UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC., **Plaintiff,** **v.** **FEDERAL ELECTION COMMISSION,** **Defendant,** ***and*** **SEN. JOHN MCCAIN, *et al.*,** **Intervening Defendants**	**Civ. No. 04-1260 (DBS, RWR, RJL)** **THREE-JUDGE COURT**

MEMORANDUM OF LAW IN RESPONSE TO SCHEDULING ORDER

In the Scheduling Order issued April 17, 2006, this Court directed the parties to address whether and to what extent this case presents a live controversy. Intervening Defendants respectfully submit that there is no justiciable conflict here: the case is moot with respect to the 2004 advertisements, and it is not ripe with respect to any hypothetical advertisements plaintiff might hope to broadcast in the future. Because this Court has independent constitutional and

statutory obligations to ensure its own subject matter jurisdiction, moreover, the Supreme Court's remand does not alter the analysis.

I. This Case Is Moot With Respect To Plaintiff's Proposed 2004 Advertisements

In its complaint, plaintiff principally sought two forms of relief: an injunction barring application of BCRA to prohibit plaintiff's broadcast, prior to the 2004 election, of three specific advertisements plaintiff never ran; and a declaratory judgment holding BCRA unconstitutional as applied to those three contemplated but unaired advertisements. (Am. Compl., at 14.) Because neither injunctive nor declaratory relief would have any effect at this stage of the proceedings, there is no live controversy regarding the application of BCRA to the three proposed 2004 advertisements appended to the complaint. *See, e.g. Calderon v. Moore*, 518 U.S. 149, 150 (1996) (case must be dismissed as moot when the court "cannot grant 'any effectual relief whatever'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

First, the Court cannot grant injunctive relief for the simple reason that there is nothing to enjoin. The 2004 election is over, and the period in which the plaintiff alleges that it intended to broadcast the 2004 advertisements—and for which the plaintiff sought this Court's protection—has long since passed. A forward-looking injunction logically cannot address historical events. In addition, the plaintiff did not broadcast the 2004 advertisements prior to the 2004 election and therefore did not engage in any relevant conduct that could expose it to sanctions under BCRA. For that reason, this Court cannot enjoin Defendant from enforcing BCRA against plaintiff in

connection with those advertisements. Nor can the Court enjoin the Defendant from enforcing BCRA with respect to "intended 2004 conduct" (Order, at 2): BCRA proscribes the act of engaging in impermissible electioneering communications, not the intent to do so.

Second, the Court cannot issue a declaratory judgment regarding the lawfulness *vel non* of the 2004 advertisements under BCRA because such a ruling would have no practical effect on the rights of the parties. "A federal court has no 'power to render advisory opinions [or] . . . decide questions that cannot affect the rights of the litigants in the case before them." *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (quoting *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *Mills*, 159 U.S. at 653 (1895) (federal courts may not "give opinions upon moot questions or abstract propositions"). Because the issue of the constitutionality of BCRA as applied to the 2004 advertisements is moot, this Court does not have subject matter jurisdiction to opine on it.

This controversy should not be viewed as falling within the narrow exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." "The capable-of-repetition doctrine applies only in exceptional situations, where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998) (citations, alterations, and internal quotation marks omitted). "The burden is on

the [plaintiff] to show that these requirements are met," *Southern Co. Serv., Inc. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005), and the plaintiff has failed to carry that heavy burden in this case.

Intervening Defendants acknowledge the D.C. Circuit's holding that "[c]hallenges to rules governing elections are the archetypal cases for application of [the capable-of-repetition] exception." *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998); *see also Branch v. FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987) ("Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'"). That conclusion is based on two considerations presumed to apply in this context: "elections are routinely too short in duration to be fully litigated, and there is a reasonable expectation that the same party would be subjected to the same action again." *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir. 1997). This case, however, is different from the ordinary election dispute in ways that render those presumptions inappropriate and the capable-of-repetition exception therefore inapplicable.

