No. 04-1581

In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From
The United States District Court,
District Of Columbia

BRIEF FOR *AMICUS CURIAE* DOUGLAS L. BAILEY IN SUPPORT OF APPELLEE

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INTEREST OF *AMICIUS CURIAE*

Douglas L. Bailey was a pioneer in the field of political campaign consulting.[1] In 1968, Mr. Bailey co-founded Bailey, Deardourff & Associates, which was one of the first national political consulting firms in the United States. As a campaign consultant, Mr. Bailey has provided countless candidates for elected office with a full array of campaign services, including the development of overall strategies and themes and the creation of both print and broadcast advertisements to implement those strategies and themes. His clients have included Gerald Ford's 1976 Presidential Campaign, and various Republican candidates for Governor, Congress, and the Senate. He has consulted on over fifty successful campaigns for Governor and the United States Senate in seventeen states.[2] Mr. Bailey also has extensive experience consulting on various citizens initiatives and other grassroots issue campaigns.[3]

Mr. Bailey was among the first eight recipients of the American University-Campaign Management Institute's "Outstanding Contribution to Campaign Consulting"

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Mr. Bailey or his counsel, make a monetary contribution to the preparation or submission of this brief.

[2] For example, Mr. Bailey has consulted on successful campaigns for, among others, Governors Kean (NJ), Bond (MO), Bowen (IN), Orr (IN), Thompson (IL), Milliken (MI), Rhodes (OH), Ray (IA), Snelling (VT), Thornburgh (PA), Alexander (TN), Clement (TX), Ashcroft (MO), Kean (NJ), Cahill (NJ), DuPont (DE), and Senators Brooke (MA), Mathias (MD), Schweiker (PA), Baker (TN), Bond (MO), Danforth (MO), Chafee (RI), Pressler (SD), Lugar (IN), Stafford (VT), Percy (IL).

[3] For example, Mr. Bailey has advised, among others, Handgun Control, Incorporated, Floridians Against Casinos, and League of Conservation Voters.

Award honoring political consultants who have best represented the ideals of the profession and shown concern for the consequences and impact of political campaigns on public attitudes about the American democratic process.

In 1987, Mr. Bailey co-founded *The Hotline*, a bipartisan daily online briefing that covers the media coverage of campaigns, candidates, and specific political issues raised in over 2,500 media sources nationally, including television, radio, and newspapers across the country. Its audience includes the White House, Congress, both political parties, the political consultant industry, numerous special interest groups, and a wide variety of national media outlets. *The Hotline* was sold to the National Journal in 1996. Mr. Bailey continues as a Senior Advisor at *The Hotline*.

From 2001 through the 2004 election, Mr. Bailey was the president of Freedom's Answer, a non-partisan voter turnout program he co-founded with Mike McCurry, former Press Secretary to President Clinton. Their purpose in founding Freedom's Answer was to counteract declining voter turnout, particularly among young people, which Mr. Bailey concludes has resulted in part from the increase and importance of soft money in campaigns, thereby divesting local citizens' networks of their power. In 2002, the program helped create the largest voter turnout ever in a non-presidential year (both nationally and in 27 different states). In 2004, it contributed to an astounding increase of 17 million voters above the 2000 presidential turnout.

The integrity of the election process is extremely important to Mr. Bailey both professionally and as a citizen. He has a deep and long standing interest in

restoring voter confidence in our electoral system and lectures on the subject frequently. In *McConnell v. FEC*, he submitted a sworn affidavit, which was cited by both the District Court, 251 F. Supp. 2d 176, 305 (Henderson, J.), 528-31, 534, 560-61 (Kollar-Kotelly, J.) (D.D.C. 2003), and by this Court, 540 U.S. 90, 193 n.77 (2003), in their decisions upholding the bright-line prohibition against using corporate or union treasury funds to pay for "electioneering communications" aired in specified time periods immediately preceding general and primary elections.

