constitutionality of BCRA's "bright line" test for regulating all "electioneering communications."

a. The Statutory Scheme.

Since 1907, federal law has prohibited corporations from making contributions to federal candidates.[22] This prohibition was expanded in 1925,[23] and then extended to cover labor unions during World War II.[24] In the Taft-Hartley Act of 1947, these prohibitions were strengthened and expanded to cover corporate and union "expenditures" as well as

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[22] Tillman Act, ch. 420, 34 Stat 864. The history of these provisions is recounted in *McConnell*, 124 S.Ct. at 644-46, and also in *FEC v. National Right to Work Committee,* 459 U.S. 197, 209 (1982).

[23] Federal Corrupt Practices Act, §§ 301, 313, 43 Stat. 1070, 1074 (1925).

[24] Hatch Act, 54 Stat. 767; *see also* War Labor Disputes Act of 1943, § 9, 57 Stat. 167.

contributions.[25] These provisions were codified at 2 U.S.C. § 441b(a) in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, and in the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. The Supreme Court has noted that Congress' "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *McConnell*, 540 U.S. at 117, quoting *FEC v. National Right to Work Committee,* 459 U.S. 197, 209 (1982) (citations omitted).

In *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 249 (1986) (*MCFL*), the Supreme Court construed the prohibition on corporate or union expenditures "in connection with" a federal election, 2 U.S.C. § 441b(a), to encompass only "express advocacy," that is, direct exhortations to support or oppose a candidate, such as "vote for" or "vote against." The Court's rationale in *MCFL* was based on its earlier discussion in *Buckley v. Valeo,* 424 U.S. 1, 40-43 (1976), where, in order to avoid constitutionally impermissible vagueness, it construed a statutory restriction on expenditures "relative to" a candidate to include "only explicit words of advocacy of the election or defeat of a candidate."

MCFL also highlights another important point: that with the exception of a narrow class of corporations "that have features more akin to voluntary political associations than business firms," 479 U.S. at 263, the prohibitions on election-related corporate spending *apply to non-profit advocacy corporations such as WRTL as fully as they do to for-profit business corporations*.[26] As the Court subsequently explained in *FEC v. Beaumont,* 539 U.S.

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[25] Labor Management Relations Act of 1947, 61 Stat. 136.

[26] WRTL states in its Amended Complaint (¶ 23) and in its memorandum in support of motion for summary judgment (p. 4) that it does not qualify for the *MCFL* exemption. WRTL receives funds from for-profit business corporations (see Summary Judgment Memorandum at 35), (footnote continued)

146, 148 (2003), "concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from 'state-created advantages' and may well be able to amass substantial political 'war chests.'" *Id.* at 154 (citations omitted). Non-profit advocacy corporations can also serve as conduits for the spending of funds they receive from for-profit corporate treasuries. *MCFL*, 479 U.S. at 264.

Corporations and unions that want to engage in political advocacy can do so from separate segregated funds, or PAC's, that the law permits them to establish. 2 U.S.C. § 441b(b)(2)(C). Such PACs are free to raise funds voluntarily contributed by individuals, subject to regulation, for unlimited spending on speech to influence federal elections. The Supreme Court has repeatedly upheld the constitutionality of requiring corporate and union speech in connection with elections to be made through PAC accounts. This applies as well to non-profit advocacy corporations:

> [A] unanimous Court in *National Right to Work* 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. See 459 U.S. at 201-202. There is no reason to think the burden on advocacy corporations is any greater today, or to reach a different conclusion here.

McConnell v. FEC, 540 U.S. at 210, n.91 (quoting *FEC v. Beaumont,* 539 U.S. 163).

b. <u>The Enactment of BCRA.</u>

For many years, the "express advocacy" limitation on the scope of section 441b worked well. Despite isolated instances of circumvention, it was generally understood that

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and is thus ineligible for MCFL status. See 11 C.F.R. § 114.10(c)(2), (4); *see also* 479 U.S. at 264 ("Third, MCFL was not established by a business corporation or a labor union, *and it is its policy not to accept contributions from such entities*. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.") (emphasis added).

ads praising or criticizing federal candidates were subject to the ban on funding from corporate or union treasuries.

However, as Judge Kollar-Kotelly noted in her separate opinion as part of the three-judge district court in *McConnell*:

> Since 1996, this longstanding prohibition has become a fiction, with abuse so overt as to openly mock the intent of the law. The record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley's* "magic words" of express advocacy.[27]

On appeal in *McConnell*, the Supreme Court added, "Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA." 540 U.S. at 127-28. Much of this spending was done by non-profit advocacy groups, like WRTL, incorporated under section 501(c)(4) of the tax code.[28]

The result, from 1996 until the enactment of BCRA in 2002, was a rapid and widespread circumvention of section 441b. Corporate and union treasury funds, in escalating amounts, were used to fund candidate-specific advertisements aired right before an election. The ads were treated as outside the scope of section 441b so long as the ads eschewed "magic words" of express advocacy. The spenders claimed that such ads were "issue ads," no matter how directly they promoted or attacked a candidate by name, and no matter how soon before the candidate's election they were aired to the candidate's electorate.

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[27] *McConnell v. FEC,* 251 F. Supp. 2d 591-2 (D.D.C. 2003) (three judge court) (Op. of Kollar-Kotelly, J).

[28] *See* 251 F. Supp. 2d at 527 (Op. of Kollar-Kotelly, J.) (discussing spending by advocacy groups).

Congress in enacting BCRA realized what the Supreme Court and all three judges on the *McConnell* district court also subsequently concluded: that the express advocacy test was "functionally meaningless." 540 U.S. at 193 (citing to the district court opinions). The Court said:

> Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley's* express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption . . . .

Id.

Congress enacted the electioneering communication provisions of Title II of BCRA in order to address this problem, to restore efficacy to the longstanding ban on corporate and union treasury expenditures, and "to correct the flaws it found in the existing system." *Id.*

Heeding the Court's admonition in *Buckley* and *MCFL* that a statutory regulation of corporate and union spending must avoid unconstitutional vagueness, Congress enacted a "bright line" test to regulate such spending. By reference only to objective criteria, Congress defined "electioneering communication[s]" as encompassing those ads which meet four standards:

i. a broadcast, cable or satellite communication,

ii. that refers to a clearly identified candidate for federal office, and

iii. that is made in a period 30 days prior to a primary election or 60 days prior to a general election for that candidate, and

iv. is targeted to the electorate of that candidate.

