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**	**Case No. 04-1260 (DBS, RWR, RJL)** **THREE-JUDGE COURT**

INTERVENING DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Intervening Defendants respectfully submit this memorandum in opposition to the Motion for a Temporary Restraining Order and Preliminary Injunction submitted by Plaintiff Wisconsin Right to Life ("WRTL"). In making its second request for preliminary injunctive relief in this case, WRTL has failed to demonstrate that it is entitled to the extraordinary relief it seeks. This Court should deny WRTL's motion.

INTRODUCTION

At the outset of this case, this Court denied a motion by WRTL for preliminary relief that was in relevant respects like the present request. In weighing the likelihood of WRTL's success on the merits, this Court concluded that WRTL's claim had "little likelihood of success" because—even putting aside the question whether as-applied challenges to the electioneering communications provisions of the Bipartisan Campaign Reform Act ("BCRA") are permissible—the facts suggested that WRTL's advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n* ("*WRTL v. FEC*"), No. 04-1260, slip op. at 6 (D.D.C. Aug. 17, 2004) (citing *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003)). This Court also found that WRTL could not meet its burden of establishing the additional requirements for preliminary injunctive relief: irreparable harm in the absence of an injunction, the lack of substantial injury to other parties, and the furtherance of the public interest by an injunction. *Id* at 6-9.

Two years later, following a remand by the Supreme Court and after the bulk of the briefing on the merits has been completed, WRTL again requests preliminary injunctive relief (as well as a temporary restraining order), only this time for an ad that would have the effect of supporting (rather than opposing) a candidate in the 2006 election. The Court should reject this request. WRTL's motion is flawed at the outset because it belatedly seeks, without an amendment to the complaint or the commencement of a new action, a determination of BCRA's application to an ad that has never been before this Court. Moreover, WRTL has not, in any event, established that it is entitled to the extraordinary relief it seeks. The factors that counseled against WRTL's original request for relief are equally applicable to the present motion. Now, as in 2004, WRTL has failed to establish that preliminary injunctive relief is warranted.

ARGUMENT

I. WRTL'S MOTION IS NOT PROPERLY BEFORE THIS COURT

WRTL filed its Amended Verified Complaint for Declaratory and Injunctive Relief on September 1, 2004. In that complaint, WRTL asserted two challenges: (1) it challenged BCRA as applied to three advertisements it planned to run prior to the 2004 elections; and (2) it challenged BCRA as applied to all "grass-roots" lobbying ads. WRTL's Amended Complaint for Declaratory and Injunctive Relief ("Am. Verified Compl.") at 14. Approximately two years later, on the eve of this Court's decision on the merits, WRTL asserts a challenge to BCRA as applied to an advertisement regarding the 2006 elections that it hopes to broadcast.

WRTL could have proceeded in either of two ways when it determined that it wanted to challenge BCRA as applied to a new advertisement. First, WRTL could have filed a new complaint, which would have been assigned pursuant to the governing rules. *See* LCvR 40.5; 28 U.S.C. 2284. Or, it could have sought leave to amend its existing complaint. WRTL chose neither option; instead, it filed the instant motion. But the basis for WRTL's connection of the CCPA advertisement to its Amended Complaint is unclear. If WRTL asserts that the CCPA advertisement falls within its general claim regarding "grass-roots lobbying ads," it faces the very heavy burden of demonstrating that BCRA cannot constitutionally be applied to *any* "grass-roots lobbying ad." On the other hand, the present challenge clearly does not fall within WRTL's Amended Complaint to the extent that the complaint challenged BCRA as applied to WRTL's 2004 advertisements. Thus, to the extent that WRTL's arguments are based on the particular features of the CCPA advertisement, that issue is not within the scope of the Amended Complaint and thus is not properly before this Court.

If this Court treats the current motion as a motion for leave to amend the complaint, that motion should be denied. This Court entered final judgment in this case on May 9, 2005, and WRTL appealed to the Supreme Court. The Supreme Court remanded for a very narrow purpose: "to consider the merits of WRTL's as-applied challenge in the first instance." *Wisconsin Right to Life v. Federal Election Comm'n*, 126 S.Ct. 1016 (2006). Given the advanced procedural posture of the case, granting WRTL leave to amend would not serve the interests of justice. *Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977) (upholding a denial of leave to amend when the amendment was sought late in the case, "in consideration of the potential prejudice to the other party and the interest in eventual resolution of litigation").

