United States District Court
District of Columbia

Wisconsin Right to Life, Inc. ***Plaintiff*,** ***v.*** **Federal Election Commission,** ***Defendant*.**	**Civil Action No. 04-1260 (DBS, RWR, RJL)** THREE-JUDGE COURT Oral Argument Requested

Plaintiff's Reply Memorandum in Support of Its Summary Judgment Motion

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I. *McConnell* Did Not Preclude As-Applied Challenges.[1]

A. The FEC Failed to Respond to Numerous WRTL Arguments.

WRTL spent nearly a score of pages explaining why *McConnell v. FEC*, 540 U.S. 93 (2003), did not preclude future as-applied challenges, but rather that the Supreme Court embraced them as the solution for the assertion by the *McConnell* plaintiffs that the prohibition on corporate funding of electioneering communications was overbroad for sweeping in constitutionally-protected communications. WRTL included several new arguments and refinements of prior arguments, which makes somewhat curious the FEC's assertion that "WRTL presents almost nothing new." FEC Mem. at 2. In asserting that *McConnell* precludes as-applied challenges, the FEC relied primarily on prior briefing, thereby largely failing to respond to WRTL's arguments. In summary form, here are some of those arguments and the FEC's response, which was generally no response.

- WRTL argued that Article III only grants courts authority to decided cases and controversies, which means that the present as-applied challenge could not have been decided in *McConnell*, which was decided as a facial challenge on the basis of no substantial overbreadth. WRTL's Mem. at 7-8. The FEC made no response to this argument.
- WRTL argued that the Supreme Court's adjudication principle of avoiding unnecessarily broad holdings, based on Article III and prudence and expressly reaffirmed in *McConnell* in its analysis of BCRA Title II (containing "electioneering communications" provisions), precluded consideration of this as-applied case in *McConnell*, which was decided as a facial

[1]Wisconsin Right to Life here replies in support of its summary judgment motion. WRTL will file its opposition to the FEC's summary judgment motion when it is due. LCvR 7.

challenge. WRTL Mem. at 8-9. The FEC made no response.

- WRTL argued that the FEC *itself* conceded overbreadth of up to six percent in *McConnell*, but argued that as-applied challenges should be brought later to cure such overbreadth and that the case should be decided solely on the basis of the substantial overbreadth analysis set out in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which is inconsistent with the FEC's present position that no as-applied challenges must be allowed. WRTL Mem. at 10. The FEC made no response other than to continue asserting its inconsistent position.
- WRTL argued that BCRA's prime sponsors, Sen. McCain et al. (several of whom are currently amici curiae herein), likewise urged the Supreme Court to decide *McConnell* as a facial, substantial-overbreadth case, and allow as-applied challenges to cure remaining overbreadth. WRTL Mem. at 10-11. The FEC made no response.
- WRTL argued that *McConnell* embraced future as-applied challenges by citing and employing *Broadrick* substantial overbreadth analysis for First Amendment facial challenges because in *Broadrick* the Supreme Court expressly stated that if the unconstitutional applications of a statute are not sufficiently substantial for facial invalidation then case-by-case, as-applied cases are the solution for resolving the unconstitutional overbreadth. WRTL Mem. at 7-8. The FEC made no response.
- WRTL argued that *McConnell*'s statements that the *McConnell* plaintiffs' argument that the electioneering communication prohibition was "overbroad" because the " justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications. . . . fails *to the extent that* the issue ads . . . are the *functional equivalent* of express advocacy," 540 U.S. at

206 (emphasis added), indicates that as-applied challenges remain open to demonstrate that certain communications are not the "functional equivalent." WRTL Mem. at 11, 15-16, 18. The FEC made no response to this argument, but did argue that allowing as-applied determinations of functional equivalence would create "uncertainty" and blur the "bright line," FEC Mem. at 6-7, an issue dealt with *infra*.

- WRTL argued that in establishing functional equivalence to express advocacy, *McConnell*'s focus was on sham issue ads, as evidenced by numerous citations, and not "genuine issue ads," which received only scant mention (and no mention of grass-roots lobbing occurred), so that functional equivalence was proven only as to such sham issue ads of the sort the Court described. WRTL Mem. at 2, 11, 31-33. The FEC made no response.
- WRTL argued that, despite the fact that *McConnell* relied exclusively on a facial analysis, the Court made one as-applied analysis to eliminate a substantial area of overbreadth by reading into BCRA an exemption for *MCFL*-type corporations, and that in recognizing this exception it employed as-applied terminology, and that there was no such analysis or language with regard to grass-roots lobbying. WRTL Mem. at 15-16. The FEC made no response.
- WRTL argued that genuine grass-roots lobbying did not fall into the "doubtful cases" category mentioned in *McConnell* as possible candidates for the PAC alternative, 540 U.S. at 206, by setting out three types of genuine issue ads and showing that the sort of ads WRTL proposed would not have fallen into the "doubtful" category. WRTL Mem. at 17 & n.12. The FEC made no response.
- WRTL argued that *McConnell*'s comment that "in the future" the prohibition could be

avoided by, inter alia, using the PAC alternative merely sought to minimize the "substantial" reach of the prohibition for *Broadrick* substantial overbreadth analysis and the language used was adopted from the FEC's own brief in a section where the FEC was arguing that the overbreadth was not substantial enough for facial invalidation. Thus, the Court was not saying that "genuine issue ads" could be regulated. WRTL Mem. at 18-20. The FEC made no response to show that this analysis is wrong, merely continuing its old assertion that *McConnell* was holding that "genuine issue ads" could be constitutionally restricted. FEC Mem. at 4.