2 U.S.C. § 434(f)(3)(A).

Such "electioneering communication[s]" are of course not banned. Under section 201 of BCRA, they are instead subject to certain disclosure requirements. 2 U.S.C. § 434(g). And under section 203 of BCRA, in the case of corporate or union sponsors, they are subject to the same source requirement imposed on "express advocacy" communications: that they be funded with PAC funds raised from voluntary contributions by individuals, and not from corporate or union treasury funds. *Id.* at §§ 441b(b)(2); 441b(c)(1).

c. The Supreme Court's Decision.

McConnell upheld Title II in its entirety. And it upheld the definition of "electioneering communication" in a discussion that necessarily addresses, and also plainly rejects, the "as applied" challenge made here by plaintiff.

The Court conclusively rejected the *McConnell* plaintiffs' central argument that the "express advocacy" test was a constitutional mandate, emphasizing that it was instead "an endpoint of statutory interpretation, not a first principle of constitutional law." 540 U.S. at 190. The Court said that in *Buckley,* and then again in *MCFL*, it had resorted to interpreting the statutory language at issue as limited in scope to express advocacy in order to save the statute from being held void for vagueness, but those cases "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.* at 192-93.

The *McConnell* plaintiffs challenged the BCRA "bright line" test as overbroad, the Court noted, by arguing that the justifications which support the regulation of express advocacy "do not apply to significant quantities of speech encompassed by the definition of electioneering communications." 540 U.S. at 206. But this argument fails, the Court said,

"to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.*

The Court observed that the "precise percentage of issue ads" that identified a candidate and were aired in the pre-election period "but had no electioneering purpose" is a matter of dispute, but noted that "the vast majority of ads clearly had such a purpose." *Id.* But even in acknowledging that a small minority of ads might *not* have that purpose, the Court nonetheless said that the inclusion of such ads within the scope of regulated electioneering communications was permissible:

> 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.

Id. (emphasis added). On this basis the Court concluded that plaintiffs had not carried their burden of proving the statute was overbroad.

The Court thus expressly recognized that the statute permissibly extends even to "genuine issue ads." The Court held that the alternatives available to a corporate or union speaker to finance such ads serve adequately to protect the speaker's constitutional rights. It did not hold that the section 203 would be unconstitutional as applied to such ads.[29]

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[29] The Court additionally sustained the statute under the facial overbreadth test set forth in *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973), and held that "[e]ven if we assumed" that BCRA "will inhibit some constitutionally protected" speech, the statute would not be facially invalid unless it did so substantially. *Id.* at 207. The Court concluded that "[f]ar from establishing that BCRA's application to pure issue ads is substantial, . . . the record strongly supports the contrary conclusion." 540 U.S. at 207. This alternative ground for upholding the definition of "electioneering communication" does not supplant the Court's companion holding that rejects "as applied" challenges to even insubstantial instances of statutory overbreadth, because such overbreadth can be cured by the alternatives permitted by the statute.

The Court's holding on Title II is twice reinforced in the opinion. First, the Court notes that it need not rule on the constitutionality of the so-called statutory "backup" definition of electioneering communication, 2 U.S.C. § 434(f)(3)(A)(i),[30] because "*We uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 540 U.S. at 190, n.73 (emphasis added). The Court's description of its ruling as encompassing "all applications of the primary definition" leaves no room for this "as applied" challenge to *some* applications of the primary definition, such as the ones WRTL proffers here.

So too, the Court's opinion upholding section 504 of BCRA, which imposes certain recordkeeping requirements on broadcasters, refers back to its Title II ruling in the same fashion, and describes it as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey message of support or opposition." *Id.* at 239 (Maj. Op. of Breyer, J) (emphasis in original).

This description of its ruling on section 203 – especially the Court's use of emphasis – reinforces the conclusion that *McConnell* upheld the regulation of *all* electioneering communications even if they not always – but only *often* – suggest an election-related message. Even those ads which do not necessarily convey that message are still permissibly regulated by the statute because they fall within the scope of the statutory "bright line" test, and because the statute provides acceptable alternatives for the speakers to use.

Finally, this reading of the *McConnell* Court's treatment of section 203 is also reinforced by the Court's explicit acknowledgment that *other* parts of the statute, though sustained on a facial basis, may be scrutinized by future "as applied" challenges. Thus, for

[30] The "backup definition" would take effect only if the primary definition were held to be "constitutionally insufficient." *Id.*

instance, in upholding the Title I provision of BCRA that restricts state parties from spending soft money for "federal election activities," 2 U.S.C. § 441i(b), the Court said that if a state party in the future can show that the impact of the restriction would be "so radical" as to violate constitutional standards, "as applied challenges remain available." 540 U.S. at 173. In upholding the ban on soft money fundraising by national party committees, 2 U.S.C. § 441i(a), as it applies to minor parties, the Court noted that "a nascent or struggling minor party can bring an as-applied challenge" if the ban prevents it from raising sufficient resources to be effective. 540 U.S. at 159. The Court upheld the Title V recordkeeping requirement on broadcasters, but noted that broadcasters "remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied." *Id.* at 242. And in the section 201 disclosure provisions of Title II, the Court rejected a facial attack to the requirement that the names of donors whose funds are used for electioneering communications be reported to the FEC, where the argument was made that such disclosure might subject the donors to "threats, harassment, and reprisals." 540 U.S. at 198, (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). Instead, the Court expressly noted that its ruling "does not foreclose possible future challenges to particular applications of that [disclosure] requirement" if there were evidence of such harassment in a particular case. *Id.* at 199.

All this stands in sharp contrast to the Court's treatment of section 203, where it failed to mention, much less endorse, the possibility of future "as applied" challenges. To the contrary, the Court explicitly approved "all applications" of section 203, even to "genuine" issue ads. *Id.* at 206.