Indeed, there is no reason to believe that the case would end with this particular proposed amendment to the complaint. Conceivably, WRTL could extend the case before this Court into perpetuity simply by placing a new advertisement before the Court every time the Court nears the point when it can enter final judgment on the advertisements previously at issue.

Finally, although WRTL's motion requests a temporary restraining order and a preliminary injunction, it is unclear how either form of relief practically would redress the concerns raised in the motion. It appears that WRTL is asking this Court for one of two things: (1) to preliminarily enjoin any investigation by the FEC because such an investigation would chill its speech; or (2) a permanent declaratory judgment that BCRA cannot be applied constitutionally to the advertisements at issue. If WRTL merely seeks preliminary relief that would preclude the FEC from instituting an investigation or commencing a proceeding during the pendency of the preliminary injunction, then such relief would be unlikely to redress any purported chilling effect raised by the prospect of an enforcement action. After all, the FEC could simply institute and bring any enforcement proceeding after the expiration of the

preliminary injunction. Alternatively, it is possible that WRTL seeks a decision that would permanently bar any enforcement action—even one taken many months for now, and even after this Court may have concluded that WRTL ultimately loses on the merits. In that case, however, WRTL would be seeking permanent relief in this extremely expedited proceeding.

II. WRTL HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO THE RELIEF IT SEEKS

Even if this Court decides to entertain WRTL's motion, WRTL's request for a preliminary injunction and a temporary restraining order does not meet the standards for such extraordinary relief. As was the case two years ago, WRTL cannot carry its heavy burden of showing "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable harm without injunctive relief, (3) that an injunction would not substantially harm other interested parties, and (4) that issuance of the injunction is in the public interest." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (citing *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18) (D.C. Cir. 1998)).[1]

A. WRTL Cannot Demonstrate A Substantial Likelihood of Success on the Merits

1. *The CCPA Advertisement Is Indistinguishable From the Advertisements that the Supreme Court Found Congress Has a Compelling Interest in Regulating*

In this Court's early assessment that WRTL had "little likelihood of success" on the merits, the Court made clear that its analysis of the availability of as-applied challenges to the electioneering communications provisions of BCRA was "but one reason [it found] little

[1] WRTL also seeks a temporary restraining order. "The same standards apply for both temporary restraining orders and preliminary injunctions." *Experience Works, Inc. v. Chao*, 267 F. Supp.2d. 93, 96 (D.D.C. 2003) (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

likelihood of success on the merits." *WRTL v. FEC*, No. 04-1260, slip op. at 6. In addition, the Court explained, WRTL could not meet its burden of showing a likelihood of success on the merits because the proposed ads "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id*. (citing *McConnell*, 540 U.S. at 695). As this Court further explained, "[i]n *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements 'will *often* convey a message of support or opposition' regarding candidates."[2]

That lesson is equally applicable to WRTL's latest advertisement, as confirmed by subsequent precedent in this Court. Less than four months ago, a three-judge panel of this Court concluded that a plaintiff in very similar circumstances was unlikely to succeed on the merits. In that case, the Christian Civic League ("CCL") sought a preliminary injunction that would allow it to run an advertisement about the positions of Maine's Senators on the "Marriage Protection Amendment." After noting that the facts were "markedly similar" to the facts in this case, *Christian Civic League of Maine, Inc. v. Federal Election Comm'n* ("*CCL v. FEC*"), No.

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[2] WRTL never properly appealed this Court's Memorandum and Order denying its initial preliminary injunction motion. Moreover, the only part of this Court's reasoning in that decision that was reviewed on the merits by the Supreme Court was the conclusion that footnote 73 in *McConnell* foreclosed any "as-applied" challenge to BCRA. The Supreme Court, in rejecting this one specific conclusion, stated unequivocally that it would not opine on this Court's separate conclusion that WRTL's advertisements "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Wisconsin Right to Life*, 126 S.Ct. at 1017. And it did not disturb this Court's other three conclusions in its August 17, 2004 decision (none of which were referred to in the May 9, 2005 decision) as to why preliminary relief was not warranted (i.e., that WRTL had not shown that it would suffer irreparable harm, that an injunction would not cause substantial injury to other parties, and that the public interest would not have been furthered by the injunction). At least as to those three issues, the Court's conclusions remain undisturbed, and this Court should not revisit the issues absent good cause not present here. *See, e.g., Crocker v. Piedmont Aviation*, 49 F.3d 735, 739 (D.C. Cir. 1995) ("a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases.").

