UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wisconsin Right to Life, Inc., **Plaintiff,** **v.** **Federal Election Commission,** **Defendant** **and** **Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, Representative Martin Meehan,** **Intervening Defendants**	**Case No. 04-1260 (DBS, RWR, RJL)** **THREE-JUDGE COURT**

INTERVENING DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. WRTL HAS NOT SHOWN THAT THERE IS AN ARTICLE III CASE OR CONTROVERSY

WRTL's Opposition contains no cogent refutation of the points that (a) WRTL's claims concerning the three 2004 ads are moot and (b) WRTL's claims regarding hypothetical and unidentified future ads are not ripe. Accordingly, for the reasons previously stated, WRTL's

complaint should be dismissed in its entirety. *See* Opening Mem.[1] at 9, 23; Intervening Defendants' May 1, 2006 Response to the Court's April 17, 2006 Scheduling Order.

II. WRTL HAS NOT SHOWN THAT ANY ASPECT OF ITS AS-APPLIED CHALLENGE HAS MERIT

A. WRTL HAS MISREAD THE SUPREME COURT'S REMAND

WRTL's Opposition misconstrues the Supreme Court's remand when it contends that the Court broadly acknowledged that there is "constitutional protection for an exception for genuine grassroots lobbying to the electioneering communication prohibition," Opp. at 30, and even "had in mind that [the District Court] would assist it in creating [a general rule]," *id.* at 32. The Supreme Court held only that *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) "did not purport to resolve future as-applied challenges" to BCRA's electioneering communications provision. *WRTL v. FEC*, 126 S. Ct. 1016, 1018 (2006) (citing 540 U.S. at 190 n.73). Holding that it was unclear whether this Court had actually concluded that the three 2004 advertisements were of the type *McConnell* considered, the Court vacated this Court's judgment and remanded for consideration of "the merits of WRTL's as-applied challenge in the first instance." *Id.* The Supreme Court did not opine on the merits or imply that a general exception to the provision for "grassroots lobbying" ads might be appropriate.

B. WRTL HAS NOT SHOWN THAT BCRA IS UNCONSTITUTIONAL AS APPLIED TO THE THREE 2004 ADS

With the focus on whether the three 2004 ads were of the type *McConnell* considered, *id.*, it is apparent that the fundamental problem with WRTL's position is that it would require a judge-made exception to BCRA's electioneering provision that is so broad that it would swallow

[1] "Opening Mem." refers to Intervening Defendants' Memorandum (1) in Opposition to Plaintiff's Motion for Summary Judgment and (2) in Support of Motion for Summary Judgment Or, in the Alternative, Judgment On the Record.

the entire rule the Supreme Court facially sustained in *McConnell* (at least as applied to broadcast ads that mention incumbents). A would-be corporate or union spender who wishes to mention a specific candidate yet evade Title II will always be able to refer in an ad to some issue that may be subject to a future Congressional vote. Congress and the *McConnell* Court correctly rejected that failed "magic words" approach and concluded that most ads Title II covers in fact are intended to influence elections (although they might be run for other purposes as well) and have that effect. 540 U.S. at 206.

1. The 2004 Ads Are Undisputedly Similar In All Material Respects To Those Reviewed By The Supreme Court In *McConnell*, And WRTL Has Not Demonstrated Otherwise

The *McConnell* plaintiffs made an argument very similar to the one WRTL presses here with respect to the three 2004 ads. *See* Opening Mem. at 10, 25 (quoting Reply Brief of Appellants/Cross-Appellees National Right to Life Committee, et al., No. 02-1733 (Aug. 21, 2003) at 6-7 (emphasis in original)). The *McConnell* plaintiffs offered *specific ads*—the texts of which are included in Intervening Defendants' Opening Memorandum—that typified the "grassroots lobbying" they claimed unconstitutionally fell within BCRA's ambit. The *McConnell* Court, after considering these ads and others said to be examples of "issue ads," held that "the vast majority" of such ads had an electioneering purpose, thereby rejecting in substance the very argument WRTL attempts to resurrect here. 540 U.S. at 206.