SUMMARY OF THE ARGUMENT

Advertisements aired in the time frame immediately preceding an election that mention a clearly identified candidate by name will undoubtedly influence voting decisions regardless of whether the advertisement makes a direct appeal for voter support or opposition. Every competent campaign consultant, issue advocacy group, or other entity involved in the political process is cognizant of this undeniable fact and design their advertising approaches accordingly.

The Bipartisan Campaign Reform Act ("BCRA") prohibits the use of soft money to finance advertisements that clearly mention a candidate in the sixty days preceding the general election (and thirty days preceding a primary election) because, irrespective of the purpose of the ad or the intent of the organization or individual sponsoring the ad, such ads will unavoidably influence voting decisions in the election. Of course, an organization or individual may use soft money to broadcast electioneering advertisements outside the 30/60 day time periods

defined by BCRA, or to broadcast true issue advertisements (that do not refer to a candidate) in the time immediately preceding an election. The purpose of these BCRA provisions is to eliminate the unlimited expenditures of soft money on sham "issue ads" that are functionally equivalent to ads expressly advocating for or against a particular candidate's election.

Wisconsin Right To Life ("WRTL") is essentially seeking to overrule a major tenet of this Court's decision in *McConnell* by creating an exception to BCRA's bright-line prohibition—an exception that would operate to subsume the rule. WRTL claims that its ads are true issue ads that are simply one part of its "grassroots efforts" to affect pending legislative activities. According to WRTL, the constitutionality of an advertisement would essentially hinge on the purpose of the advertisement and the intent of the party broadcasting it. Determining the purpose and intent behind a particular ad will be a virtually impossible task for district courts. It will lead to arbitrary and non-uniform results regarding which advertisements are permissible under BCRA based on the subjectivity of a particular judge looking at the context of political ads and attempting to divine the purpose and intent of the party in running such an ad. Moreover, it is well known in the political campaign world that clearly identifying a known candidate in an ad aired right before an election will impact the electorate in regard to that candidate, and that a competent political consultant can design an effective issue ad or grassroots lobbying effort without identifying a candidate. Accordingly, it should be presumed that the true purpose or intent (and unavoidable result) of any ad aired right before an election that clearly identifies a candidate for office is to influence the election.

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ARGUMENT

I. "ISSUE" OR "GRASSROOTS LOBBYING" ADVERTISEMENTS AIRING IMMEDIATELY PRIOR TO AN ELECTION WHICH IDENTIFY A CANDIDATE WILL UNAVOIDABLY INFLUENCE THAT CANDIDATE'S ELECTION.

In contrast to commercial transactions for which advertising is run, nearly all political "sales" take place on a single day—election day. The context for voters' decisions is created by what happens leading up to election day. Aggressive political campaigns always seek to create the most favorable context in which voters are asked to make their decisions, based on the goals of the group sponsoring the advertisement.

The quintessential purpose of a political consultant's role in designing an advertising campaign for a specific candidate is to create a cumulative, positive general impression of the candidate and provide a favorable context in which the voters can make a decision about that candidate. Broadcast advertisements about candidates are short in duration and the image sought cannot be achieved in only one or two ads. However, over time, a campaign consultant will attempt to define a candidate through a combination of style, image, and issues. Each advertisement that airs in support of a candidate in the months leading up to an election is intended to give voters a "feel" for the candidate. Arguably the most important voters—the "swing" voters that will ultimately decide the outcome of the election—rarely vote for a candidate based solely or even significantly on substantive positions that candidate has on the issues. Rather, these voters will support a candidate if they perceive that the candidate is likeable and shares similar values to them. A campaign consultant

will often use a substantive issue simply as a vehicle to help persuade targeted voters that the candidate shares their values, and to make the voters comfortable with the candidate. Thus, so-called issue ads that mention a candidate by name, whether in a positive or negative context, will undoubtedly influence the election because such ads are merely another method of providing voters with a feel for the candidate.