06-0614, slip op. at 5 (May 9, 2006), the three-judge panel concluded that the CCL could establish "neither a substantial likelihood of success on the merits nor that it will be irreparably injured in the absence of the 'extraordinary remedy' of a preliminary injunction." *Id.* at 4 (quoting *Cobell*, 391 F.3d at 258).

As to the likelihood of success on the merits, the *CCL* panel concluded that the so-called "issue advertisement" that CCL sought to air was "functionally equivalent to the sham issue advertisements identified in *McConnell*." *Id.* at 10. The advertisement at issue in that case—which referred to Senator Olympia Snowe, a candidate for re-election—stated in relevant part: "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 [amendment]." *Id.* at 2 (citing CCL Verified Compl., Exh. A). The *CCL* panel explained that the ad's characterization of Senator Snowe's previous stance on the Marriage Protection Amendment as "[u]nfortunate" is "the sort of veiled attack that the Supreme Court has warned may improperly influence an election." *Id.* at 10 (citing *McConnell* at 126-27).

WRTL's proposed "CCPA" advertisement is, under BCRA and *McConnell*, no different. It states:

> The U.S. Senate recently passed a bill to protect parents from secret abortions. Fortunately, Senator Kohl voted <u>for</u> the rights of parents. But, sadly, Senator Feingold did not. . . . Please call Senators Kohl and Feingold at 202-224-3121 and urge them to stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions.

See WRTL's Motion for Temporary Restraining Order and Preliminary Injunction ("WRTL Mot."), Exh. D (emphasis in original). Just as in *CCL*, the advertisement refers specifically to a candidate who is running for office in the upcoming election—in this case, Senator Kohl—and characterizes the candidate's prior votes on a particular issue in a way that will likely have an

electoral effect.[3] The advertisement at issue in *CCL* criticized Senator Snowe's vote as "unfortunate," and the CCL panel rightly concluded that language was just the sort of "veiled attack" that, as the Supreme Court warned in *McConnell*, could very well influence an election. *CCL v. FEC*, No. 06-0614, slip op. at 10. Likewise, the advertisement here praises Senator Kohl's vote "for the rights of parents" as "fortunate" and urges voters to contact him. WRTL Mot., Exh. D (emphasis in original). "Veiled" support—no less than "veiled" opposition—falls squarely within the ambit of BCRA and the *McConnell* decision.

WRTL draws an illusory distinction between an ad praising Kohl as a *candidate* and an ad praising him as an *officeholder*. WRTL Mot. at 9. Admitting that the ad praises Senator Kohl's vote, WRTL claims that the support is irrelevant because the ad's promotion is not of "Kohl in any way in his role as a candidate." *Id.* The ad, according to WRTL, is "about Kohl's votes in Congress, not the election . . . [and it is] not about Sen. Kohl as a candidate, but it is about him as a legislator." *Id*. at 9-10. The fallacy with WRTL's attempted distinction is that virtually all of the sham issue ads at issue in *McConnell* either praised or attacked an officeholder in his or her capacity as an officeholder—not as a candidate. *See McConnell*, 540 U.S. at 126-28. *See also* Intervening Defendants' Mem. In Support of Mot. for Summary Judgment, at 10-11

[3] As explained by Douglas Bailey, an experienced political advertising consultant and expert in this case, a purported "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 reference candidate." Intervening Defendants' Motion for Summary Judgment Or, In the Alternative, Judgment on the Record ("Mot. for Summary Judgment"), Exh. 15 ¶ 11 (Bailey Declaration). Moreover, "[s]o-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." *Id.* ¶ 8. Professor Charles H. Franklin has offered similar testimony. *See, e.g*., Intervening Defendants' Mot. for Summary Judgment, Exh. 14 at 41 (Franklin Expert Report) (concluding that there is "strong empirical evidence that any political advertising close to an election has electorally relevant consequences"). *See generally* Intervening Defendants' Mem. in Support of Mot. for Summary Judgment, at 14-17.

(quoting ads presented to the *McConnell* Court). If the rule suggested by WRTL is that any ad that attacks (or praises) a legislator for a vote or other official action is constitutionally exempt because it is not about a "candidate," then it would effectively overturn *McConnell* and would invite precisely the type of massive circumvention of the law that BCRA was designed to prevent.

