IN THE SUPREME COURT OF THE UNITED STATES

No. 05-1447

CHRISTIAN CIVIC LEAGUE OF MAINE, INC., PETITIONER

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION OF THE FEDERAL ELECTION COMMISSION TO APPELLANT'S MOTION TO EXPEDITE AND CONSOLIDATE BRIEFING

On May 12, 2006, appellant Christian Civic League of Maine, Inc. (CCLM) filed a jurisdictional statement seeking review of the three-judge district court's order denying a preliminary injunction. On that same date, CCLM filed a Motion to Expedite and Consolidate Briefing. That motion requests (at 5) that the Federal Election Commission (FEC or Commission) be directed to respond to the jurisdictional statement by noon on May 17, 2006; that the jurisdictional statement and the FEC's response be treated as the respective parties' briefs on the merits; and that the Court "set this matter for argument as expeditiously as possible." For the reasons stated below, CCLM's motion should be denied and the FEC should be permitted to respond to the jurisdictional statement in the ordinary course.

BACKGROUND

1. This suit involves a constitutional challenge to provisions of the Federal Election Campaign Act that regulate "electioneering communications." Enacted as Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, 91-92, those provisions bar corporations and labor organizations from using their general treasury funds to pay for any broadcast, cable, or satellite communication that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. See 2 U.S.C. 441b(b)(2), 434(f)(3).

In McConnell v. FEC, 540 U.S. 93, 203-211 (2003), this Court upheld against facial constitutional challenge BCRA § 203's bright-line definition of "electioneering communication" and the ban on the use of corporate or union treasury funds to pay for communications that fall within that definition. Noting that a long line of its campaign finance precedents reflect "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," the Court concluded that compelling governmental interests supported prohibiting corporations and labor organizations from financing electioneering communications out of their general treasury funds. Id. at 205 (citations and internal quotation marks omitted). While BCRA § 203 is constitutional on its face, this Court has made clear that the decision in McConnell does not foreclose as-applied

constitutional challenges to the restrictions on electioneering communications. See Wisconsin Right to Life, Inc. v. FEC, 126 S. Ct. 1016, 1018 (2006) (WRTL).

2. CCLM's complaint in the instant case was filed on April 3, 2006. CCLM alleged that it plans to run a particular radio advertisement, the text of which was attached as an exhibit to the complaint, "and/or materially similar ads between May 10 and early June." Complaint ¶¶ 11, 13. The text of the advertisement is as follows:

> Our country stands at the crossroads -- at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges -- by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

J.S. App. 1a-2a. The complaint further alleged that CCLM "intends" to run "materially similar grass-roots lobbying ads" falling within the electioneering-communications definition "on a range of issues in addition to laws protecting traditional marriage" in the electioneering communication periods prior to the November 7, 2006, general election and prior to later elections. Complaint ¶16. Because "Senator Snowe is a candidate in a primary election scheduled for June 13, 2006," J.S. App. 2a, the effect of BCRA's electioneering-communications provisions is that the advertisement

in question, if broadcast in Maine between May 14, 2006, and June 13, 2006, cannot be financed with CCLM's treasury funds.

On April 3, 2006, CCLM also filed a motion for a preliminary injunction, which the three-judge district court denied on May 9, 2006. J.S. App. 1a-13a. In finding that CCLM had failed to establish a likelihood of success on the merits, the court noted, inter alia, that the advertisement CCLM proposed to run

> appears to be functionally equivalent to the sham issue advertisements identified in McConnell. * * * * [T]he advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection.

Id. at 10a. The court also found that CCLM had failed to demonstrate that it would suffer irreparable harm from denial of the injunction because, notwithstanding BCRA's restrictions on "electioneering communications," various alternative means were available for communicating CCLM's views concerning the Marriage Protection Amendment. Id. at 11a.

ARGUMENT

CCLM's motion states (at 2) that the Marriage Protection Amendment is expected to "receive a Senate vote on or about June 5, 2006," and that the CCLM "only wants to run the ad until the vote occurs and not thereafter." No date has been set for a vote on the Marriage Protection Amendment. But regardless of when a vote occurs, CCLM will be free from the restrictions imposed by BCRA's "electioneering communications" provisions after the Senate primary election on June 13, 2006. Thus, unless the Court adopts a highly

expedited scheduled for briefing and argument in this case, the question whether the district court should have issued a preliminary injunction is likely to become moot before the Court can resolve the merits of CCLM's current appeal.