Thus, the assumption underlying plaintiff's claim here is wrong. WRTL argues that its proposed broadcast ads cannot be regulated as electioneering communications because they are "genuine" issue ads and "authentic grass-roots lobbying ads." For reasons discussed below, *see* pp. 27-30, *infra,* these characterizations of plaintiff's ads are wrong. But even if accepted at face value, *McConnell* makes plain that the Court understood section 203 might, on occasion, encompass such "genuine" issue ads – and that the statute is constitutional, even as applied to such ads.[31]

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[31] Plaintiff's position in this case amounts to little more than a fundamental disagreement that WRTL has with the Supreme Court's holding in *McConnell*. Thus, many of plaintiff's constitutional arguments involve no more than an extended criticism of the Court's Title II analysis in *McConnell.* According to plaintiff, the Court "brushed aside" concerns about issue ads. Plaintiff's Memorandum in Support of Motion for Summary Judgment at 11. The Court "obscured" its analysis by "simply referring to an *overbreadth* challenge" *Id.* at 12 (emphasis in original). According to WRTL, the *McConnell* Court mishandled the question of whether Title II of BCRA was narrowly tailored to meet a compelling governmental interest by improperly analyzing instead whether Title II's reach was overbroad, and "slid past" the former into the latter. *Id.* at 14.

But these criticisms of *McConnell* are off the mark, and simply reflect plaintiff's rejection of the holding by the Supreme Court. At bottom, plaintiff faults the Court for not sharply separating its analysis of whether Title II is "narrowly tailored" to serve compelling governmental interests, from its analysis of whether the statute is impermissibly overbroad in doing so. *Id*. at 14. But these criticisms are wrong because the Court appropriately addressed both questions in upholding the statute: it first found that the compelling interests that apply to the regulation of express advocacy ads "apply equally" to electioneering communications because such ads "are the functional equivalent of express advocacy." 540 U.S. at 105. To this extent the statute meets the narrow tailoring test. The Court then found the statute not substantially overbroad because, "[f]ar from establishing that BCRA's application to pure issue ads is substantial . . . . the record strongly supports the contrary conclusion." *Id.* at 207.

More than anything else, plaintiff seems troubled simply by its perception that the Court's analysis is too brief. But brevity is not the equivalent of error. Given the clarity of the Court's past rulings on corporate spending to influence elections, and the alternative available to corporate speakers to use PAC money to fund electioneering communications, the Court simply did not find the constitutional questions to require the lengthy explanation that plaintiff apparently desires or believes was necessary. *Id*. at 204 ("Because 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."(citations omitted)).

In any event, the relative brevity of the Court's analysis, or the fact that plaintiff disagrees with the analysis, does not detract from the Court's holding, or the binding precedent it establishes.

(footnote continued)

2. Plaintiff WRTL is re-litigating arguments about "grassroots lobbying" that were squarely presented to the Supreme Court in *McConnell*, and rejected.

WRTL's claim in this case is simply a reprise of claims made to, and rejected by, the Supreme Court in *McConnell*. The Title II plaintiffs in *McConnell*, like WRTL here, claimed that many of the ads encompassed by the definition of electioneering communications were in fact intended to have legislative, not electoral, impacts. Senator Mitch McConnell's Supreme Court brief, for instance, quoted several ads which it said "all sought to lobby and pressure federal officeholders on issues of unquestioned importance to the groups that sponsor them."[32] The ads cited to the Supreme Court in *McConnell* share the same characteristics as the proposed electioneering communications of WRTL– ads that discuss a pending legislative issue and that only urge the public to call a Member and tell him or her to vote one way or the other on the issue.

For instance, we attach as Exhibit M the story boards of two ads that were among a small number of ads attached to Senator McConnell's opening brief to the Court in McConnell. The first ad reads:

> [Announcer] It's almost too much to swallow. Year after year the federal government takes a bigger piece of the pie.
>
> In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now, with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough.

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[32] Brief for Appellants/Cross-Appellees Senator Mitch McConnell *et al.*, *McConnell v. FEC*, No. 02-1674 (July 8, 2003) at 52. All of the Supreme Court briefs in the *McConnell* case are available on the Court's website at: http://www.supremecourtus.gov/bcra/bcra.html.

> Call Harry Reid and John Ensign, tell them no matter who goes to Washington you want them to cut your taxes. Otherwise they'll be nothing left but crumbs.[33]

Another ad featured for the Court as "a good example of what is lost under BCRA," McConnell Br. at 51, is:

> [Announcer]: Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets draining American jobs.
>
> Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal.
>
> Tell Congresswoman Myrick to vote "No" and keep China on probation until this label stands for fairness.
>
> Paid for by the AFL-CIO.[34]

Both of these ads presented to the Court have the same essential characteristics as the ads proffered here by plaintiff WRTL: they discuss a legislative issue and urge viewers to call a clearly identified candidate, without mentioning the candidate's past position on the issue.

The *McConnell* plaintiffs – including the National Right to Life Committee (NRLC), represented by plaintiff's counsel here – pressed with special vigor the argument that Title II, if upheld, would unconstitutionally impinge on efforts to influence legislation, particularly grassroots lobbying. The NRLC reply brief in *McConnell*, for instance, put squarely before the Supreme Court the same issues WRTL now raises here – the alleged unconstitutional impact of Title II on grassroots lobbying. Indeed, NRLC there said that Title II will "eliminate a whole *category* of American political speech by citizen groups for nearly a fourth of the year":

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[33] McConnell Brief, App. 4a.

[34] McConnell Brief, App 2a.

