No. 05-1447

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTIAN CIVIC LEAGUE OF MAINE, INC., Appellant,

v.

FEDERAL ELECTION COMMISSION, Appellee,

and

SENATOR JOHN McCAIN, SENATOR RUSSELL FEINGOLD, CONGRESSMAN CHRISTOPHER SHAYS, CONGRESSMAN MARTIN MEEHAN, AND CONGRESSMAN TOM ALLEN, Intervenor-Appellees.

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

INTERVENOR-APPELLEES' OPPOSITION TO APPELLANT'S MOTION TO EXPEDITE AND CONSOLIDATE BRIEFING

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For the reasons given below and by Appellee Federal Election Commission, Intervenor-Appellees Senators John McCain and Russell Feingold and Congressmen Christopher Shays, Martin Meehan, and Tom Allen respectfully urge that the Court deny Appellant Christian Civic League of Maine's ("CCL") motion to expedite and to consolidate briefing.

BACKGROUND

1. This is an appeal from the unanimous decision of a three-judge district court denying CCL's motion for a preliminary injunction. CCL sought to enjoin the Federal Election Commission ("FEC") from enforcing the "electioneering communications" provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 2 U.S.C. §§ 431 et seq., against CCL for running an advertisement referring to Senator Olympia Snowe during the 30-day period preceding the June 13 Maine primary election. The radio advertisement expressed support for the proposed Marriage Protection Amendment to the Constitution; stated that "[u]nfortunately, your senators voted against the [Amendment] two years ago;" and then urged listeners to "call Sens. Snowe and Collins immediately and urge them to support the [Amendment]." JS App. 2a.

2. After an extremely abbreviated period for taking discovery and expedited briefing, the three-judge court concluded that CCL had failed to carry its burden of demonstrating "a substantial likelihood of success on the merits." JS App. 8a (quotation omitted). The court found that the BCRA "does not bar the proposed advertisement; it only requires that [CCL] fund it through a political action committee." JS App. 9a. In addition, the court noted that CCL "may publish the advertisement with its own general corporate funds . . . so long as it uses a medium other than 'broadcast, cable, or satellite,'" and that it could broadcast the ad "if it refrained from 'clearly identify[ing]' Senator Snowe." *Id.* The court, moreover,

concluded that the ad that CCL "seeks to broadcast appears to be functionally equivalent to the sham issue advertisements identified in *McConnell* [*v. Federal Election Comm'n*, 540 U.S. 93, 126-127 (2003).] JS App. 9a-10a. The court found as a matter of fact that the CCL ad—and, in particular, its reference to Senator Snowe's "[u]nfortunate" vote against the Marriage Protection Amendment—constituted "the sort of veiled attack that the Supreme Court has warned may improperly influence an election." JS App. 10a. Although CCL emphasizes the fact that Senator Snowe is currently unopposed in the primary election, the three-judge court found that the ad "might have the effect of encouraging a new candidate to oppose Senator Snowe," might "reduc[e] the number of votes cast for her in the primary, weakening her support in the general election," and might "undermin[e] her efforts to gather support, including by raising funds for her reelection." *Id*

3. The three-judge court also found that CCL had failed to carry its burden of demonstrating that it would suffer an irreparable injury in the absence of a preliminary injunction and that the public interest favored entry of a preliminary injunction, and it found that granting the preliminary injunction would injure the FEC and the public. Among other things, the court found that CCL "can broadcast the same advertisement by funding it through a political action committee;" "could publish the text of the advertisement in a medium other than 'broadcast, cable, or satellite;'" and "could refrain from 'clearly identif[ying]' Senator Snowe in the advertisement." JS App. 11a.

ARGUMENT

4. CCL requests that this Court treat its jurisdictional statement as a merits brief and that it provide the FEC and the Intervenors with a mere three business days to file their merits briefs. It then requests that the Court set the case for oral argument and render decision

sufficiently in advance of June 5 to permit CCL to air its ads. Nothing in this case justifies such an extraordinary action. Rather, as in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U.S. 1305, 1305 (2004) (Rehnquist, C.J., in chambers), any extraordinary relief is particularly unwarranted here, since "this Court recently held [the] Act facially constitutional, *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 189-210 (2003), and . . . a unanimous three-judge District Court rejected applicant's request for a preliminary injunction."

5. Nothing in BCRA demands the unusual expedition CCL requests. To the contrary, Congress provided specific rules requiring expedition in appeals to this Court from "final decision[s]" in cases challenging the constitutionality of the Act, but included no such provision for interlocutory appeals. 116 Stat. 113.