First, unlike the typical election controversy, which must progress through three levels of federal-court review before final resolution, this dispute is immediately appealable to the Supreme Court. 2 U.S.C. § 437h, note. In addition, BCRA's expedited review provision, § 403(a)(4), requires this Court "and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of" any action challenging the constitutionality of FECA. 2 U.S.C. § 437h, note. Given the truncated review and expedited schedule mandated by BCRA, the two-year election cycle should ordinarily provide sufficient

time for final resolution of the type of as-applied challenge at issue here. Plaintiff has failed to show why that is not the case. Accordingly, the pre-election period arguably is not "inherently of such short duration that" an as-applied challenge to BCRA's electioneering-communications provisions "cannot ordinarily be fully litigated before" the challenge is rendered moot. *Hall v. C.I.A.*, 437 F.3d 94, 99 (D.C. Cir. 2006). *See LaRouche*, 152 F.3d at 978 (noting that although "'both Supreme Court and circuit precedent hold that orders of less than two years' duration ordinarily evade review," this "two-year mark . . . serves only as a rule-of-thumb" and is not an inflexible rule) (internal quotation marks and citations omitted).

Second and more important, unlike in the usual case, there can be no "reasonable expectation" that this plaintiff "will be subject to the same action again." There is no suggestion in the record that this plaintiff will seek to broadcast the proposed 2004 advertisements in Wisconsin in the future. This is significant because, in a purely as-applied challenge, the controversy is highly dependent on the particular content of the advertisements at issue and the unique context surrounding their creation and dissemination—including plaintiff's intent, the availability and adequacy of non-broadcast media, the perceptions of the target audience, and the circumstances of the 2004 campaign. It is "not reasonable to expect that this exact factual and legal situation will recur." *Public Utilities Comm'n of State of Cal. v. FERC*, 100 F.3d 1451, 1459 (9th Cir. 1996). Even if the particular plaintiff were to bring an as-applied challenge again—a speculative proposition in itself—any such controversy would involve proposed advertisements with materially different content, broadcast in materially different circumstances;

it therefore will not present a recurrence of the same dispute. "When resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and hence is moot." *Id.* at 1460 (citing *Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1282-83 (9th Cir. 1994)). It is not enough that this or some other organization may in the future propose to run a different advertisement in different circumstances.

II. This Case Is Not Ripe With Respect To Any Hypothetical Future Advertisements

Ripeness doctrine ensures the existence of a crystallized controversy, which in turn "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005). Before declaratory relief may issue, the controversy therefore "must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986) (justiciability rules of Article III are intended to ensure "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."). Moreover, the "obligation to notice defects in . . . subject-matter jurisdiction assumes a special importance" where, as here, "a constitutional question is presented." *Bender*, 475 U.S. at 541-542; *National Black Police Ass'n v. District of Columbia*,

108 F.3d 346, 353 (D.C. Cir. 1997) (noting that "it is a well-established principle that courts should avoid unnecessarily deciding constitutional questions"); 13A Charles A. Wright, et al. *Federal Practice and Procedure* § 3532.1, at 120 (2d ed. 1984) (stating that ripeness doctrine stems from the "values of avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the federal government").

The Supreme Court settled the facial constitutionality of BCRA's "electioneering communications" provisions in *McConnell v. FEC*, 540 U.S. 93, 189-194 (2003). Accordingly, there is no room to view this case as presenting the general, amorphous issue of BCRA's application to broadcast advertisements at unspecified times of unspecified texts denominated as "electioneering communications . . . that constitute grass-roots lobbying . . . communications." (Order, at 2).