WRTL's Motion also appears to suggest a distinction between attacking and praising a candidate. *See* WRTL Mot. at 9 ("In the CCPA Ad itself, WRTL notes that Kohl voted in the way that WRTL preferred . . . ."). But the fact that the underlying motivation of an advertisement is one of support rather than opposition is of no constitutional importance. The electioneering communications provisions apply equally to supporting a candidate and to opposing a candidate. *See* 2 U.S.C. § 434(f)(3)(A)(I). The Supreme Court did not make any distinction between attacking or supporting a candidate in *McConnell*, and in fact affirmatively recognized that BCRA properly applied to ads that, without expressly saying "vote for" a candidate, could nevertheless influence an election by serving as the functional equivalent. *McConnell*, 540 U.S. at 193. *See also id*. at 203-04 (explaining that, "[s]ince our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly *advocating the election or* defeat of candidates in federal elections has been firmly embedded in our law" and BCRA "extend[s] this rule . . . to all 'electioneering communications' covered by the definition of that term in [§ 434(f)(3)]") (emphasis added).

2. *Given the Alternatives Available to WRTL, the Electioneering Communications Provision is Narrowly Tailored to the Advertisement at Issue*

WRTL's motion also fails to show any likelihood of success on the merits because Congress narrowly tailored the electioneering communications provisions of BCRA to accommodate ads like the one that WRTL proposes. The merits analysis of the three-judge panel in *CCL* is, again, instructive. Invoking *McConnell*'s rationale that "'[b]ecause corporations can still fund electioneering communications with [political action committee] money, it is simply wrong to view the [electioneering communications] provision as a complete ban on expression rather than a regulation,'" the panel concluded that BCRA's electioneering communication provision was narrowly tailored as to CCL because BCRA "does not bar the proposed advertisement." *CCL v. FEC*, No. 06-0614, slip op. at 9 (quoting *McConnell*, 540 U.S. at 204). CCL, explained the court, was free to fund its advertisement "through a political action committee," "publish the advertisement with its own general corporate funds . . . so long as it uses a medium other than 'broadcast, cable or satellite," or refrain from clearly identifying the candidate mentioned in the advertisement (in that case, Senator Snowe). *Id*. at 9-10. *See also WRTL v. FEC*, No. 04-1260, slip op. at 8 (concluding that the Supreme Court's endorsement of the "PAC option" "not only *weighs against the likelihood of success on the merits*, but it also suggests that plaintiff has not advanced a strong case of irreparable harm in the absence of a preliminary injunction") (emphasis added).

The electioneering communications provision is narrowly tailored to the advertisement at issue in this case for these same reasons—and for the identical reasons that BCRA is narrowly tailored to WRTL's 2004 advertisements. As explained fully in Intervening Defendants' Motion for Summary Judgment, WRTL has a number of available alternatives for running its

advertisement: (1) WRTL could run the same ads on any radio or television outlet, at any time, simply by using funds raised by WRTL-PAC, rather than WRTL's general treasury funds; *see* 2 U.S.C. §§ 441b(b)(2), 441b(c)(1);[4] (2) WRTL could disseminate its message at any time, in any outlet, and even with corporate funds, "by simply avoiding any specific reference to federal candidates," as the Supreme Court noted; *see McConnell*, 540 U.S. at 206; (3) WRTL could run its advertisement through the print or electronic media rather than on television and radio; or (4) WRTL could use its treasury funds to broadcast ads that referred to Senator Kohl outside the statutory pre-election window, for such ads would not be "electioneering communications" under BCRA. Intervening Defendants' Mem. In Support of Mot. for Summary Judgment, at 18-22. BCRA was carefully drafted so that organizations like WRTL would continue to have an array of options available to them for communicating their messages, and all of those options remain available to WRTL.

WRTL's contention that the PAC option does not provide a sufficient alternative in this case is wrong on both the facts and the law. First, WRTL states it has insufficient money in its PAC to run the radio ads.[5] WRTL Mot. at 5. But the affidavit submitted in support of the motion allows that the corporation itself must start a fundraising campaign in order to raise sufficient funds to pay for the ads. WRTL Mot., Third Affidavit of Barbara L. Lyons ("Third Lyons Aff.")

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[4] WRTL incorrectly states that *McConnell* "merely h[eld] that the PAC alternative was adequate as to 'express advocacy.'" WRTL Mot. at 11. To the contrary, the Supreme Court, in upholding BCRA's electioneering communications provisions, stated in no uncertain terms that, even though some so-called "issue" ads may be covered by BCRA's pre-election restrictions, those ads are properly regulable because other options, including the "segregated fund" option, remain available. 540 U.S. at 206.

[5] Earlier in this litigation, WRTL also offered vague and unsupported assertions that fundraising has become more difficult for PACs, *see* WRTL's Motion for Summary Judgment at 49, but it pointed to no actual changes that would explain such a phenomenon.