> That whole category of speech is *grass roots lobbying,* in which Citizens Associated for Amplified Free Expression, Inc. – during the bustling days of legislative activity just before the fall election as representatives try to ram through bills to buy votes before taking a recess to run home for final campaigning before the polls open – buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to "Call Representative Swing-Vote and ask her to vote for the bill sponsored by Representatives Commonweal and Controversy."
>
> Defendants [sic] assertions that (1) "'genuine' issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA," FEC Br. 93, and (2) that "it is not necessary to refer to 'specific candidates for federal office in order to create effective [issue] ads." *id.* (citation omitted), simply does not apply to grass roots lobbying. And citizen groups need to remain free to engage in grass roots lobbying through the media that Defendants concede is the most effective, FEC Br. 93, during the time when legislation is being considered, which often can and often does fall during the days just before an election – the timing of which is wholly beyond the control of citizen groups and wholly in the hands of incumbent politicians.
>
> Grass roots lobbying is a fundamental part of our system of representative government that must remain available whenever it is needed. It is not "a few 'marginal applications.'" FEC Br. 105 (citation omitted). And it is profoundly, negatively affected by Title II of BCRA.[35]

The National Rifle Association made much the same type of grassroots lobbying argument in its brief challenging Title II:

> Title II's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections. The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal

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[35] Reply Brief of Appellants/Cross-Appellees National Right to Life Committee, *et al.*, *National Right to Life Committee, Inc. v. FEC*, No. 02-1733 (Aug. 21, 2003) at 6-7 (emphasis in original). The argument that WRTL makes in this case about its so-called grass roots lobbying effort is remarkably similar to the arguments made by NRTL and rejected by the Supreme Court in *McConnell*. WRTL even employs similar language to the NRTL's brief quoted above: "[P]eriods before elections often contain peak legislative activity, as legislators push through legislation before rushing off for campaigning. Human nature being what it is, some will use the cover of blackout periods to engage in legislative activity unpopular with constituents without sentinel groups raising the hue and cry to organize sovereign response." Plaintiff's Mem. at 2-3.

> purposes: (1) to educate the public about Second Amendment and related firearm issues, including pending legislative initiatives . . . .
>
> . . . Broadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate Title II. Just as this Court has recognized that speech pertaining to referenda does not raise a substantial concern about corruption, so too speech urging the passage or defeat of pending legislation does not carry any threat of corrupting the political process.[36]

To the same effect, the AFL-CIO complained that Title II "poses an immediate, direct and substantial threat to the AFL-CIO's historic role in advocating for progressive social legislation, influencing other government actions affecting workers and their families, and educating union members and the general public about these issues."[37] The brief characterized the AFL's ads within the scope of Title II as follows:

> The AFL-CIO spends millions of dollars annually for television, radio and cable advertisements on a wide variety of social and economic issues. This program began in the wake of the 1994 national election, when the organization ran numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress's attempts to enact the "Contract with America," including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs . . . . Virtually all of these ads urged viewers or listeners to call named Members of Congress to oppose the budget cuts . . . . Several of these ads would have been banned if BCRA § 203 had been in effect . . . .[38]

The Supreme Court rejected these arguments in *McConnell,* upholding Title II in its entirety, and concluding that even grassroots lobbying ads were permissibly encompassed within Title II. The Court explicitly recognized that even though Title II may in rare cases

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[36] Brief for Appellants the National Rifle Association, *et al.*, *National Rifle Association v. FEC*, No. 02-1675 (July 8, 2003) at 35-6 (emphasis in original).

[37] Brief for AFL-CIO Appellants/Cross Appellees, *American Federation of Labor and Congress of Industrial Organizations v. FEC*, No. 02-1755 (July 8, 2003) at 1-2.

[38] *Id.*, at 2 (citations omitted).

cover "genuine issue ads," 540 U.S. at 206, it found this to be constitutional because of the alternative available to finance such ads "by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.*

WRTL admits here, as it must, that its argument about the impact of Title II on its grassroots lobbying – which is the foundation of its case before this court – was already "argued strenuously" to the Supreme Court in *McConnell*. Pl. Mem. at 15. WRTL reasons that because the Supreme Court "didn't mention grass roots lobbying," it "indicates that the issue was left for as-applied challenges." *Id.*

But given the centrality of the arguments about grassroots lobbying ads made by the numerous challengers in *McConnell*, it is clear the Supreme Court fully considered the arguments, and rejected them. The Court surely knew – multiple plaintiffs highlighted precisely this point – that the statute would encompass pre-election ads *even if* those ads simply urged a Member of Congress to vote one way or the other on a piece of pending legislation. The Court did not hold such ads outside the proper scope of Title II. It did not find the statute unconstitutional as applied to such ads. Confronted then with all of the same arguments that plaintiff now makes here, the Court did not state – or even imply – it was postponing for another day a future challenge to the statute as applied to such ads. Rather, the Court upheld the "bright line" test drawn by the statutory definition of electioneering communication.

3. Plaintiff's premise that its electioneering communications will solely influence legislation, and not elections, is wrong.

WRTL asks this court to decide that its proposed ads are "genuine" issue ads because, plaintiff asserts, they are intended only for purposes of grassroots lobbying, not electioneering, and therefore the provisions of Title II cannot constitutionally apply to them.

Even if the premise of this argument were relevant as a matter of law, the assertion is little more than *ipse dixit*. Plaintiff may attest in its summary judgment papers that its motives are purely legislative, and that the airing of its electioneering communications is intended to affect only policy, not politics. But plaintiff's *intent,* even if taken at face value, is not dispositive as to *effect*, and Congress reasonably concluded that *all* ads referring to a federal candidate and broadcast to the candidate's electorate just before the election may affect the election, whatever the intent of the sponsor.[39]

Here, however, the context in which WRTL sought to air these ads strongly undermines the assertion that they would have had no impact on the election; much less that WRTL intended them to have no such impact.

The ongoing Senate filibuster of judicial nominees was a key issue in the Wisconsin Senate race, as well as a national, partisan campaign issue. All three Republican Senate candidates made it a key issue in their races, as did the state Republican Party, which listed this issue as one of four reasons to defeat Senator Feingold. *See* Exhibit J. Further, WRTL itself made the judicial filibuster a campaign issue, citing it both as a reason it endorsed the three Republican opponents of Senator Feingold, and as a reason that one of its "top election priorities" was "to send Feingold packing!" *See* Exhibits B and C. As WRTL's PAC chair

[39] The Court in *McConnell* did not find significance in the distinction between whether the sponsor of an electioneering communication *intended* its ad to influence the election, and the *effect* of the ad in doing so. In describing statute, the Court said that Title II prohibits the use of corporate and union treasury funds for communications "that are intended to, *or* have the effect of, influencing the outcome of federal elections." 540 U.S. at 132 (emphasis added). As Judge Kollar-Kotelly concluded in her separate district court opinion in *McConnell*, "While there may be [electioneering communications] that are not *intended* to influence an election, the record demonstrates that as an objective matter advertisements sharing these characteristics influence the outcome of federal elections." 251 F. Supp. 2d at 588 (Op. of Kollar-Kotelly, J.) (emphasis added).

stated,"[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." *See* Exhibit B.