- WRTL argued that *McConnell* footnote 73 had nothing to do with as-applied exceptions, explaining that the footnote really speaks of all applications of the primary definition of "electioneering communications" *in BCRA* (not in as-applied, factual situations), so that no discussion of the backup definition was required. WRTL Mem. at 21-22. The FEC made no response to this argument, merely continuing to assert its old argument that footnote 73 means that all future as-applied "applications" were eliminated. FEC Mem. at 3.
- WRTL argued that Justice Breyer's Title V dictum not only did not preclude as-applied challenges, because he was merely describing how substantial overbreadth analysis works in a facial challenge (all provisions are upheld unless the admittedly unconstitutional applications are "substantial"), but that his analysis actually indicated that the Court was leaving alleged overbreadth for as-applied challenges by stating that considerations raised but not resolved could be handled in as-applied challenges. WRTL Mem. at 22-23. The FEC made no response to this argument, merely continuing to assert its old argument that the Court was, in its discussion of Title V, deciding matters regarding Title II and that the words

clearly describing substantial overbreadth analysis must instead be understood to somehow eliminate all future cases not before the Court. FEC Mem. at 3.

- WRTL argued that since Congress acknowledged overbreadth by authorizing the FEC to make certain limited exceptions and BCRA's prime sponsors supported a limited grass-roots exception, it would be incongruous if an Article III court could not consider as-applied exceptions. WRTL Mem. at 23-24. The FEC made no response.

If the Court accepts the FEC's invitation to pull out the FEC's old briefing (incorporated by reference), the Court will likewise find no responses where none are given now, for most of these arguments are new or contain new features.[2] Where a party "never responds to [an] argument in the relevant section of his opposition to the motion for summary judgment. . . . [t]he court may treat the [party's] failure to respond as a concession on this point. *See* Local Civil Rule 7.1(b)."[3] *Ward v. Kennard*, 133 F. Supp. 2d 54, 60 n.3 (D.D.C. 2000) (party's failure to respond to an argument in the relevant section of its opposition to summary judgment motion resulted in treatment as a concession). *See also Halmon v. Jones Lang Wootton USA*, 355 F. Supp. 2d 239 (2005) (concession for failure to brief arguments).

Consequently, the arguments made by WRTL in its opening memorandum, including these

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[2]Perhaps the FEC will attempt to respond to these arguments in its reply in support of its cross-motion for summary judgment, but that would wrongly deprive WRTL of its right under Federal Rule of Civil Procedure 56 to respond to any FEC counter arguments on the present motion. The FEC's response opportunity has passed with respect to WRTL's motion for summary judgment. Sen. McCain et al. as amici curiae make some arguments in opposition to WRTL's motion, but these are not the arguments of a party and cannot substitute for arguments that the FEC has failed to make. *See infra* (cases cited). However, a brief response will be made to those arguments in the limited time and space allowed.

[3]When "a[n opposition] memorandum is not filed within the prescribed time, the Court may treat the motion as conceded." LCvR 7(b).

numerous unanswered (or minimally answered) arguments, demonstrate that *McConnell* was not foreclosing as-applied challenges but was intentionally leaving such challenges for another day, just as the FEC *itself* insisted that the Court should do, Redacted Brief of Defendants at 131, 161, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) (conceding overbreadth of up to six percent but arguing that as-applied challenges were the proper solution), and as Sen. McCain, Sen. Feingold, et al. also insisted should be done. [Redacted] Brief for Intervenors at 64, *McConnell*, 540 U.S. 93 (No. 02-1674) ("[A]waiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.") (brackets in brief title in original).

B. What the FEC Did Argue Was Erroneous and Largely Already Answered.

Rather than responding with counter arguments to WRTL's arguments, which answered the FEC's prior (now present) arguments in this case, the FEC simply reasserted those prior arguments without further refinement, in fact incorporating them by reference. It relied on **(1)** three passages from *McConnell*, FEC Mem. at 3-4, **(2)** the assertion that the PAC option is "constitutionally sufficient," *id.* at 4, **(3)** an argument from silence (that *McConnell* didn't expressly say that as-applied challenges to the electioneering communications prohibition are permitted), *id.* at 4, **(4)** an allegation that WRTL "distorts the plain language of [*McConnell*]," *id.* at 5, **(5)** an allegation that WRTL "argues that the *McConnell* majority's real rationale is to be found in" Justice Stevens' concurrence in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), FEC Mem. at 5; **(6)** an allegation that WRTL relies on "rejected" opinions by Justice Kennedy and Judge Leon, *id.*, **(7)** the allegation that WRTL proposes a "16-factor test," *id.*, and **(8)** an assertion that "the broader rationale of both *McConnell* and BCRA § 203 would be subverted." *Id.* at 6-7. These will be answered seriatim.

(1). The FEC continues to rely on the assertion that *McConnell* thrice asserted that no as-applied challenges are permitted. But the assertions apparently cannot withstand careful scrutiny because the FEC has failed to respond to the counter arguments made concerning the FEC's interpretations of these passages in *McConnell*, along with other arguments WRTL has made.

First, the FEC says that *McConnell* footnote 73 proves there are no as-applied challenges permitted. FEC Mem. at 3 (citing 540 U.S. at 190 n.73). WRTL has provided an alternate explanation, logically and contextually compelled, that the footnote is about all applications of the primary definition *in the statute*, not applications of the statute *to all fact situations*, WRTL Mem. at 21-22, to which the FEC has provided no counter argument.