Nevertheless, although CCLM has a statutory right to appeal the denial of the preliminary injunction to this Court (see 28 U.S.C. 1253; CCLM Mot. 3 n.2), the Court has no obligation to reorder its calendar and issue a decision in this case under the extraordinarily expedited schedule proposed by CCLM simply to ensure that the appeal of an interlocutory order in the case is decided while a live controversy remains with respect to the validity of the district court's preliminary injunction. As CCLM acknowledges (Mot. 2-3), no statute requires the Court to expedite its consideration of the interlocutory appeal in this case. For a number of reasons, expediting this case to the degree necessary to render a decision on the merits of the preliminary injunction before June 5 (or June 13), 2006, would not represent a wise use of this Court's resources.

Instead, the Court should deny CCLM's motion and permit the FEC to respond to CCLM's jurisdictional statement in the ordinary course. It is true that CCLM's appeal of the district court's preliminary injunction will likely be moot -- assuming that the Senate votes on the Marriage Protection Amendment by June 5, 2006 -- by the time the Court acts on the jurisdictional statement. But even if this Court denies the motion to expedite, CCLM may still seek further relief before the district court, perhaps following

further factual development or proceedings. In deciding the scope of as-applied challenges to BCRA's "electioneering communications" provisions, this Court should await a case in which the record concerning the communications at issue has been fully developed, and the Court is able to engage in its customary decisionmaking process rather than the truncated procedure proposed by CCLM.[1]

1. Although the Court in WRTL held that McConnell did not foreclose as-applied constitutional challenges to BCRA's restrictions on the corporate financing of electioneering communications, the Court did not identify the circumstances, if any, under which such as-applied challenges might succeed. While resolution of any as-applied challenge will by definition turn in part on the circumstances of the individual plaintiff, the Court in deciding this case would likely articulate general standards to be applied in future cases involving similar as-applied attacks. The highly expedited schedule that would be necessary for the Court to resolve the case before June 5 (or even June 13), 2006, would not be conducive to sound decision-making. That schedule would require the parties to brief the issues in an accelerated and truncated manner (CCLM's proposal that the FEC's response to the

[1] In ruling on CCLM's motion, it is appropriate for this Court to consider not only the party and judicial resources that would be consumed by expedited disposition of the instant appeal, but also the resources that would likely be consumed in the future if the Court adopted a general practice of expediting appeals from district court decisions denying preliminary injunctive relief in similar as-applied challenges to BCRA's "electioneering communications" provisions. Such a practice could consume substantial resources of this Court in any election cycle in which BCRA's "electioneering communications" provisions are operative.

jurisdictional statement be treated as its brief on the merits implies that the Commission should be given only 30 rather than the usual 50 pages to brief the case); it would make it very difficult for other persons who may be affected by the Court's decision to participate as amici curiae; and it would give the Court an extremely narrow window of time -- less than three weeks -- to hear oral argument and issue a decision during what is otherwise one of the busiest times of the Court's year.

2. Although the district court held that CCLM had not demonstrated a substantial likelihood of success on the merits (J.S. App. 8a-11a), the court did not definitively reject CCLM's as-applied challenge. Rather, the court found that "each of the four preliminary injunction factors counsels against the grant of the requested injunction" (id. at 8a), and it accordingly denied the requested injunctive relief (id. at 13a, 14a). The fact that this case arises on an appeal from a preliminary injunction makes it an unsuitable vehicle for clarifying the circumstances, if any, under which BCRA's restrictions on corporate financing of electioneering communications are unconstitutional as applied. The application of the preliminary-injunction factors to the circumstances of this particular case not only lacks general importance, but also bears no resemblance to the types of issues that this Court has previously expedited in the extraordinary manner proposed by CCLM. See, e.g., Dames & Moore v. Regan, 452 U.S. 932 (1981).