For the 2004 election, WRTL announced that it would "do everything possible . . . to send Russ Feingold packing!" *See* Exhibit C. Its PAC said that "the defeat of Feingold must be uppermost in the minds of the Wisconsin right to life community in the 2004 elections." *See* Exhibit B. This is consistent with WRTL's past electoral positions since, through its PAC, it has made significant independent expenditures expressly to defeat Senator Feingold, as has the National Right to Life PAC.

WRTL has also made much publicly of Senator Feingold's support of the judicial filibuster, including through several press releases criticizing him for his vote. In this context, the fact that its proposed electioneering communication ads did not *themselves* specifically state Senator Feingold's position on the issue matters little, since WRTL has used other means to publicly disseminate Senator Feingold's position, as did his three Republican opponents and the Republican state party, all of whom attacked Senator Feingold repeatedly for his position.

Thus, when WRTL's electioneering communication ads refer to Senator Feingold in the context of criticizing "a group of Senators" for conducting an ongoing filibuster that is "not fair" and "causing gridlock," it is implausible to maintain that this criticism would not have attached to Senator Feingold and accordingly have had an impact on his Senate race.

In this context, furthermore, this Court should be highly skeptical of plaintiff's representation that its proposed electioneering communication ads to Wisconsin voters in the immediate pre-election period had *only* a grassroots lobbying purpose. The fact that the topic of these ads – the Senate filibuster of judicial nominees – was one that both the Republican

Senate candidates and WRTL identified as a key campaign issue undermines plaintiff's claim that these electioneering communications amount to no more than grassroots lobbying. [40]

4. Grassroots lobbying ads are not exempt from the definition of electioneering communications.

Finally, WRTL manufactures its own cumbersome 16-factor test, Pl. Mem. at 4-5, to determine if its ads constitute "authentic grass-roots lobbying," *id.* at 5, and then scores itself as meeting all sixteen of the factors. WRTL had proposed an 18-factor test in its preliminary injunction papers, but has now dropped two of the factors, perhaps because its own ads fail to meet one of them. (One factor dropped by WRTL was whether the ad "refers to the candidate only by use of the terms 'Your Congressman,' . . . or a similar reference that does not include the name or likeness of the candidate in any form . . . ."). But this Court need not concern itself with any of WRTL's cumbersome, multi-factor tests because they exist only in plaintiff's imagination, not in the law: neither one is a test enacted by Congress, or imposed by the Supreme Court, or adopted by the FEC.

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[40] This is precisely the kind of context analysis that Judge Kollar-Kotelly engaged in when she reviewed an advertisement run during the 1998 North Carolina Senate campaign between then-incumbent Senator Lauch Faircloth and now-Senator John Edwards. The ad, run by the American Association of Health Plans, told viewers to call Senator Faircloth "'and tell him to keep up his fight' against trial lawyers' efforts to pass new liability laws." 251 F. Supp. 2d at 568 (Op. of Kollar-Kotelly, J.). As Judge Kollar-Kotelly said, "Defendants point out that this advertisements might appear to be an example of 'genuine issue advocacy' if not for the fact that '[a]t the time this ad was run, the airwaves in North Carolina were saturated with millions of dollars of ads run by Senator Faircloth's campaign, by the Republican party, and by interest groups, portraying Edwards as 'deceptive,' truth stretching trial lawyer. She concluded:

> [T]he record demonstrates that it is very difficult, if not impossible, to determine the objective behind an advertisement by simply listening or viewing the advertisement; particularly when the advertisement is viewed outside the context of the election.

Id. This also illustrates precisely why Congress adopted a "bright line" standard to define "electioneering communications," and why the Supreme Court upheld it in its entirety.

Congress could have, but did not, craft an exemption from BCRA for ads directed at lobbying. Nor did the Supreme Court suggest that such a test is constitutionally mandated. Congress did, however, provide a highly circumscribed authority to the FEC to create exemptions by regulation. The definition of the term "electioneering communication" does not include:

> any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii).

2 U.S.C. § 434f(3)(B)(iv). The section 431(20) cross reference describes 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 (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii).

Thus, this so-called "clause iv" authority permits the Commission to adopt a narrow exemption from the definition of electioneering communication if the exemption would be "consistent" with the scheme of Title II, "appropriate" under that scheme, and would not permit any ad that promotes, supports, attacks or opposes a candidate.

The FEC *rejected* the idea of establishing an exemption under this provision for grassroots lobbying ads that otherwise fall within the definition of electioneering communications.[41] In considering various proposals that were offered for such an

[41] The Supreme Court, in upholding Title II in December, 2003, was well aware of the fact that the Commission had not promulgated an exemption for grassroots lobbying in its Title II rulemaking completed over a year earlier, in October, 2002. Indeed, this point was forcefully made by *McConnell* plaintiffs in their briefs to the Supreme Court. *See, e.g.,* Brief of AFL-CIO, *supra* at 30. (footnote continued)

exemption, the Commission ultimately concluded that no such definition would meet the statutory standard of ensuring against ads which promote or attack candidates. In explaining its conclusion, the Commission said:

> A wide range of commenters addressed these alternatives, and none of the alternatives was favorably received. The most frequently expressed comments were that each of the alternatives could be easily evaded so that a communication that met the requirements for an exemption nonetheless would also promote, support, attack, or oppose a Federal candidate.

67 Fed.Reg. 65201 (Oct. 23, 2002). Thus:

> The Commission concludes that *communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate*. Although some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, *the Commission believes that such communications could be reasonably perceived to promote, support, attack or oppose a candidate in some manner*. The Commission has determined that all of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement.