Second, the FEC says *McConnell* foreclosed all as-applied challenges because in its discussion of Title V it noted parenthetically that Title II restrictions on "*all* advertising were upheld because such advertising will *often* convey . . . support or opposition." FEC Mem. at 3 (citing 540 U.S. at 239 (emphases in original). WRTL answered this assertion in its opening memorandum, explaining that Justice Breyer's Title V dictum merely explained that in a facial, First Amendment, substantial-overbreadth analysis *all* provisions are upheld unless the arguably unconstitutional applications are substantial, and that his analysis immediately thereafter indicated that the Court was leaving alleged overbreadth for as-applied challenges, WRTL Mem. at 22-23, to which the FEC provided no counter argument.

Third, the FEC says that the *McConnell* statement that "in the future corporations may finance genuine issue ads . . . by [not identifying] candidates, or in doubtful cases by paying for the ad from a segregated fund" means that no as-applied challenges may be brought. FEC Mem. at 4. But WRTL answered this assertion it its opening memorandum by explaining (a) that this

was necessarily an effort to show that the burden on genuine issue ads was not "substantial," not that as-applied challenges are banned, WRTL Mem. at 18-21, (b) that WRTL's proposed ads did not fit the "doubtful" category, *id.* at 17 & n.12, and (c) that the Court immediately qualified the quoted statement by appending footnote 88, which stated in plain terms: "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." WRTL Mem. at 17, 28-29; 540 U.S. at 206 n.88. The FEC provided no counter arguments, although it did attempt an alternate explanation for *McConnell* footnote 88.[4]

(2). The FEC asserted parenthetically that the "PAC option is 'constitutionally sufficient,'" so there is no "unconstitutional burden." FEC Mem. at 4 (quoting *McConnell*, 540 U.S. at 203).

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[4]The FEC has, of course, been unable to explain away the plain statement of the *McConnell* majority, in footnote 88, that the Court's analysis assumed that the interests underpinning "campaign speech might not apply to the regulation of genuine ads." Analyzing this statement in the context of the discussion above it at page 206 reveals that it comes at the end of a paragraph that answered plaintiffs' claim, as put by the Court, that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications,"540 U.S. at 206, i.e., compelling interests were allegedly lacking for much of the speech. In the answering paragraph, the Court declares that the *McConnell* plaintiffs' substantial overbreadth facial-challenge claim that compelling interests were missing for much of the material swept in "fails *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*." *Id.* (emphasis added). It follows logically that "to the extent that" ads are *not* the functional equivalent of express advocacy, then the *McConnell* plaintiffs' argument does not fail, i.e., the question of whether compelling interests are sufficient to allow prohibition remains open. When this paragraph is immediately followed by a footnote that says that the Court assumes that the interests supporting "campaign speech," i.e., sham issue ads as described in *McConnell*, may not justify "genuine ads," the constitutional logic is that as-applied challenges must be permitted to see if those interests justify genuine ads.

The Court alluded to the Kennedy-Stevens dialogue that WRTL has provided to the Court and then proceeded to give some examples of cases where governmental interests were not found sufficient in as-applied cases. Thus, footnote 88 reinforces the other clear indications in *McConnell* that as-applied challenges were to be considered as the solution to alleged facial-challenge overbreadth.

Of course the context reveals that *McConnell* was speaking in general terms, not as-applied terms, because the Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256-65 (1986) ("*MCFL*"), held that the PAC option was *not* constitutionally sufficient where the constitutional interests that justified it were not compelling, *id.* at 263,[5] and *McConnell* expressly extended this as-applied exception for *MCFL*-type corporations to the prohibition on electioneering communications. 540 U.S. 209-11. So a blanket assertion is inadequate without doing the actual constitutional analysis, i.e., is there a compelling interest supporting the ads proposed by WRTL on the present facts and is the prohibition narrowly tailored to advance these interests (if any)? WRTL provided further arguments on this issue in its opening brief, including the fact that as a factual matter the PAC alternative was inadequate, to which the FEC has provided no counter arguments. WRTL Mem. at 42-44. (And this practical inadequacy argument clearly indicates that WRTL's facts about the lack of PAC money are not "immaterial," as the FEC alleges in its response to WRTL's factual statement.)

(3). The FEC insists that since *McConnell* didn't expressly say that as-applied challenges to the electioneering communications prohibition are permitted, while it mentioned such

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[5]The Supreme Court expressly rejected the notions, currently asserted by the FEC (as they were in *MCFL*), that a PAC alternative is sufficient and that the mere desire for a bright-line rule is a compelling interest *absent* a rigorous constitutional analysis:

> [T]he [FEC's] rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom. While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we do not assume a legislative role, but fulfill our judicial duty – to enforce the demands of the Constitution.