6. More fundamentally, there is nothing about this case that would justify adopting the extraordinary schedule that CCL has proposed. This Court has only rarely adopted highly expedited briefing schedules and only in cases of the greatest national significance. *See, e.g., United States v. Washington Post Co.*, 403 U.S. 943 (1971); *United States v. Nixon*, 417 U.S. 927 (1974); *Bush v. Gore*, 531 U.S. 1046 (2000). In this case, by contrast, the important national issue of BCRA's facial constitutionality was decided by the Court less than three years ago. Although the issue presented here involves the First Amendment, it also necessarily involves an intensely fact-specific inquiry into whether the "electioneering communications" provisions of BCRA are unconstitutional *as applied* to the particular ad (in the particular context) present here. Not every case involving a claimed violation of the First Amendment merits the extraordinary treatment CCL seeks late in this Court's Term.

7. Here, the three-judge court carefully considered CCL's claims and correctly concluded that CCL had failed to carry its burden in *numerous* respects. Most fundamentally,

the ad in question is, as the three-judge court found, "the sort of veiled attack" on a candidate for office that implicates the campaign finance laws. JS App. 10a. Moreover, as the three-judge court also correctly found, CCL will not suffer any irreparable injury if it is required to establish a separate segregated fund to run its ads or is required to use a different media or to avoid referring to Senator Snowe. CCL can run these ads during the period preceding the Maine primary—if CCL incurs the modest burden of establishing a separate segregated fund, it can use broadcast media; if CCL insists on using its corporate treasury, it may either publish the same advertisement in non-broadcast media or omit the words the clearly identify Senator Snowe. Indeed, CCL has indicated that it has a donor who has "committed to paying the entire $3,992 cost of the radio buy." JS App. 6a (quotation omitted). CCL has failed to identify anything that would preclude it from immediately establishing a separate segregate fund,[1] receiving that donation from a member of CCL, and running its ad in that lawful manner. Finally, very limited discovery conducted by the FEC to date strongly suggests that the ads at issue were developed for the purpose of creating a test case, thus undercutting any claim of significant injury.[2]

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[1] As CCL has acknowledged, it currently has an "associated state political action committee, the Christian Action League." JS 6. CCL has failed to identify any reason that it could not form a similar federal committee.

[2] That discovery suggests that CCL's interest in sponsoring the ad arose only after it was contacted by another group, Focus on the Family, which sent an email solicitation to a broad list of groups in states "that could be affected by the McCain-Feingold restrictions" on ads relating to the Marriage Protection Amendment "that target U.S. senators who are on the ballot." Ex B. to FEC Opp. to Mot. For Prelim. Inj. ("FEC Opp."). The email attached a message from counsel, who offered to seek a federal court injunction "at no charge" on behalf of "any group" planning to run an ad during the electioneering communications period, adding that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling.)" *Id.*

CCL's executive director responded to this email by stating, "I will run an ad in that period of time mentioning Olympia Snowe." FEC Opp. Ex. C. Focus on the Family subsequently sent CCL the text of the "Crossroads" ad. FEC Opp. Ex. A at 46.

As of the time of the deposition of CCL's executive director, Michael Heath, on April 13, 2006, ten days after the complaint in this case was filed, CCL did not have the approximately

8. The limited factual record assembled on the preliminary injunction further militates against expedited consideration of this appeal. Although the facts are necessarily critical to an as-applied challenge, discovery took place over the period of approximately a week and included only one deposition. Permitting the parties to complete discovery and to present a complete factual record to the three-judge court would ensure that any decision rendered in this case is premised on the best possible understanding of all of the relevant facts.

CONCLUSION

For the foregoing reasons, Intervenor-Appellees respectfully request that the Court deny Appellant's motion to expedite and to consolidate briefing and, rather, consider this appeal in the ordinary course.

Respectfully submitted,

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$3,500 in funds it estimated would be required to broadcast the ad, nor had anything been done to record or produce the radio ad, nor had any radio stations been contacted about buying time for the ad, nor could he say where or how often the ad would run. FEC Opp. Ex. A at 51-52, 54, 65-68, 70, 73-74. CCL subsequently filed a supplemental declaration of Mr. Heath stating that CCL had located a single donor who had agreed to contribute approximately $3,900 to pay for the airing of the ad and that the ad had been recorded. CCL Reply Br. in Support of Mot. for Prelim. Inj. Heath Decl. ¶ 16.