Id. at 65201-02 (emphasis added).[42]

WRTL's unwieldy 16-factor test for "bona fide grassroots lobbying" is a compilation of various standards that were before the Commission during this rulemaking. But the Commission *rejected* those standards precisely because it concluded that they *do not* ensure that the ads would comply with the narrow exception authorized by the statute, namely that such ads do not promote, support, attack or oppose candidates.

Thus, it is an odd argument indeed for plaintiff to assure the court that its ads are "authentic" issue ads because they meet factors considered by the FEC, when the FEC itself

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[42] WRTL could have, but did not, seek judicial review of the FEC's administrative decision that the statute does not permit an exemption for grassroots lobbying ads, by bringing suit against the FEC under the Administrative Procedures Act, 5 U.S.C. § 704 *et seq*.

concluded that those very same factors were not adequate to prevent communications that promote or attack candidates. Plaintiff's analysis, if it proves anything at all, proves only that its ads meet the standards of a legally insufficient test.[43]

B. WRTL Has Available Alternatives For Broadcasting Its Ads.

WRTL argues that it suffers an infringement of its First Amendment rights because BCRA imposes a "statutory prohibition" on airing its proposed advertisements during the pre-election period governed by BCRA's electioneering communication rules. Pl. Mem. at 39. But contrary to WRTL's contention, BCRA imposes no "prohibition " whatsoever on WRTL's communications, as the Supreme Court made clear in *McConnell*. Rather, it provides WRTL several alternative avenues to disseminate its advertisements to Wisconsin's citizens, and the Supreme Court determined in *McConnell* that those avenues fully protect the First Amendment rights of corporations like WRTL. This Court made precisely this point when it denied WRTL's motion for a preliminary injunction, stating unequivocally: "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that

[43] As it did in its preliminary injunction papers, WRTL continues to assert in its summary judgment papers that it meets most (but not all) of the standards for a grass roots lobbying exemption that had been proposed by the principal congressional sponsors of the law, including some of the *amici* here. *See* Comments of Senator John McCain, *et al.*, *supra* n.3. The Commission, however, rejected that test as well, and the test accordingly has no legal standing. 67 Fed.Reg. 65201-02. Even if that test was relevant, what is beyond dispute is that *none* of WRTL's ads meets that test, because all of WRTL's ads refer *by name* to a Federal candidate, a crucial difference from the sponsors' proposed test. Plaintiff's argument thus amounts to an absurd double counter-factual: that if the WRTL ads met the test the sponsors proposed, which they do not, then those ads would be exempt from the law if the FEC had adopted that test, which it did not. Even worse, plaintiff simply ignores the fact that its ads fail to meet the sponsors' proposed test. Instead it claims that naming the candidate is "necessary" if the people are going to be able to exercise "their sovereignty in a republican form of government and their express right to petition[.]" Pl. Mem. at 31. It is bizarre, to say the least, for WRTL to argue that the right of citizens to participate in a republican form of government hinges on the ability of a corporation to name candidates in its election season broadcast advertisements.

corporations and unions engaging in such speech . . .channel their spending through political action committees (PACs)." Memorandum Opinion and Order at 7 (footnote omitted).

1. Plaintiff can fund its proposed ads, without alteration, by using a PAC.

WRTL can broadcast its proposed advertisements, without alteration, on any radio and television outlet, at any time, simply by using a PAC to fund the ads. *See* 2 U.S.C. §§ 441b(b)(2), 441b(c)(1). In BCRA, as in previous restrictions imposed on corporate and union federal campaign activity, see *supra* at pp. 13-15 Congress did not *prohibit* any spending or any speech, but only required corporations and unions to channel certain spending through their PACs.

Given that BCRA, like earlier statutes, provides this "PAC option," the Supreme Court has flatly rejected WRTL's characterization that BCRA "prohibits" speech. To the contrary, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [section 203 of BCRA] as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162-63).

WRTL's opportunity to fund its proposed advertisements through a PAC, moreover, precludes the First Amendment claim it asserts. The Supreme Court has repeatedly held that the opportunity to use a PAC for election-related activity fully safeguards corporate and union First Amendment rights. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668-669 (1990) (upholding rule that corporations must fund express advocacy with PACs); *Beaumont*, 539 U.S. at 162-63 (upholding rule that corporations must fund campaign

contributions with PACs).[44] The Court in *McConnell* explained that requiring corporations and unions to fund election-related spending with their PACs appropriately allows corporations and unions to participate in the political process while ensuring that they do not distort it:

> 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, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations' members.

540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162-63).

In *McConnell*, the Court adopted this reasoning to find that BCRA lawfully requires corporations and unions to fund *all* electioneering communications with their PACs. The Court first confirmed the "firmly embedded" principle that "the ability to form and administer [PACs] has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy." 540 U.S. at 203. The Court then extended that principle from express advocacy to electioneering communications, noting that under BCRA, corporations and unions "may not use their general treasury funds to finance electioneering communications, but remain free to organize and administer separate segregated funds, or PACs, for that purpose." *Id.* at 204.

As detailed above, *see supra* at pp. 14-15, the Court then upheld the statute as against a claim of overbreadth precisely because of the availability of this "PAC option." It concluded that the "vast majority" of electioneering communications are the "functional

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[44] The Court has held that a certain narrow class of nonprofit advocacy corporations are entitled to an exception from the rule requiring corporations to fund campaign expenditures through their PACs. *See FEC v. MCFL*, 479 U.S. at 264. WRTL has stated that it does not qualify for that exemption, s*ee* Amended Compl. ¶ 23, because "it receives corporate donations." Pl. Mem. at 35.

equivalent" of express advocacy, but recognized that there might be rare instances in which "genuine issue ads," fell within the electioneering communications definition. *Id.* at 206. But the Court found no constitutional infirmity in requiring corporations and unions to pay for such ads from their PACs: "[I]n 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*.