479 U.S. at 263 (italics in original; underlining added). This holding also eliminates the FEC's current assertion that Article III courts can't create their own bright-line rules, based on constitutional mandates, because doing so is "act[ing] as a legislature." FEC Mem. at 2.

challenges in connection with certain other provisions, that as-applied challenges are foreclosed. FEC Mem. at 4. An *argumentum ex silentio* is weak because it is impossible to read the minds of the Justices as to what the silence means. It more likely means that because, inter alia, (a) Article III and Court adjudication principles prohibit considering cases as applied to parties and facts not before the Court, (b) as-applied challenges are the norm, (c) the Supreme Court relied expressly on a *Broadrick* "substantial overbreadth" analysis and *Broadrick* expressly said that where a facial challenge fails there are always as-applied challenges, (d) both the FEC and Sen. McCain et al. urged the Court to allow as-applied challenges to solve overbreadth allegations, and (e) because the Supreme Court acknowledged in several places in *McConnell* that, as usual, as-applied challenges are available for specific challenges to BCRA, that the Court *saw no need* to say what everyone already knows, i.e., that as-applied challenges are permitted. WRTL set these arguments out in its opening memorandum with appropriate citations, and the FEC has made no serious effort at counter argument. WRTL Mem. at 7-24. Moreover, the FEC has not answered the logical question of how any court in deciding a facial challenge could foresee and decide all possible factual situations so as to preclude all future as-applied challenges. *Id.* at 8. That is perhaps an even more difficult task than the impossible one of reading the minds of the Justices. And WRTL specifically addressed this argument from silence in its opening memorandum by providing specific opinions (in cases directly on point with the subjects of this case), *id.* at 4 n.15, in which the Supreme Court considered as-applied cases where it had not "opened [the] door" by "referr[ing] to the possibility of as-applied challenges." FEC Mem. at 4. The FEC failed to respond to these specific examples. The as-applied door stands open already.

(4) The FEC alleges it offers "clear reasoning" while WRTL "distorts the plain language of

[*McConnell*]." FEC Mem. at 5. The FEC failed to point to a specific distortion, so this seems a generalized disagreement with how WRTL has analyzed *McConnell*. But the FEC failed to explain why WRTL's careful exegesis of numerous passages in WRTL's opening brief are wrong, choosing instead this abstract *argumentum ad hominem*.

(5) The FEC alleges that WRTL "argues that the *McConnell* majority's real rationale is to be found in" Justice Stevens' concurrence in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990). FEC Mem. at 5. This is inaccurate and an exaggeration. WRTL did not cite the ongoing discussion of Justices Stevens and Kennedy from *Austin* through *McConnell* in its discussion of why as-applied challenges are permitted, although it certainly has applicability there because it has to do with *McConnell* footnote 88. So WRTL was not primarily relying on this dialogue for the proposition that as-applied challenges must be permitted, as the FEC alleges. WRTL included the Stevens-Kennedy dialogue as part of its discussion of why grass-roots lobbying is not the functional equivalent of express advocacy, as were the "sham" issue ads described and considered in *McConnell*, WRTL Mem. at 28-29 (Stevens-Kennedy dialogue), 31-33 ("sham" issue ads described and distinguished). The FEC makes no sustained effort to refute the non-functional-equivalence argument, based on the Stevens-Kennedy dialogue, so no counter argument is needed on that issue. And the applicability of footnote 88 to the permissibility of as-applied challenges is addressed *supra* at note 4.

(6) The FEC alleges that WRTL relies on "rejected" opinions by Justice Kennedy and Judge Leon. FEC Mem. at 5. While Judge Kennedy was in the minority on the present issues in *McConnell*, the Stevens-Kennedy dialogue is an historical fact that can't be "rejected" by any majority (nor has any purported to do so). It has already been discussed, and as noted the FEC

does not refute the substance of the dialogue and its applicability to the interpretation of this case, choosing to argue with the pejorative terms "rejected" and "more than a decade earlier."[6]

As to the statements in Judge Leon's opinion that WRTL cited as evidence that genuine grass-roots lobbying was considered to be different in kind from "sham" issue ads throughout the *McConnell* litigation, WRTL Mem. at 27-28 & n.18, there was no discussion of those statements by the Supreme Court. As shown by WRTL (and as urged to the Supreme Court by both the FEC and Sen. McCain et al.), the Supreme Court was leaving as-applied considerations of grass-roots lobbying for another day, and it had neither the interest nor the time for such details. Consequently, there is no holding that Judge Leon was in any way in error in his findings and conclusions on the subject of grass-roots lobbying differing in essence from the "sham" issue ads which the Court described and on which it focused. Moreover, factfinding is the province of the trial court, and nowhere in *McConnell* did the Court "reject" Judge Leon's findings. Rather, Judge Leon was cited more times in *McConnell* for findings and conclusions than is convenient to cite. *See*, *e.g.*, 540 U.S. at 125 (thrice). Had the Court gotten around to discussing genuine grass-roots lobbying, Judge Leon would surely have been cited for the same material cited in WRTL's brief. In fact, the very absence of any citation to Judge Leon's findings and conclusions on grass-roots lobbying is a powerful indication that the Court was saving grass-

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[6]If there is any of the "distortion" that the FEC alleges, FEC Mem. at 5, it is surely evident in the FEC's assertion that WRTL "essentially argues" that the *McConnell* "majority . . . embraced Justice Kennedy's view that such 'grassroots lobbying' ads should be exempt from the statutory requirements . . . ." FEC Mem. at 6 n.7. WRTL has clearly and consistently stated its position that the Supreme Court in *McConnell* did not decide whether an exception for genuine grass-roots lobbying is constitutionally mandated, leaving such as-applied questions for case-by-case determination because the Court did not consider the alleged overbreadth sufficiently substantial for facial invalidation of the prohibition on corporately-funded electioneering communications.

roots lobbying for an as-applied challenge. Nowhere does the FEC take factual issue with the substance of these statements from Judge Leon's opinion or with the experts he cites, so they must stand. In any event, his statements are not cited primarily for the proposition for which the FEC attempts to use them, i.e., as going to whether or not as-applied challenges are precluded by *McConnell*, although they have applicability there. They were cited to show that grass-roots lobbying is different in kind from "sham" issue ads, that the belief that this was so was an important part of the decisional backdrop of the *McConnell* decision, and that this essential difference is important to deciding whether an exception for genuine grass roots lobbying is constitutionally required.