Prior to BCRA, so-called issue ads financed by soft money were an integral part of election campaigns, and they were often part of a concerted joint effort and overall plan between advocacy groups and the candidate. Competent political consultants know that true issue ads run in the time period immediately preceding the election are largely ineffective at actually raising voter awareness of, or interest in, a particular issue. In the time period preceding the election, true issue ads are likely to be drowned out and overwhelmed by the large volume of various political ads seeking to influence the election. Issue ads run during this time that mention a candidate's name become inexorably intertwined with the campaign itself, augmenting voters' overall perception of candidates by providing additional context in which to view the candidate.

A true issue ad campaign is most effective when it is aired outside of the time period immediately before an election, when its message will not be distorted or overwhelmed by the prevalence of candidate campaign ads. By contrast, an electioneering ad—even one purportedly about an issue but that refers to a candidate—is designed as part of a campaign package to subtly influence a voter to reach certain conclusions about the candidate while giving the voter the impression he came to that conclusion entirely independent of political propaganda. An issue ad

that airs in the time immediately preceding an election that implores a voter to "contact" or "tell" a candidate about one's opposition to a certain policy will unavoidably affect that candidate's election. During the election time period, the implicit message to the voter is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one's support for a particular policy, implicitly suggests that one way to continue that policy is to vote for the referenced candidate.

II. "GRASSROOTS LOBBYING ADS" AIRING IMMEDIATELY PRIOR TO AN ELECTION WHICH REFERENCE A CANDIDATE BY NAME ARE, IN REALITY, "ELECTIONEERING ADS."

Context and timing will ordinarily determine whether an ad is a true issue ad or an electioneering ad in disguise.[4] While an ad that refers to a candidate may have an effect as an issue ad a year away from an election, that same ad will impact the viewer as an electioneering ad when it is aired right before an election. In the midst of swirling campaign activity, the primary impact of an ad that mentions a candidate's name will be as an electioneering ad.

[4] WRTL's argument that "Grassroots lobbying ads . . . have nothing to do with elections" defies decades of actual campaign realities. Similarly, its argument that the Court should distinguish a grassroots lobbying ad from an electioneering ad based on an examination of "the text of the ads themselves" and "not external factors" is a head-in-the-sand approach that ignores the realities of sophisticated, modern-day campaign techniques. (Br. of Appellant at 25.) The context and environment in which an ad airs is an important consideration in designing the ad and how the ad will be perceived by the viewer.

In short, the audience is simply unlikely to distinguish between the issue in the ad as opposed to the more prevalent election activity when the so-called issue ad mentions a specific candidate's name.

Competent interest and advocacy groups are fully cognizant of this dynamic and would only run a so-called issue ad or grassroots lobbying ad with full knowledge that it is the functional equivalent of electioneering. As Judge Kollar-Kotelly found and detailed extensively in her findings of fact in *McConnell*, advocacy and interest groups aired many more purported issue ads in the time period immediately preceding an election, and those ostensible issue ads were much more likely to mention a candidate by name. *See* Mem. Op. of Kollar-Kotelly, J., 251 F. Supp. 2d at 561-63.

A particularly compelling example is the Citizens for Better Medicare ("CBM") campaign of "issue ads" aired in the year preceding the 2000 election:

> During the final three weeks before the 2000 federal election, CBM aired 6,010 spots that mentioned a candidate and only eight spots that did not mention a candidate. . . . From January 1 through September 4, 2000, CBM ran 23,867 television spots, *none* of which mentioned a candidate.

Id. (citing Expert Report of Kenneth M. Goldstein) (emphasis in original). This evidence confirms what every competent campaign consultant already knows: ads that mention a candidate by name in the time period immediately preceding an election are intended to influence, and unavoidably will influence, that election. It does not

matter that they are labeled as issue ads or grassroots lobbying ads.

Judge Koller-Kotelly's opinion also provides an excellent illustration of a facially innocuous issue ad that is undeniably an electioneering ad when placed in the context of an election timeframe using a candidate's name. In her opinion, Judge Kollar-Kotelly quoted at length from a speech given by Tanya K. Metaska, former chair of the National Rifle Association Political Victory fund. Ms. Metaska said:

> We engaged in issue advocacy in many locations around the country. Take Bloomington, Indiana for example. Billboards in that city read,
>
> > 'Congressman Hostettler is right.'
> >
> > 'Gun laws don't take criminals off Bloomington's streets.'
> >
> > 'Call 334-1111 and thank him for fighting crime by getting tough on criminals.'
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. *When we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them*.