Discovery in this case shows that WRTL's three 2004 ads do indeed "fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," *WRTL v. FEC*, 126 S. Ct. at 1018 (citation omitted).[2] WRTL has not refuted the strong record evidence showing

[2] *See* Opening Mem. at 10-11 (quoting ads attached to Appellants/Cross-Appellees' brief that they characterized as seeking "to lobby and pressure federal officeholders on issues of unquestioned importance to the groups that sponsor them"). Specifically, WRTL's ads, like the

that its ads, on their face and viewed in context, would have affected Senator Feingold's 2004 election efforts. The ads mention Senator Feingold by name and attack his position on the judicial filibuster issue. As for the context, the record indisputably shows, for example, that: (1) WRTL and WRTL-PAC announced in 2004 press releases that one of their "Top Election Priorities" was to "send Russ Feingold Packing!"; (2) WRTL's website trumpeted its PAC's endorsement of all three Republicans who were vying to run against Senator Feingold; and (3) WRTL-PAC had, for more than a decade, consistently opposed Senator Feingold and had spent considerable sums to defeat him. Opening Mem. at 12-14. The record further shows that the judicial filibuster issue had become a central focus in the Wisconsin Senate race and was being used to attack Senator Feingold at that time in that campaign.

The intended timing of the 2004 ads strongly suggests an intent to affect the elections, and WRTL has not refuted that inference.[3] WRTL intended to broadcast the three 2004 ads during the Senate's 2004 summer recess (*after* four judicial filibuster votes had occurred)—an inopportune time for lobbying but a perfect time for influencing the Senate election. *See*

"grassroots lobbying" ads considered by the Court in *McConnell*, discuss an issue of importance to WRTL (judicial filibusters); encourage constituents to contact Senators Feingold and Kohl to tell them to take a position on that issue; do not expressly state either Senator's position on the filibuster (instead suggesting they are members of the "group of Senators" who are "using the filibuster delay tactic to deny judicial nominees . . . a 'yes' or 'no' vote"); and do not expressly urge citizens to vote for or against Senator Feingold in the upcoming election (instead implicitly opposing his reelection). *See id*. at 11.

[3] As this Court recognized in its Memorandum Opinion and Order denying WRTL's Motion for Preliminary Injunction, "WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media." Mem. Op. & Order at 6.

Opening Mem. at 13. The same inference must be drawn from when WRTL chose not to run the ads—in 2005, when the filibuster issue peaked in the Senate.[4]

WRTL has offered no testimony to rebut the conclusions of the two experts offered by Intervening Defendants and the FEC that WRTL's ads, like the ads considered in *McConnell*, undoubtedly would have influenced the 2004 Senate election in Wisconsin if WRTL had aired them during the pre-election period. WRTL challenges Douglas Bailey's testimony, which is based on vast campaign and grassroots lobbying experience, that more subtle negative advertisements—like the three 2004 ads—sometimes produce a more effective electioneering result than blatant attack ads, and are therefore used for that very reason.[5] But WRTL provides no factual basis either for its criticism or to support a contrary conclusion. Likewise, WRTL's attacks on Professor Franklin's expert report and testimony lack substance. Franklin, a respected academic, has studied and published articles on elections and political campaigns for over twenty

[4] WRTL's contention that the issue as it existed in 2005 no longer related to filibusters is belied by WRTL's own pleadings. *See* WRTL's Statement of Undisputed Material Facts ¶¶12-17, 22 ("[a] significant number of the ads in the spring of 2005 for and against judicial filibusters were designed to affect or influence the vote in the Senate on the filibuster issue, while some may have been more aimed at public opinion generally"). *See also* Franklin Expert Report at 7 (the "stalemate was not broken until May 23, 2005"). WRTL's further contention that in the spring of 2005 the filibuster issue "arose too fast" to address, relies heavily on the testimony of Jason Vanderground. But, as WRTL admits, Vanderground actually stated he was unfamiliar with how the judicial filibuster issue took shape in the spring of 2005. Opp. at 9 (citing Vanderground Dep. 146:1-2). By contrast, Professor Franklin, who studied the filibuster issue, offered unrebutted testimony that it had been "clear" for several months that the judicial filibuster issue was "coming to a head" in Spring 2005. Franklin Dep. at 24:17-20. Indeed, other groups spent at least $8.5 million in advertising during that period while WRTL sat on the sidelines. *Id*. at 18:17-21, 26:17.

[5] Bailey testified that: (1) an ad can qualify as so-called "grassroots lobbying advertising" while having an electoral effect; (2) a more "subtle" ad can at times be more effective in influencing elections than one that "categorically state[s] with a sledgehammer what the position of the public officials are;" and (3) WRTL's attempt to sever the text of an ad from its context is misplaced and does not accurately reflect how an ad will affect an election. Opening Mem. at 30-31 & n.61.

years. His expert report relies on twenty-seven well-documented pages of empirical data and established political science literature.[6] WRTL's assertion that Franklin's conclusions as to the effects of advertising on campaigns were somehow biased is speculative and unsupported. Moreover, the ads Franklin studied (the only in-depth empirical analysis directly addressing such ads) were precisely the type of "grassroots lobbying" ads for which WRTL seeks an as-applied exemption.