(7) The FEC asserts that *McConnell*'s footnote 88 does not sanction "the 16-factor test that WRTL asks the Court to enact in lieu of BCRA's bright-line definition." FEC Mem. at 5. This is a straw man. WRTL does propose that this Court follow the pattern of the Supreme Court in *MCFL*, 479 U.S. at 263-64, and declare which factors are "essential" to its holding that an exception for genuine grass-roots lobbying is required. WRTL Mem. at 24. This is not "a legislative role, but [is] fulfill[ing the Court's] judicial duty – to enforce the demands of the Constitution." *MCFL*, 479 U.S. at 263. But as to the 16 factors WRTL recites as showing that the three proposed ads are "genuine," not "sham," nowhere has WRTL proposed them as a test. It has merely said that the Court could simply declare that on these facts an as-applied exception may (and must) be declared even if the Court does not decide to go further and declare which elements are "essential" by recognizing WRTL's actual proposed test (at WRTL Mem. at 30). WRTL Mem. at 36-37 & n.21. However, this has nothing to do with whether *McConnell* permitted as-applied challenges. The FEC is here joining argument again on the merits of

whether genuine grass-roots lobbying is the functional equivalent of express advocacy, the argument for which the factors were set out. That is dealt with in the next part of this memorandum.

(8) The FEC asserted that "the broader rationale of both *McConnell* and BCRA § 203 would be subverted" if as-applied challenges are permitted. FEC Mem. at 6-7. WRTL has already addressed this assertion, demonstrating that WRTL's proposed definition of grass-roots lobbying (i.e., essential elements for an exception), its compliance with all disclosure requirements, its alternative count based on the use of a "segregated bank account" (containing no corporate donations) eliminates the governmental interests the Supreme Court recognized as justifying the electioneering communication prohibition. WRTL Mem. at 29-31 (definition), 31-36. As noted there, the Supreme Court has already rejected the FEC's mere desire for a bright line as a compelling reason for a prohibition where the constitutional justification is absent. *MCFL*, 479 U.S. at 263. *MCFL* clearly stands for the proposition that constitutional rights may not be ignored for the sake of administrative agency convenience, i.e., the FEC has asserted an already rejected *argumentum ad inconvenienti*. But in this argument, the FEC was really asserting, without adequate argument, that the requisite compelling interests and narrow tailoring were met here, a question going to the substance of the claim (*see* Part II, *infra*), not to whether *McConnell* precluded as-applied challenges.

And as previously noted in WRTL's memorandum, WRTL Mem. at 34, the bright line WRTL proposed that this Court recognize by stating what factors are "essential" to its decision, is every bit as bright as the line the Supreme Court drew in *MCFL* when it recognized the essential elements for an exception to the corporate "independent expenditure" ban for *MCFL*-

type corporations. *MCFL*, 479 U.S. at 263-64. Consequently, there will be no "uncertainty." The FEC has failed to provide any counter arguments. Just as corporate officials, the FEC, and courts measure the nature and activities of a corporation against the *MCFL*-type corporation test and the FEC's regulations on the subject, so corporations will measure their grass-roots lobbying communications against both the factors this Court should recognize as "essential" to its decision to recognize a constitutionally-mandated exception to the electioneering communications corporate prohibition for genuine grass-roots lobbying and the FEC regulations that may be promulgated in the wake of the decision.

In any event, while *McConnell* said that the express advocacy test was not a constitutional mandate and that the electioneering communications definition posed none of the vagueness and overbreadth problems that caused the Court to read the express advocacy requirement into provisions at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curriam), and *MCFL*, 479 U.S. 238, it did not then say that the electioneering communication definition was now fixed in stone as a constitutional mandate, never to be altered lest there be uncertainty, or that no as-applied exceptions could be permitted as a means to protect that bright line. In fact, it proceeded shortly in its analysis to recognize an as-applied exception to the prohibition for *MCFL*-type corporations (with that court-created bright line). 209-11. The exception did not blur the line.

And there is yet another powerful argument. As WRTL has shown in Part II of its opening memorandum, both careful definition and the facts of this case eliminate the concerns and compelling interests recognized by the Supreme Court in *McConnell* as justifying the corporate prohibition. Absent constitutional justification, there can be no prohibition. The FEC has not answered this vital argument, making every effort to avoid actually doing the strict scrutiny

analysis that must govern this case. But by saying that *McConnell* foreclosed all as-applied challenges, the FEC attributes to the Supreme Court a decision with no constitutional justification – mere fiat. As the Supreme Court (and this present Court) are only authorized to decide constitutional questions on the basis of constitutional analysis and justification, it must be deduced that the Supreme Court could not have considered the merits of this case in view of the failed efforts of the FEC (and amici) to counter the arguments that the requisite justifications are absent. In sum, given WRTL's answers to the FEC's assertions about *McConnell*, and WRTL's arguments to which the FEC provided no response, it is clear that *McConnell* did not, and could not, preclude as-applied challenges.[7]

II. A Grass-Roots Lobbying Exception Is Constitutionally Required.

As noted above, the FEC has joined argument in several ways on the substance of WRTL's claim that an exception to the electioneering communications prohibition is required for genuine grass-roots lobbying.[8] It continued doing so in footnote 8, asserting that "even if the Court were

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[7]The FEC says it is unclear "which advertisements of WRTL it is asking the Court to consider in the as-applied challenge." FEC Mem. at 5 n.5. The FEC misunderstands the exception to the mootness doctrine for matters capable of repetition yet evading review. *See* WRTL Mem. at 6 & n.4. The three ads proposed in WRTL's original and amended complaint remain at issue, and WRTL has verified that it wishes to do similar ads. WRTL Mem. at 3-4.