Id. at 537 (emphasis added). Ms. Metaska's view was entirely correct and reflects a sophisticated and effective, albeit subtle and indirect, approach to campaigning. Moreover, her statements also apply to apparent grassroots lobbying ads.

Regarding the WRTL ads at issue in this litigation, there is no practical difference, in the context of an election, between asking the audience to "contact" Senator Feingold regarding a "negative" issue about which his position is widely known, or to "vote against" him, at least in part because of it. It is actually more effective in many cases to use indirect words such as "contact" instead of direct appeals such as "vote for" or "vote against" because often voters will respond more favorably to a political message employing subtlety.

III. WRTL'S FILIBUSTER ISSUE ADS CLEARLY WERE INTENDED TO INFLUENCE, AND UNDENIABLY WOULD HAVE INFLUENCED, THE ELECTION HAD THEY BEEN AIRED AT THE INTENDED TIME.

WRTL's ads, viewed in the context of the timeframe they were intended to air, appear to have been designed to portray Senator Feingold in a negative light for the purpose of influencing the outcome of the election for which he was campaigning. The ads disparage a "group of senators" for blocking qualified candidates from serving as judges, and using politics to cause "gridlock and back up some of our courts to a state of emergency." The ads then specifically urge voters to contact Senators Feingold and Kohl and tell them to oppose the filibuster. The logical and unavoidable implication of the ads is that Senator Feingold (the only Senator mentioned who was up for reelection) supports the filibuster, and thinks that "politics" are more important than saving courts from a "state of emergency" or allowing qualified candidates to serve in the federal judiciary. Indeed, there would be no reason to tell

voters to contact Feingold and Kohl urging them to oppose the filibuster if they were already opposed to it.[5]

The three WRTL ads,[6] viewed in context with WRTL's explicit advocacy against Senator Feingold, and in light of their timing, seem obviously intended to influence the election. WRTL, Senator Feingold's Republican opponents, and the Wisconsin Republican Party had criticized Feingold for his support of the judicial filibusters and had made it a significant campaign issue. *See generally* R. at 26:1-2[7] (Dist. Ct. Mem. Op. & Order); R. at 18, Exs. 15-16, 18, 20-25 (Def. FEC's Mem. in Opp'n to Pl.'s Mot. for Preliminary Injunction, Exs. 15-16, 18, 20-25.); R. at 41, Attachment 1:3-9 (Br. of Senator John McCain et al. as *amici curiae* at 3-9.). Specifically, WRTL had released press statements critical of Senators Feingold and Kohl on July 14, and July 21, 2004. R. at 18, Exs. 24-25.

In its July 21 press release, WRTL stated that "the Senate, with the assistance of Senators Kohl and Feingold, has voted to continue its unprecedented filibuster of judicial nominees." In its July 14 press release, WRTL noted that it had "grave concerns" that Senators Feingold and Kohl had "voted 16 out of 16 times to filibuster judicial candidates." That same press release also noted that

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[5] The fact that the proposed ads deal with both a candidate (Feingold) and a non-candidate (Kohl) equally and did not single out the candidate is of no consequence in terms of the implicit message communicated to voters, i.e., express your displeasure and disregard by complaining to Kohl and by voting against Feingold.

[6] Transcript copies of the WRTL ads are attached hereto in the Appendix.

[7] References to the Record are to the docket number assigned to each document, followed by the internal attachment number, exhibit number, or page number as appropriate.

Miguel Estrada had to withdraw his nomination after two years of having it filibustered. When WRTL's proposed ads are viewed in the context of WRTL's plan to air them right before Senator Feingold's election, along with WRTL's own press releases, website, and negative comments, and campaigning by the Republican Party and Senator Feingold's opponents, the only logical conclusion is that WRTL intended to influence the election with its proposed ads, not merely to conduct grassroots lobbying.