Contrary to CCLM's contention (J.S. 12), the prospect that this appeal will soon become moot does not alter the nature of the order being appealed from or the applicable standard of review. The order from which an appeal has been taken simply denies CCLM's motion for a preliminary injunction, and the order expressly contemplates additional proceedings "for the further administration of this case." J.S. App. 14a. Although this Court would review the district court's legal rulings de novo, the Court would apply an abuse-of-discretion standard in reviewing the district court's application of the preliminary-injunction factors. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1217 (2006). As a result, the Court might well resolve CCLM's appeal without definitively deciding whether the challenged BCRA provisions are unconstitutional as applied to CCLM's proposed advertisement.

That extraordinary intervention is not demanded at this stage of the proceedings is well illustrated by the Court's handling of the plaintiff's request for interim relief in WRTL. The plaintiff in WRTL initially sought to appeal the three-judge district court's denial of preliminary injunctive relief and requested an injunction pending appeal. Chief Justice Rehnquist denied the application for interim relief. Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305 (2004) (Rehnquist, C.J., in Chambers). The Chief Justice explained that "[a]n injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy," ibid., and noted that "a unanimous three-judge District

Court rejected applicant's request for a preliminary injunction," id. at 1306.

In the instant case, CCLM does not request that the Circuit Justice or the Court as a whole issue an injunction during the pendency of its appeal from the district court's May 9 order. As in WRTL, however, the plaintiff requests that enforcement of an Act of Congress be enjoined prior to the final resolution of the lawsuit, notwithstanding the conclusion of a unanimous three-judge district court that such relief is unwarranted. That extraordinary remedy should be denied here as well. More broadly, the Court's subsequent review of the final judgment in WRTL (which is currently pending before the three-judge district court on remand) demonstrates that the choice in this context is not between now and never, but between orderly review in due course or rushed proceedings at an interlocutory stage. The Court opted for orderly review in WRTL (and in McConnell itself, see Club for Growth v. FEC, Nos. 02A989 and 02A990 (Chief Justice denied applicants' request to vacate district stay and for injunction pending appeal)) and should do so here as well.

3. Treatment of the district court's order as the effective equivalent of a final judgment would be especially inappropriate because the current evidentiary record is incomplete. As the FEC explained in the district court, the Commission seeks to compile a record addressing a narrow range of topics concerning the purpose and likely effect of CCLM's planned advertisement, such as the organization's decision about where, when, and how to run the

advertisement; CCLM's prior use of broadcast and other media for its public communications; the relationship between matters raised in CCLM's contemplated advertisement and Senator Snowe's candidacy for reelection; and CCLM's prior expressions of support for or opposition to Senator Snowe. In addition, the Commission may seek expert testimony as to the likely effect of CCLM's advertisement in Maine's electoral climate, the importance of identifying office holders in grassroots lobbying advertisements, and whether a grassroots lobbying exemption like the one CCLM now seeks would likely enable political consultants to craft electioneering advertisements that would circumvent regulation during the "electioneering communication" periods defined by the Act. Factual development with respect to such considerations could be important to the disposition of CCLM's as-applied challenge.[2]

The district court is required by BCRA to expedite this case "to the greatest possible extent" (CCLM Motion 2 & 3 n.1), and there is no reason to suppose that the process of record development will be protracted. In addition, CCLM was of course entitled to, and did, seek interim relief from the district court

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[2] A full record on the factual issues identified in the text could not be compiled based on the limited discovery that the Commission was able to obtain in the few days it had to respond to CCLM's motion for a preliminary injunction. For example, CCLM has not yet provided the Commission with all relevant documents in response to the FEC's discovery request for documents relating to the creation of the broadcast advertisement at issue here, such as drafts of the advertisement, documents that would indicate who wrote the advertisement or commented on drafts of its text, or how the final text was chosen. Instead, CCLM has claimed in conclusory fashion, without providing a privilege log, that such documents are subject to attorney-client privilege.

during the pendency of the lawsuit. The process of compiling the record has not yet been completed, however, and that fact could significantly hinder any effort by this Court to decide the merits of CCLM's as-applied challenge. The Court's consideration of CCLM's as-applied challenge would be materially enhanced by reviewing the case after the record is fully developed and the district court has had an opportunity to consider CCLM's challenge in light of that record.