[8]The FEC disparaged the dialogue between Justices Stevens and Kennedy in *Austin* and *McConnell*, which goes to the present substantive issue. FEC Mem. at 5. It argued that the PAC option is sufficient in all situations, FEC Mem. at 4, which goes to the substance of whether the prohibition as presently applied survives strict scrutiny examination of compelling interests and narrow tailoring. It argued that Judge Leon's findings and conclusions on grass-roots lobbying had been rejected (which they have not been), FEC Mem. at 5, which goes to the issue of whether genuine grass-roots lobbying is different in kind from "sham" issue ads and must be accorded an exception. It argued that *McConnell* "in no way sanctions . . . the 16 factor test that WRTL asks the Court in enact in lieu of BCRA's bright-line definition," FEC Mem. at 5, which goes to the present substantive issue. In footnote 6, the FEC continued this argument on the merits: "WRTL's 16-factor legislative proposal (WRTL Mem. at 5) not only finds no support

to . . . hold that WRTL's as-applied challenge is not precluded by *McConnell*, the Court should nevertheless grant summary judgment for the Commission." FEC Mem. at 7 n.8. WRTL will address these arguments further in its opposition memorandum to the FEC's own motion for summary judgment, but since the FEC's memorandum is also styled as a reply, the arguments in this footnote go directly to the FEC's substantive reasons for denying WRTL's summary judgment motion on the merits.

The FEC argued first that there is "no unconstitutional burden on WRTL," then that WRTL's argument on the merits that genuine grass-roots lobbying is not the functional equivalent of express advocacy "is beside the point" because the proposed ads have an "electoral effect" based on their content and context and were just the sort of things targeted by BCRA's prohibition. *Id.* (citing the FEC's own Statement of Material Facts as to other activities of WRTL and its PAC). The FEC concluded that "[t]hose explanations did not, and need not, depend on the presence of express advocacy in such advertisements." *Id.*[9]

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in *McConnell*, but is also contrived and unexplained. For example, are all 16 'factors' necessary for an ad to constitute grassroots lobbying, or would 14 suffice?" FEC Mem. at 5 n.6. Of course, WRTL does not propose a 16-point test and does propose a test with lesser elements, as noted in text above, but the FEC has clearly submitted argument on the merits of the claim. And the FEC's "broader rationale" subversion argument, FEC Mem. at 6-7, goes directly to the question of what compelling interests are met (if any) by applying the prohibition on the present facts and whether the prohibition is narrowly tailored without an exception, given the fact that the usual asserted interests are all met by full disclosure (reporting and disclaimer) of its electioneering communications by WRTL and by the narrowness of the proposed ads, rule, and facts of this case.

[9]Either this is a distortion or a misunderstanding of WRTL's argument, for WRTL does not assert that express advocacy need be present in communications that fall within the definition of electioneering communication (which *McConnell* held). Rather, WRTL asserts that the strict scrutiny constitutional analysis this Court should apply is the same one that *McConnell* applied, i.e., are WRTL's proposed ads the functional equivalent of express advocacy in the same way as the "sham" issue ads described and considered in *McConnell*?

WRTL has thoroughly briefed these issues in its opening memorandum, so that little further argument is necessary here in response to the FEC's arguments. *See* WRTL Mem. at 24-45. WRTL would add that deciding whether WRTL may speak on an issue on the basis that some candidate has spoken about the same issue is the logical equivalent of giving candidates a heckler's veto. A heckler's veto is not generally permitted because one's free speech cannot be circumscribed by what others do. *See*, *e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *See also Hague v. CIO*, 307 U.S. 496, 502 (1939) (dictum); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (dictum); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (dictum).

WRTL would further add that if the FEC's argument that Congress may regulate whatever activity in some measure affects elections, regardless of whether it constitutes the functional equivalent of express advocacy, then by logical extension Congress would have the authority to regulate myriad activities that the Court has so far never approved, including such things as celebrity appearances and endorsements, Michael Moore "documentaries," and television programs (both fiction and nonfiction). Just because genuine grass-roots lobbying may have some minimal level of influence on elections does not mean that constitutionally cognizable interests are sufficiently present to permit restriction. And nowhere does the FEC address the added weight of the rights to petition and self-government, which were not discussed in *McConnell* but which must be added to the weight of constitutional right favoring an exception for grass-roots lobbying (along with the rights of free speech and association).

The FEC's whole response to WRTL's description of our constitutional republic, the sovereign role of the people, and the vital role they must play in self government in ongoing dialogue with their representatives is the descriptor "extravagant rhetoric" and the phrase "more

candid reliance on policy arguments to urge the Court to act as a legislature." FEC Mem. at 2 & nn.3-4. While the FEC employs argument by verbal disparagement, it offers no substantive response to the fact that in a republican form of government the people are sovereign and have a constitutional (indeed supra-constitutional) right to participate in self government. In vindicating the people's free speech, free association, free petition, and self-government rights, this Court would recognize nothing extravagant and would merely do its constitutional duty, not legislate. *MCFL*, 479 U.S. at 263-64.