Though WRTL criticized Senators Feingold and Kohl for two years of filibusters, and lamented that one "well-qualified" judge had already had to withdraw his nomination, it did not start to run its so-called grassroots lobbying ads until right before the upcoming election. Pre-BRCA, this pre-election period was consistently the time when most "issue ads" financed with soft money were aired in a thinly disguised attempt to influence the election. By WRTL's own admission, the filibuster issue was a long-standing one. (Br. of Appellant at 34). If WRTL had truly wanted to run effective issue ads, it would have been best, as every competent campaign consultant knows, to run them long before the election—or even after the election, when the clamor of competing campaign messages would have died down. Tellingly, WRTL followed the historical pattern of attempting to run so-called issue ads that mention a candidate's name just prior to the election. As Judge Kollar-Kotelly explained in great detail in her findings of fact in *McConnell*, advocacy groups adopt this approach primarily to influence the election, not to actually raise awareness of a particular issue.

Interestingly, WRTL's ads provided no phone number, URL, address, or other contact information allowing listeners or viewers to actually contact Senators Feingold

and Kohl, as WRTL encourages. Instead, the ad directs listeners to WRTL's own website where, it says, contact information for Feingold could be found. But no information necessary to contact Feingold is provided by the ad itself. It is a further indication that the purpose of WRTL was not to incite such contacts at all, but rather to impact voting in the upcoming election. Indeed, the ad directed viewers and listeners to WRTL's website, which, through its e-alerts, was explicitly critical of Senator Feingold's position on filibusters. From a campaign consultant's point of view, WRTL's ads (airing in the heat of an election campaign) telling voters to contact Senators Feingold and Kohl would have been ineffective for the purpose of influencing the filibuster fight in Congress.[8] The ads, however, would undoubtedly have been effective as electioneering ads, implicitly portraying Senator Feingold as "unfair," and providing a negative general context in which voters would view him when they cast their ballots.

[8] WRTL incorrectly claims that it was necessary that it run ads in the time period prohibited by BCRA because "an unprecedented issue of vital national importance" was "coming to a head" at the end of the Congressional Session. (Br. of Appellant at 34.) WRTL did not air its "Wedding" ad until July 26, 2004, which was days *after* several judicial filibusters had already happened, *Id.* at 3. Most importantly, the Senate had already commenced its summer recess on *July 22, 2004*, and did not return until September 7, staying in session until October 11. (Congress' schedule is a matter of public record, and is available at http://thomas.loc.gov/home/ds/s1082.html.) The only logical conclusion that can be drawn from these facts is that WRTL intended to use Senator Feingold's past filibusters of judicial nominees to create a negative context for voters interested in his candidacy. WRTL's advertising strategy is inconsistent with an advocacy group that truly wished to engage in "grassroots lobbying." If that was WRTL's actual intent, any competent consultant would have run issue ads in the time leading up to the July filibusters, when the message would not have been obfuscated by the overabundance of campaign and electioneering ads.

IV. IF WRTL'S TYPE OF "GRASSROOTS LOBBYING" ADS ARE ALLOWED TO BE AIRED AS LEGITIMATE ISSUE ADS, THE EFFECTIVENESS OF BCRA WILL BE SERIOUSLY UNDERMINED.

BCRA was designed to avoid the sham of electioneering ads masquerading as issue advertisements. In *McConnell*, the Court concluded:

> Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless. 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.

540 U.S. at 193 (referencing Decl. of Douglas L. Bailey, *quoted in* 251 F. Supp. 2d at 305 (Henderson, J.)) (internal citations omitted). The so-called grassroots lobbying advertising exception that WRTL seeks in this case would be the functional equivalent of the "magic words" express advocacy/issue advocacy distinction drawn by the Court in *Buckley v. Valeo*, 424 U.S. 1, 43 (1976). In other words, WRTL's proposed exception would seriously undermine BCRA's prohibition on the use of soft money to finance electioneering ads immediately preceding an election.