4. Expedited treatment of this appeal is also unwarranted because of the minimal nature of the burden that BCRA's financing restrictions will impose on CCLM. As the district court explained, "[t]he facts as presently developed strongly suggest that [CCLM] will not suffer irreparable, or even significant, harm in the absence of the requested injunction." J.S. App. 11a. Although BCRA prohibits the use of corporate treasury funds to finance electioneering communications, corporations remain free to finance such communications through a political action committee (PAC), see McConnell, 540 U.S. at 204, and they may use treasury funds to run advertisements in other media and to "finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates," id. at 206. It is undisputed that those avenues remain open to CCLM.

The minimal nature of BCRA's impact on issue advertising is particularly apparent in the circumstances presented here. CCLM has represented that the cost of the proposed advertising campaign is $3992, and that one individual donor has committed to pay for

the campaign in its entirety. See J.S. App. 6a. Because the projected cost of the campaign is lower than the $5000 annual limit on individual donations to PACs (see 2 U.S.C. 441a(a)(1)(C)), CCLM's donor could become a member of the corporation (if he is not a member already) and could then be solicited to direct his donation to CCLM's political action committee rather than to its general treasury. Indeed, because BCRA's restrictions on the financing of electioneering communications do not apply to individuals, CCLM's prospective donor could simply pay for the advertisement himself without using the corporation as a conduit. See J.S. 14 (recognizing that "the individuals who make up [CCLM] could engage in electioneering communications," and that even BCRA's disclosure requirements apply only if an individual's spending "exceeds $10,000 in a calendar year").

The practical concern on which CCLM's constitutional claim is premised -- i.e., that individuals should not be hindered from pooling their resources to "form themselves into an effective advocacy group for lobbying" (J.S. 14) -- therefore is not implicated on the facts of this case. Regardless of the legal significance of the availability of the various alternative means of communication with respect to the ultimate merits of CCLM's as-applied challenge, the existence of those alternatives is directly relevant at this preliminary-injunction stage of the case because they underscore that CCLM cannot establish irreparable harm. The availability of those alternatives therefore counsels heavily against CCLM's extraordinary request for expedition.

5. The circumstances under which this lawsuit was initiated further suggest that the denial of preliminary injunctive relief places insubstantial constraints on CCLM's own communicative freedoms, and that the highly expedited consideration and disposition that CCLM requests would not be a sound use of this Court's resources. As the FEC explained in its opposition to CCLM's motion for a preliminary injunction (at 6-7), CCLM filed this lawsuit ten days after an official of the Colorado group Focus on the Family sent an e-mail to leaders of a number of organizations, including CCLM's executive director. No record evidence suggests that CCL had previously planned to finance broadcast advertising this year. The subject line in that March 24, 2006, e-mail was "Possible legal action needed." The e-mail explained that the particular recipients had been selected "because [they were] in [states] that could be affected by McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." Approximately one hour later, CCLM's executive director responded by e-mail with a message stating, "I will run an ad in that period of time mentioning Olympia Snowe." Focus on the Family subsequently provided CCLM with the text of the advertisement that is at issue in this case.

Thus, the advertisement at issue here appears to have been deliberately formulated so as to trigger BCRA's ban on corporate financing of electioneering communications.[3] The fact that the

[3] The funding arrangement that CCLM contemplates, whereby the advertisement is paid for not with pooled contributions, but with (continued...)

advertising campaign apparently was designed so as to create a test case does not mean that the dispute between the parties is unsuitable for judicial resolution and does not necessarily impact the merits of the constitutional question. That fact is, however, highly relevant to considerations of irreparable injury because it calls into question the true urgency of this matter to CCLM itself and the likely harm that denial of expedition would entail to its purported grassroots lobbying. These circumstances provide a further reason that this Court should decline CCLM's invitation to upset its calendar and adopt the extraordinary expedited proceeding envisioned by CCLM.

For the reasons stated above, the Motion to Expedite and Consolidate Briefing should be denied and the FEC should be permitted to file its response to the jurisdictional statement in the ordinary course.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2006

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[3](...continued)
a donation from an individual who could lawfully finance the advertisement himself, reinforces the inference that the planned advertising campaign is primarily a mechanism for engendering litigation.