And again it must be highlighted that the FEC has neither done the required strict scrutiny analysis nor provided any counter argument to WRTL's clear demonstration that all of the Supreme Court's concerns and interests are met by the careful definition and facts of this case. WRTL Mem. at Part II. That argument standing unrebutted it should be considered conceded. Even absent any concession, the actual strict scrutiny that should govern this case yields summary judgment for WRTL.

The Court has before it all the facts and arguments needed to decide this case in WRTL's favor on summary judgment. However, having (a) joined issue in legal arguments on the merits, (b) responded to WRTL's statement of facts, and (c) submitted its own statement of facts (which WRTL assumes was intended to apply to both motions as it was timely filed for responding to WRTL's motion), the FEC makes the strange assertion that "WRTL's summary judgment should be denied. No discovery has yet taken place in this case. Thus, if the legal issues the parties have briefed are not dispositive, the Commission should be permitted to take discovery . . . ." FEC Mem. at 7.

If the FEC means that if the cross-motions for summary judgment fail to resolve this matter

then the usual procedure of proceeding to trial should be followed, WRTL does not object. The FEC's language indicates that this is its position. But given that there are adequate facts without "genuine issue," Fed. R. Civ. P. 56, to decide this case and that there are cross-motions for summary judgment that address the dual issues of whether as-applied challenges are permitted and whether an exception is required, this case should be decided on summary judgment.

If, however, the FEC means that it has no affidavit evidence to submit in opposition to WRTL's statement of the facts because discovery has not occurred and that consideration of the substantive aspect of WRTL's motion must be deferred, then WRTL strongly objects. The summary judgment rule requires "affidavits of a party opposing the motion" from which "it appear[s] . . . that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition" before "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions taken or discovery to be had . . . ." Fed. R. Civ. P. 56(f). The FEC has in no way complied with this rule nor even asserted what the rule requires to be asserted. The FEC could not have it both ways by joining issue on both the threshold and substantive summary judgment issues and then insisting that if things might go in WRTL's favor it would need more discovery. The FEC has had since July 28, 2004, to engage in discovery, which it has not done. The time has come and gone for it to allege that it needs more discovery before WRTL's summary judgment motion may be fully considered (or for that matter its own motion, which addresses both the threshold and substantive issues).

III. Amici Curiae May Not Fill in Gaps Left by Parties, But Amici's Arguments Yield the Same Results in Favor of WRTL.

The FEC has chosen not to address a number of WRTL's arguments, both on the threshold

and substantive issues. Sen. McCain et al. have filed an amicus curiae brief[10] in an apparent effort to fill in some gaps, although it still has no response to some of WRTL's arguments (e.g., Article III and Supreme Court adjudication principles precluded considering as-applied challenges in a facial challenge and there are no interests sufficient to survive strict scrutiny.)

But permitting amici to make arguments where the party made none is improper absent extraordinary justification (e.g., the party is unrepresented). The rule is that failure by a party to brief an argument is a concession of the argument, LCvR 7(b), and the D.C. Circuit has stated that arguments raised by amici but not raised by parties should not be considered.[11] So WRTL objects to any consideration of arguments not raised by the FEC in deciding this summary judgment motion. However, WRTL will briefly address some of amici's arguments to show that they do not change the result, which should be a decision in WRTL's favor.

Amici began with the familiar assertion that the rationale and language of *McConnell* precluded as-applied challenges. AC Mem. at 13-27. But amici added a new argument, i.e., that the Supreme Court in *McConnell* necessarily considered an as-applied challenge for grass-roots

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[10]As a preliminary matter, it should be noted that amici curiae only filed their brief "in opposition to plaintiff's motion for summary judgment," AC Mem. at 1, and not in support of the FEC's own motion for summary judgment, so that amici curiae's arguments are by the memorandum's own express terms limited to the present motion.

[11]*See*, *e.g.*, *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001) (declining to consider argument advanced by amicus but not government); *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1367 (D.C. Cir. 1999) (remanding where the parties sought remand but amicus sought appellate court resolution); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998) ("Because we ordinarily do not entertain arguments not raised by parties ... we consider only the [party's] equal protection challenge" although amicus filed brief "supporting [the party's] equal protection claim and reiterating its separation of powers and bill of attainder arguments"); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (ordinarily "would not entertain an amicus' argument if not presented by a party").

lobbying and rejected it. This is absolutely contrary to what Sen. McCain and the other BCRA prime sponsors argued to the Supreme Court in *McConnell*. There they argued that as-applied challenges would be the solution to alleged overbreadth. [Redacted] Brief for Intervenors at 64, *McConnell*, 540 U.S. 93 (No. 02-1674) ("[A]waiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.").[12] So effectively, Sen. McCain et al. said then "later" and say now "too late." They can't have it both ways.