Competent and creative political and media consultancy professionals could and would readily use WRTL's proposed grassroots lobbying issue ads exception to design ostensible issue ads that will have a profound and direct

impact on candidate elections. There are and always will be hot-button political issues before Congress right before any election that could be used as a pretext for airing supposed issue ads within the immediate pre-election time frame of BCRA. If the Court adopts WRTL's proposed grassroots lobbying issue ads exception, political consultants can and will design ads to influence voter behavior by portraying an issue (and/or politicians supporting that issue) in a positive or negative light, and then asking the audience to contact the incumbent politician to oppose or support that legislation, initiative or measure.

Examine, for example, the pertinent text of WRTL's proposed "Loan" ad, one of the radio ads at issue in this case.

Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org.

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

While WRTL claims that its "Loan" ad is a legitimate attempt to conduct grassroots lobbying on the issue of filibustering, it is important to note that there is no contact information for Feingold (who was up for re-election) or for Senator Kohl (who was not). Under WRTL's proposed exception to BCRA, campaign consultants will be able to easily design grassroots lobbying ads that are much more vitriolic, insidious, and emotive than the ads at issue in this case. While the ads will be grassroots lobbying ads in name, they will be electioneering ads in reality and effect. Political consultants, advocacy groups, and others parties designing ads will develop ads that will render the grassroots lobbying ads/sham issue ads distinction as meaningless as the former issue advocacy/express advocacy distinction. For example, under WRTL's notion of issue advertising nothing would stop it from modifying the above ad to read as follows:

> Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators *tied to a radical pro-abortion philosophy*[9] is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates are not getting the chance to serve, because *the Senators do not have a modicum of respect for human life*.
>
> The Senators are putting politics ahead of democracy and fairness, causing gridlock and backing up some of our courts to a state of emergency.

[9] The italicized portions of this modified ad quote language from a WRTL press release characterizing Senator Feingold after he voted against Unborn Victims of Violence Act. R. at 18, Ex. 20.

> Contact Senators Feingold and Kohl and tell them to make sure that these un-American tactics stop and to vote to end the filibuster.
>
> Visit: BeFair.org.
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Similarly, a pro-choice group such as Planned Parenthood could design an inflammatory and diametrically opposed ad that would fit WRTL's grassroots lobbying exception. For example:

> Right now, the Senate is trying to push through a group of radically right-wing judges to serve on the Federal Courts of Appeal. These judges want to invade your right to decide if and when you will have a family, and insert themselves into women's reproductive choices and control what choices women make affecting their bodies. These judges have made it clear that they will take away a woman's right to choose.
>
> The only thing standing between you and your right to choose is a brave group of Senators who refuse to confirm these judges who will not respect your existing rights.
>
> But the political pressure is mounting. Call Senators Feingold and Kohl and tell them to oppose these radical judicial confirmations.
>
> Paid for by Planned Parenthood of Wisconsin, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

These two hypothetical, yet conceivably allowable, ads have a clear political message that will influence the electorate if they are aired immediately before an election (even with the required disclaimer that the ads are not authorized by any candidate). The unavoidable result is that the ads would necessarily become a part of the election campaign milieu, and would serve to persuade voters how to cast their ballots. In reality and effect, grassroots lobbying ads specifically mentioning candidates and aired within the pre-election time period are exactly what pre-BCRA issue ads—like the National Rifle Association billboards example, *supra*—are; they are the functional equivalent of electioneering ads.

WRTL's claim that "grassroots lobbying ads" do not raise the same concerns as sham issue ads simply rings hollow. In fact, the standard WRTL proposes in order to determine if ads should be considered grassroots lobbying ads is as open to abuse and subversion as the Court's "express advocacy" interpretation of the Federal Election Campaign Act of 1971. WRTL proposes that the Internal Revenue Code definition of grassroots lobbying communication should be applied. (Br. of Appellant at 21.) That section sets forth three required elements. A "grass roots lobbying communication" must (1) refer to specific legislation, (2) reflect a view on such legislation, and (3) encourage the recipient to take some action with respect to such legislation. 26 U.S.C. § 56.4911-2(b)(2)(i)-(ii).