Notwithstanding the Court's finding that a PAC option is "constitutionally sufficient," *id.* at 203, WRTL argues that the PAC alternative is "simply inadequate," stating that WRTL did not have "time" to raise funds for its PAC. Pl. Mem. at 43. WRTL itself, however, established its PAC long ago, *see supra* at p. 4, and any lack of sufficient PAC funds to pay for its broadcast ad campaign is a result of poor planning or lack of member support for its political activities, not of the electioneering communications provision of BCRA.[45]

WRTL further argues that the requirement that it fund electioneering communications through its PAC is not narrowly tailored to a compelling government interest "as applied" to its case, because WRTL seeks to engage in "grass-roots lobbying," not election-related

[45] Like WRTL here, the *McConnell* plaintiffs argued extensively that the PAC option was inadequate. In finding the PAC option "constitutionally sufficient," the Supreme Court necessarily rejected those claims. *See*, *e.g.*, Reply Br. for Appellants the National Rifle Association, *et al.*, *National Rifle Assoc'n v. FEC*, No. 02-1675 (Aug. 21, 2003) at 15, 16 ("requiring issue advocacy organizations to fund electioneering communications through their PACs will muffle the collective voice of their members to a whisper"; rule that PACs can solicit from only their members "is a draconian limitation on the NRA's nationwide solicitation practices"); Br. of Appellant the American Civil Liberties Union, *ACLU v. FEC*, No. 02-1734 (July 8, 2003) at 37 ("The concept of a PAC is at odds with the ACLU's 83-year tradition of non-partisan advocacy of civil liberties."); Reply Br. of Appellants/Cross-Appellees AFL-CIO, *et al.*, *AFL-CIO v. FEC*, No. 02-1755 at 13 ("[U]nion and corporate political action committees are unable as a practical matter to raise sufficient funds from voluntary contributions to support a fraction of the 'electioneering communications' that unions and corporations can and do undertake with treasury funds.").

activity. See Pl. Mem. at 42-44. As noted above, WRTL's characterization of its proposed ads is wrong. But even accepting the premise, this argument simply restates WRTL's claim that the Constitution compels a "grass-roots lobbying" exception to the electioneering communication rules. As detailed above, the Supreme Court found otherwise in *McConnell,* upholding BCRA's electioneering communications rules *without exception*. *See supra* at pp. 19-20.[46]

2. WRTL can disseminate its message without triggering BCRA's electioneering communication provisions.

WRTL retains other options for publishing its views without triggering BCRA's electioneering communications provisions, and it can use its general treasury funds to exercise these options.

First, WRTL could have disseminated its message at any time, in any outlet, and with any funds, as the Supreme Court noted, "by simply avoiding any specific reference to federal candidates." *McConnell*, 540 U.S. at 206. WRTL could, for instance, have informed the public about the ongoing judicial filibuster by broadcasting its proposed ads in 2004 exactly as drafted, but simply deleting the single tag line urging viewers to "call Senator Feingold," a candidate who was clearly identified by name. And WRTL could still have urged viewers to

[46] In connection with its argument that the electioneering communication provision is not narrowly tailored "as applied" to it, WRTL urges that, if this Court does not authorize WRTL to pay for its proposed ads from its general treasury funds, this Court should authorize it to fund those advertisements from a "segregated bank account" consisting solely of donations from individuals. Pl. Mem. at 35. Such donations, unlike contributions to a PAC which are limited to $5,000 per year from an individual, 2 U.S.C. § 441a(a)(1)(C), would not be subject to any contribution limit. In so urging, WRTL asks this Court to rewrite the law enacted by Congress. Indeed, Congress *rejected* precisely the rule advanced by WRTL for section 501(c)(4) nonprofit corporations. *See McConnell*, 540 U.S. at 209, n.90. *McConnell* upheld the electioneering communication provisions *as enacted* by Congress. Nothing compels or authorizes this Court to redraft the statute to provide the exception sought by WRTL.

call Senator Kohl, the other Wisconsin Senator who was not a candidate for reelection in 2004.

WRTL responds that its ads will not be effective lobbying tools unless they identify specific federal candidates. But, as the Court found, effective "lobbying" tools are also effective "electioneering" tools, and thus permissibly within BCRA's ambit.[47] WRTL reasons that effective "lobbying" ads must specify *only* those Members of Congress who are the "object of grass-roots lobbying," *i.e.*, those Members who have taken positions opposed by WRTL. Pl. Mem. at 44. But this argument contradicts WRTL's corresponding claim that its ads "do not reveal a candidate's record or position on an issue." *Id*. at 5. If WRTL's ads single out its congressional adversaries, the ads implicitly identify the position of those adversaries. Ads targeting adversaries, moreover, are reasonably viewed as having the purpose or effect of galvanizing electoral opposition to the Members of Congress so identified, and therefore as electioneering.

WRTL further argues that its ads must specify Members of Congress because many citizens would otherwise not know whom to call. *Id.* at 44. WRTL provides no evidence, however, that ads urging viewers to call specific Members of Congress in fact generate more calls or are in other ways more effective than ads which simply discuss a pending legislative issue.

WRTL can also use its general treasury funds to disseminate its advertisements identifying a federal candidate at any time, including close to an election, by publishing those

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[47] The Court quoted the former chair of a major advocacy organization's PAC as saying, "[i]t is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and advocacy of a political candidate is a line in the sand drawn on a windy day." 540 U.S. at 126 n.16 (quoting Tanya K. Metaksa).

ads in non-broadcast media such as newspapers or billboards. Indeed, Wisconsin, for example, has 36 daily newspapers and 235 weekly papers.[48] The ability to disseminate its message through non-broadcast alternatives provides the opportunity to reach a mass audience without triggering the electioneering communication requirements.

Finally, of course, WRTL is free to use its treasury funds to broadcast ads that refer to Senator Feingold outside the statutory pre-election window, as it did in 2004. Such ads were not electioneering communications under BCRA, and thus not covered by Title II.

C. The Grant of a Summary Judgment Will Injure Other Interested Parties and Harm the Public Interest.

The ruling sought by WRTL should not be granted for the additional reason that to declare this federal statute unconstitutional would manifestly injure the broader public interest.