In remanding this case, the Supreme Court permitted constitutional challenges to those provisions only as they apply to "particular communications." *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016, 1017 (2006). As explained above, the resolution of such as-applied challenges "depend[s] vitally on factual issues" regarding the content of the proffered advertisements and the unique circumstances in which they are broadcast. *See Andrade v. Lauer*, 729 F.2d 1475, 1483 (D.C. Cir. 1984). This kind of challenge can be decided only in the context of an actual, concrete controversy—involving specific advertisements, specific facts about their purpose and effect, specific time periods for their intended broadcast, specific alternative means

of communication, specific lawful sources of funding, a specific target audience, and a specific campaign that the advertisements will impact.

If such an actual dispute arises in the future, this Court may address it then. But until that "concrete factual setting" develops, *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 937 (D.C. Cir. 1998), any hypothetical controversy regarding plaintiff's future conduct or intent is not ripe. Resolution of such an "abstract proposition," *Mills v. Green*, 159 U.S. 651, 653 (1895)—whether BCRA may constitutionally proscribe some imprecise category of communications that plaintiff labels "grassroots lobbying"—would directly contravene the basic purpose of ripeness doctrine: to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

III. The Supreme Court's Remand Did Not Expressly or Impliedly Resolve Whether This Court Has Subject Matter Jurisdiction

The Supreme Court's decision remanding this case for further review did not signify, nor does it compel, a contrary conclusion. *Wisconsin Right To Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006), addressed only the specific ground on which this Court had rested its prior ruling. The remand decision corrected what the Supreme Court considered to be an error in this Court's construction of a footnote in *McConnell v. FEC*, 540 U.S. 93 (2003), and clarified that *McConnell* "did not purport to resolve future as-applied challenges." *Wisconsin Right To Life*,

126 S. Ct. at 1018. The ruling, which did not address subject matter jurisdiction, cannot reasonably be viewed as an implicit decision on that vital question.

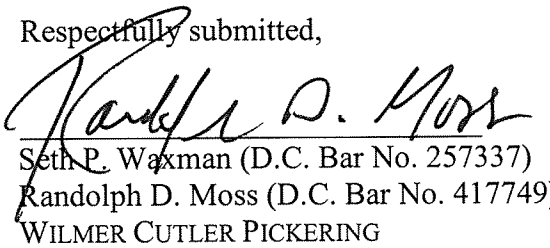
The United States Court of Appeals for the D.C. Circuit has previously held that "courts are not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *Independent Petroleum Assoc. of Am. v. Babbitt*, 235 F.3d 588, 597 (2001) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)). In *Babbitt*, as here, the appellate court reversed and remanded the district court's initial dismissal of the case. On remand, the district court dismissed the case again, this time for lack of jurisdiction. On appeal for the second time, the D.C. Circuit upheld the dismissal, rejecting the plaintiff's argument that this Court's initial decision implicitly decided the jurisdictional question. The D.C. Circuit held that its previous decision remanding the case was irrelevant to the question of jurisdiction because the jurisdictional question "was not before us, nor decided by us, even by implication." *Id.* at 597. Here too, the Supreme Court's decision remanding this case is not relevant to the question of jurisdiction because this question was neither before nor decided by the Supreme Court.

CONCLUSION

For the foregoing reasons, Intervening Defendants respectfully submit that this Court lacks subject matter jurisdiction over this case and should dismiss the complaint with prejudice.

Dated this 1st day of May, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Randolph D. Moss, a member of the bar of this Court, certify that on May 1, 2006, I caused a true and correct copy of the Memorandum of Law in Response to Scheduling Order on behalf of Intervening Defendants Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan by their attorneys to be served electronically and by overnight courier on:

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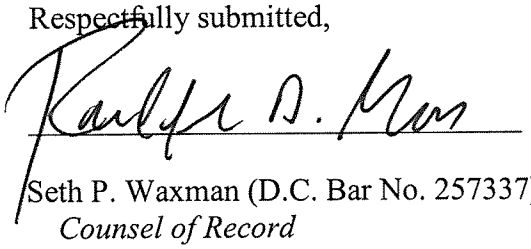

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