It is important to note that reference to an identified candidate is not necessary to satisfy the three requirements for a grassroots lobbying ad under the IRS definition.

Moreover, this definition of "grass roots lobbying communication" is extremely broad and, if adopted, will allow political consultants to easily create electioneering ads masquerading as grassroots lobbying ads. Not only would the above hypothetical ads meet this definition, but ads with much more inflammatory language on topics such as the war on terror, military appropriations, and immigration would also qualify as grassroots lobbying ads. If the Court were to create the exemption WRTL seeks in this case, a new species of sham grassroots lobbying ads would simply replace the sham issue ads that created the soft money loophole that Congress closed by enacting BCRA, the provisions of which were upheld by this Court. At any given time, there is a vast amount of legislation under consideration by each House of Congress and significantly more being considered by various committees. Should WRTL's position be allowed to stand, political consultants will be able to use soft money to conduct sham grassroots lobbying on a virtually unlimited range of issues contemporaneously under consideration at some point in the legislative process. It will not matter how contentious a piece of legislation is, or how likely or unlikely it is for a given measure to pass, to fail, or even to come up for consideration.

The only alternative to opening the political advertising arena and BCRA itself up to widespread abuse is to ask the Federal Election Commission and District Courts to try to divine on an individual basis for every single ad the true purpose of the ad or the true intent behind a given ad's sponsors. Unfortunately, as detailed in Section II, *supra*, this is an impossible and inherently unreliable task. What is reliable, however, is the conclusion that any ad will unavoidably have an effect on an election when it is (1) aired in the

immediately pre-election period and (2) refers to a clearly identified candidate who is running in that election. Consequently, the only logical conclusion is that grassroots lobbying ads that air in the time period immediately preceding an election and that specifically mention a candidate by name are deemed to be intended to influence the election, are the functional equivalent of electioneering ads, and therefore are and should appropriately be subject to the BCRA rules that apply to electioneering communications.

CONCLUSION

BCRA's reforms were designed principally to restore the integrity of the Federal Election Campaign Act, to address the fundamental concerns expressed by this Court in *Buckley v. Valeo* regarding corruption and the appearance of corruption, and to stop the massive use of soft money to circumvent the constitutionally consistent and legislatively approved limitations on campaign contributions. BCRA adopted a "bright-line" test to determine the class of communications subject to campaign finance rules. This Court in *McConnell v. FEC*, upheld this test and should do so again by affirming the decision of the Court below.

Respectfully submitted,

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APPENDIX

TV Script

Client: Wisconsin Right to Life
Title: "Waiting" :30
Job#: WRL-8136
Date: July 14, 2004

VIDEO

We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:

He reads the morning paper
He polishes his shoes
He checks for mail, which hasn't arrived
He scans through his Rolodex
He reads his Palm Pilot manual
He pays bills

SUPER:
www.BeFair.org

4-SECOND DISCLAIMER (4% or 20 scan lines):
Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee.

AUDIO

VO:
There are a lot of judicial nominees out there who can't go to work.

Their careers are put on hold because a group of U.S. Senators is filibustering – blocking qualified nominees from a simple "yes" or "no" vote.

It's politics at work and it's causing gridlock.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

WRL REPRESENTATIVE VO:
Wisconsin Right to Life is responsible for the content of this advertising.

Radio Script

Client: Wisconsin Right to Life
Title: "Wedding" :60
Job#: WRL-8136
Date: July 15, 2004

AUDIO

We hear church bells up and under . . .

TALENT

PASTOR: And who gives this woman to be married to this man?

BRIDE'S FATHER (rambling):
Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

VO:
Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial

nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over . . .

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org. That's BeFair.org

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Radio Script

Client: Wisconsin Right to Life
Title: "Loan" :60
Job#: WRL-8136
Date: July 14, 2004

AUDIO

TALENT

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and, well . . .

COUPLE: Yes, yes . . . we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca . . .

VO: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

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