Amici ignore the fact that *McConnell* was litigated and decided as a facial challenge, as *McConnell* stated and WRTL has demonstrated (*see*, *e.g.*, WRTL Mem. at 10), and claim that *McConnell* decided all as-applied challenges by doing a narrow-tailoring analysis and "additionally sustained the statute under the facial overbreadth test set forth in *Broadrick* . . . ." AC Mem. at 19, 22 n.31. Even if narrow tailoring analysis had been done (and WRTL has shown that it was not done, WRTL Mem. at 11-16, that analysis would identify some allegedly overbroad applications of the prohibition but would not decide matters not actually before the Court. So even if it had been done, it would not eliminate all future as-applied challenges. But what evidence do amici offer that it was done? Amici declare that WRTL is "wrong" in claiming there was no narrow tailoring, AC Mem. at 22 n.31:

because the Court appropriately addressed both questions in upholding the statute: it first

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[12]Amici use the terms "prohibition" and "blackout period" to describe the ban on the use of corporate funds for electioneering communications prior to elections, but insist that WRTL mischaracterizes the prohibition as such. *See* AC Mem. at 10, 11, 34. Even the *McConnell* passage amici cites, however, is captioned "BCRA § 203's *Prohibition* of Corporate and Labor Disbursements for Electioneering Communications," 540 U.S. at 203 (emphasis added), and after calling the prohibition by such a term itself the Supreme Court merely said that it "simply wrong to view the provision as a *complete ban on expression* rather than a regulation." *Id.* at 204 (emphasis added; quotation marks and citation omitted). Amici also called the ban on corporate independent expenditures a "prohibition" despite the PAC alternative. AC Mem. at 13.

> found that the compelling interests that apply to the regulation of express advocacy "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.

But *McConnell* plainly said that the "to the extent that . . . functional equivalent" language resolved the issue of whether there were *sufficient governmental interests*, not narrow tailoring. 540 U.S. at 206 (question of "justifications that adequately support the regulation of express advocacy" also supporting electioneering communication prohibition). So amici is wrong, based on the plain language of *McConnell*. And WRTL agrees that the question of "extent" and "functional equivalen[ce]" is the crucial question, for it is exactly the question that WRTL now poses with regard to genuine grass-roots lobbying. In *McConnell*, that question was only answered with respect to "sham" issue ads as described by the Court there.

Amici again attempt to prove their case by noting that grass-roots lobbying was argued before the Court in *McConnell*. AC Mem. at 23-27. This is a point that WRTL has already made, and amici provide the service of giving additional examples. But amici reach the erroneous conclusion that "given the centrality of the arguments about grassroots lobbying made by the numerous challengers in *McConnell*, it is clear that the Supreme Court fully considered the arguments, and rejected them." AC Mem. at 27. But amici are unable to show anywhere in *McConnell* where grass-roots lobbying was even discussed, and they have been unable to overcome the fact that *McConnell* was litigated and decided as a facial challenge, based on *Broadrick* substantial overbreadth analysis requiring that plaintiffs prove that the overbreadth was substantial. Plaintiffs in *McConnell* thought the inclusion of the class of grass-roots lobbying

created "substantial" overbreadth in the facial litigation context, but the Court said that *plaintiffs* had not met their burden (and plaintiffs only have the burden in substantial overbreadth analysis, not narrow tailoring analysis). WRTL Mem. at 14. As WRTL has shown, *Broadrick* says that if plaintiffs can't prove substantial overbreadth for facial invalidation, then alleged overbreadth is dealt with in case-by-case adjudication. WRTL Mem. at 8.

In sum, amici failed to prove that *McConnell* prohibited this as-applied challenge. Most telling, perhaps, is to conclude the discussion where it began. Several of the present amici urged the Supreme Court – precisely when all the parties that amici now cite were clamoring about how the electioneering communication prohibition would negatively affect genuine grass-roots lobbying – to save all such details for later, in as-applied challenges. The Court followed their lead, and now, with no evidence of embarrassment, amici blithely assert the contrary position that *McConnell* already decided those same, postponed issues. And amici couldn't have merely forgotten that they urged this in *McConnell*, for WRTL set it out plainly in the opening memo.

On the constitutional merits, amici argued that WRTL's intent shouldn't matter because the ads' effect does. AC Mem. at 27-28. WRTL agrees that subjective intent can't matter, which is something the Supreme Court has held since *Buckley*. As to effect, WRTL has shown that genuine grass-roots lobbying ads as WRTL defines them are poor tools for electioneering but useful and necessary for self-government by the people. WRTL Mem. at 24-24. Since these highly circumscribed ads have such limited use for electioneering, and are supported by such important constitutional rights and interests held by the people, the government must make a strict scrutiny showing that there are sufficiently cognizable interests and that the prohibition is narrowly tailored to those interests. WRTL has shown that its definition and disclosure and

disclaimer compliance removes most of the governmental concerns and that the "segregated bank account" eliminates any residual concerns. WRTL Mem. at 31-34. The FEC failed to address this, but amici attempted it by claiming an exception would allow corporations to flood the airwaves with ads before elections and that WRTL was merely trying to "rewrite the law enacted by Congress." AC Mem. at 40, 37 n.46. But if the people are properly engaging in self-government as outlined herein, there is no governmental interest in prohibiting ads about pending legislative or executive action. And WRTL was not asking the Court to rewrite anything. It was merely saying that WRTL was prepared to use the segregated bank account option described elsewhere in BCRA. Since that option eliminates all corporate and labor union conduit concerns, it is a more narrowly tailored, less restrictive means of achieving what Congress said it sought to achieve.

Conclusion

WRTL has demonstrated that *McConnell* did not proscribe as-applied challenges and that an exception to the prohibition on corporate expenditures for electioneering communications for carefully-defined grass-roots lobbying is constitutionally required. WRTL's summary judgment motion should be granted.

Respectfully submitted,

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