1. Enjoining an Act of Congress constitutes irreparable harm.

After seven years of careful legislative consideration, BCRA was enacted by Congress and upheld by the Supreme Court "to confine the ill effects of aggregated wealth on our political system." 540 U.S. at 224. 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 balancing hardships." *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Here, BCRA enjoys not just a "presumption," but a definitive *judgment,* of constitutionality, having been so recently upheld by the Supreme Court.

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[48] *See* Wisconsin Legislative Reference Bureau, *State of Wisconsin 2003-04 Blue Book* 777-80 (2003) (This is attached as Exhibit N).

Setting aside a duly enacted Act of Congress irreparably injures both the government and the public, the beneficiaries of that law. Thus, "any time a State is enjoined by a court from effectuating statutes . . . of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. Of Calif. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Similarly, where a lower court enjoins enforcement of an Act of Congress, the harm to the public is immediate; and if that judgment is later reversed on appeal, the harm incurred is irreparable. *Cf. National Ass'n of Radiation Survivors,* 468 U.S. at 1324 (Rehnquist, J., in chambers).

2. A decision in WRTL's favor would impair the compelling interests underlying Title II.

The Supreme Court upheld Title II in BCRA because it found "easily answered" the question whether the provision serves compelling governmental interests:

> We have 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.'

540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660).

The "as applied" exemption that WRTL seeks here would directly undermine this compelling interest and would re-open the door for corporations (and unions) to fill the airwaves with broadcast ads funded from their treasuries that refer to federal candidates in the immediate pre-election period. Congress concluded that such ads, even if they purport to address only pending legislative issues, can have a material impact on an election and thus would undermine longstanding laws that seek to exclude such funds from the federal electoral process. The Court sustained Congress' judgment.

It is no answer here to say that WRTL as a nonprofit corporation fails to pose the same threat as for-profit corporations. The Court has made clear that the purposes behind the section 441b ban on electoral spending from corporate treasury funds, as amended by Title II of BCRA, are served by regulation of nonprofit as well as for-profit corporations. Just two years ago, in *FEC v. Beaumont,* the Court explicitly rejected the argument that section 441b's ban on corporate contributions should not apply to North Carolina Right to Life, Inc., a non-profit sister affiliate of WRTL. 539 U.S. 146 (2003). Even though non-profit corporations "may not have accumulated significant amounts of wealth," the Court said, "they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." 539 U.S. at 158 (quoting *Austin,* 494 U.S. at 661). "[C]oncern about the corrupting potential underlying the corporate ban may indeed be implicated by [nonprofit] advocacy corporations."

> They, like their for-profit counterparts, benefit from significant 'state created advantages,' and may well be able to amass substantial 'political "war chests."' Not all corporations that qualify for favorable tax treatment under § 501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club. Nonprofit advocacy corporations are, moreover, no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals.

Id. at 160 (citations omitted).

Congress rejected a proposal to exclude nonprofit corporations from the electioneering communication provisions of Title II.[49] Because nonprofit corporations such as WRTL can themselves pose a threat of aggregated wealth, or can serve as conduits for

[49] In 2 U.S.C. § 441b(c)(6), Congress functionally overrode 2 U.S.C. § 441b(c)(2), a provision of BCRA that had exempted section 501(c)(4) corporations from the ban on spending their treasury funds for electioneering communications, subject to certain conditions. *See McConnell,* 540 U.S. at 210 n.90.

other incorporated entities that do so, they are properly included within the scope of the Title II provisions of BCRA. This "as applied" effort to exempt certain of their electioneering communications from the scope of those provisions would undermine the efficacy of the law, and impair the public interest served by the law.

3. If this "as applied" challenge is successful, the purposes served by Title II would be seriously undermined for lack of a "bright line" test.

Title II's rationale is that it provides a "bright line" test to determine the class of communications subject to the applicable campaign finance rules. Title II's standards for defining which ads will be treated as campaign-related serve a compelling interest in using clear and objective lines to frame any rule that affects speech. It was, after all, principally a concern for clarity that first led the Supreme Court to adopt the "express advocacy" test as a gloss on FECA's language. *Buckley*, 424 U.S. at 40-44, 79-80. After twenty-five years' experience, that test proved too susceptible to manipulation to effectively serve its purposes. In responding, Congress heeded the Court's admonitions concerning vagueness, and provided a new "bright line" test that was better tailored to capture campaign-related speech.

Plaintiff here seeks to undermine this purpose by opening the door to a potentially endless series of "as applied" challenges – first to the three ads here proffered, but undoubtedly next to another series of ads that plaintiff with equal conviction would claim are intended to influence only legislative affairs, not elections. This then will be followed by other corporate and union spenders seeking the same kind of "as applied" relief from the statute based on their attestation that their ads also intend no impact on campaigns.

To accept this invitation is to undermine the heart of Title II – the clarity, and certainty, of the "bright line" test it provides. In the name of "as applied" challenges, WRTL proposes to reintroduce uncertainty into the statute, prompting *ad hoc* judicial determinations

that carve out exceptions to the otherwise clear standards Congress provided. Both Congress and the Supreme Court rejected this approach. This Court also declined, correctly in our view, to accept WRTL's invitation to re-write the statute and to replace the bright line test with the ad hoc test concocted by WRTL. Clarity and certainty are themselves a compelling public interest in laws that touch on speech, and the relief plaintiff here seeks would disserve this public interest.

V. Conclusion

For the above reasons, *amici* submit the plaintiff's motion for summary judgment should be denied.

March 28, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of March, 2005, a copy of:

1. Motion of Senator John McCain, Representative Christopher Shays, Representative Martin Meehan, Democracy 21, The Campaign Legal Center, and the Center for Responsive Politics for Leave to File Memorandum as *Amici Curiae*

2. Memorandum of *Amici Curiae* Senator John McCain, Representative Christopher Shays, Representative Martin Meehan, Democracy 21, The Campaign Legal Center, and The Center for Responsive Politics in Opposition to Plaintiff's Motion for Summary Judgment

has been served upon the person(s) listed below by Federal Express for delivery on Tuesday, March 29, 2005,

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and has been served upon the person(s) listed below by Hand Delivery on Monday, March 28, 2005,

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