In sum, the record leaves no doubt that WRTL's three 2004 ads are not in any material respect different from the ads the *McConnell* Court held Congress has a compelling interest in regulating.

2. WRTL Has Not Shown That It Could Not Have Effectively Disseminated Its Message Using Alternative Means

Nor has WRTL undermined the indisputable conclusion that it could readily have used alternative means to disseminate its message. The ability of corporations and unions to "finance genuine issue ads during [the electioneering] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund" was important to the *McConnell* Court's conclusion that BCRA's application to ads like those WRTL sought to run is constitutional. *McConnell*, 540 U.S. at 206. For the reasons stated in our Opening Memorandum, WRTL has failed to prove that it could not adequately disseminate its message under Title II. Opening Mem. at 17-22.[7]

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[6] *See* Franklin Expert Report at 11-38. *See also id*. at 23 ("*Based on the empirical literature discussed in sections 7.1-7.6 below* I conclude that within the politicized context of an election campaign, any advertising that addresses topics of current debate is very likely to have electioneering effects, regardless of the purported purpose of the ad.") (emphasis added).

[7] WRTL has not responded to Intervening Defendants' argument that WRTL's "segregated fund" alternative lacks merit and that the differences between the statutory requirements (which WRTL claims are unconstitutional) and WRTL's proposed alternative (which WRTL finds

C. CONTRARY TO WRTL'S CONTENTIONS, *MCCONNELL* FORECLOSES ANY GENERAL "GRASSROOTS LOBBYING" EXCEPTION

WRTL's unripe request for a general "grassroots lobbying" exception merely rehashes its failed facial challenge in *McConnell*. The *McConnell* plaintiffs offered precisely the argument WRTL makes here: that the "whole category of speech" called "grass roots lobbying" would unconstitutionally be subject to regulation should BCRA be upheld. *See* Opening Mem. at 24-26. WRTL has not explained here how its plea for a rule-like general "grassroots lobbying" exception is any different from the contention *McConnell* rejected.

Moreover, WRTL hinges its argument on the mistaken premise that "grassroots lobbying" ads may easily be distinguished from electioneering or "sham" issue ads. This argument ignores *McConnell*'s core holding, that the problems Congress sought to allay through BCRA arose both from pure electioneering ads and purported "issue" ads, and that experience showed the two categories merged in practice. 540 U.S. at 193, 205-06. Recognizing that the "vast majority" of so-called issue ads that corporations and unions seek to broadcast using their treasury funds in pre-election periods are "intended to influence the voters' decisions and have that effect," the Supreme Court concluded that the same "compelling interest" that justified

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constitutionally acceptable) are not of constitutional magnitude. *See* Opening Mem. at 22. At one point, WRTL contends that, under *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), "[t]he burden is not on WRTL to prove the PAC option and other alternatives are inadequate." Opp. at 24. This argument mistakes the inquiry. The issue is not, as in *Austin*, whether WRTL's expenditure of corporate treasury funds can properly be regulated provided there is a segregated fund exception; that issue has long been decided and WRTL admits that, as a recipient of corporate donations, it is subject to BCRA's restrictions. The issue is whether WRTL is situated so differently that it cannot comply with BCRA's electioneering communication provision, which *McConnell* held constitutional, given the relatively easy alternatives of either avoiding the mention of a candidate or paying for its ads from a separate fund. WRTL bears the burden on that issue.

regulating express advocacy also facially supported the regulation of those issue ads captured by BCRA's narrow and objective definition of "electioneering communications." *Id*. at 206.

In seeking a purportedly as-applied, but general exception for "grassroots lobbying," WRTL must, at the very least, distinguish such ads from the category of ads the Supreme Court has already found Congress has properly included in BCRA's definition of "electioneering communication." Despite several attempts to do so, WRTL has made no such showing. In its latest submission, WRTL abandons its earlier reliance on the IRS definition of "grassroots lobbying," a definition so broad that it encompasses virtually every ad *McConnell* reviewed. *See* Opening Mem. at 27-28. WRTL now offers a menu of alternative definitions and requests the Court to cobble together a definition of its own. Opp. at 31-36. In the end, WRTL is unable to distinguish any solidly definable category of "grassroots lobbying" ads from those *McConnell* considered. To accept WRTL's position then, would require this Court to create some general exception to *McConnell* that would be so expansive and fluid that it would eviscerate the Supreme Court's holding in that case.

CONCLUSION

For the foregoing reasons and for those stated in Intervening Defendants' Opening Memorandum, Intervening Defendants respectfully request that this Court (1) deny WRTL's motion for summary judgment, and (2) grant Intervening Defendants' motion for summary judgment or, in the alternative, issue judgment in their favor on the existing record.

Dated this 18th day of August, 2006.

Respectfully submitted,

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