¶ 25. The fundraising appeal solicits contributions from individuals in amounts less than $5,000, *Id*., Exh. F ("Any gift is appreciated. $1,000 $500 $100."). Accordingly, the money could be raised for the PAC, at least to the extent that solicitations are made to WRTL members. WRTL is apparently already prepared to fundraise for the corporation, and WRTL makes no showing that it could not raise adequate funds simply by engaging in identical fundraising for its PAC.

Moreover, WRTL can offer no reasonable explanation why WRTL-PAC could not already have raised the approximately $11,000 that it apparently would hope to spend purchasing advertising time. *Id*., Exh. E. WRTL's own exhibit demonstrates that the Senate legislation at issue has been important to it for at least a year-and-a-half and was discussed in Congress for several years prior to that. *Id.*., Exh. C (containing, e.g., February 17, 2005 WRTL "Alert" relating to the issue and stating that the "legislation has been discussed in Congress for several years"). WRTL also has apparently known for years that it might want to run ads squarely covered by BCRA, and in fact alleged this fact two years ago in its complaint in this action. *See* Am. Verified Compl. ¶ 16. Yet, despite repeated guidance from both the Supreme Court and this Court that the PAC and other options are adequate alternatives,[6] WRTL has declined to make use of its PAC for purposes of raising funds to run advertisements like that at issue here. Any shortfall WRTL-PAC now faces is WRTL's own doing.

WRTL also asserts that running the CCPA ad with PAC funds would require it to "speak in ways" that are either "inconsistent with" its positions or "untrue" because doing so

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[6] *See McConnell*, 540 U.S. at 206 (stating that "in the future corporations and unions may finance genuine issue ads during those [electioneering] time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund"); *WRTL v. FEC*, No. 04-1260, slip op. at 7 & n.1 (denying preliminary injunction in part because WRTL could use PAC funds and had other alternative methods available to communicate its message).

would require (1) "a disclaimer declaring that this communication is 'political' (i.e., having to do with elections)" and (2) the filing of a PAC report "stating that the expenditure for the CCPA Ad was either for or against the reelection of Sen. Kohl." WRTL Mot. at 5-6. This argument has no basis in law. First, the Supreme Court did not recognize disclosure as an inappropriate burden, even for issue ads, when it approvingly set forth the PAC option as one basis for upholding the electioneering communication provisions. *See McConnell*, 540 U.S. at 204, 206, 209 n.91.[7] Second, WRTL misstates the disclaimer and disclosure requirements. An advertisement qualifying as an "electioneering communication" requires only that the political committee sponsoring the ad state that it is responsible for the ad; it does not require, as WRTL contends, any additional statement declaring the communication as "political." *See* 11 C.F.R. § 110.11. Likewise, the applicable PAC disclosure report, absent an independent expenditure (which this is not), does not require a statement as to whether the ad supports or opposes a given candidate. *See* FEC Form 3X, Report of Receipts and Disbursements (attached as Exh. A) (requiring Schedule E (which provides for designation of support or opposition) only for "independent expenditures"). WRTL's contention that using its PAC would place upon it additional speech burdens is simply unfounded.

Finally, WRTL's argument relating to its reporting and disclosure requirements cannot be squared with its own complaint in this case. WRTL stated in its complaint that it "does not challenge the reporting and disclosure requirements for electioneering communications" and that it "intends to comply" and "will continue to comply" with all applicable "record keeping,"

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[7] *See also Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 163 (2003) ("[A] unanimous Court in [*Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 201-02 (1982)] did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions.").

"reporting" and "disclaimer" requirements for electioneering communications. *See* Am. Verified Compl. ¶¶ 35-37.

B. WRTL Cannot Show Irreparable Harm

In asserting that it will suffer irreparable harm in the absence of relief by this Court, WRTL makes the identical argument it unsuccessfully pressed in its preliminary injunction motion two years ago, even relying on the same authority. *See* WRTL Mot. at 10 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In its initial request for injunctive relief, and again in this motion, WRTL argues that even a minimal loss of a First Amendment freedom constitutes irreparable injury. This Court responded in 2004 that "the actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues" and concluded that WRTL had not demonstrated irreparable harm. *WRTL v. FEC*, No. 04-1260, slip op. at 7. On "markedly similar" facts, *CCL v. FEC*, No. 06-0614, slip op. at 5, the *CCL* court agreed. Pointing to the ready availability of alternative means, the *CCL* court concluded that the plaintiff in that case had not demonstrated that it would "suffer irreparable, or even significant, harm in the absence of the requested injunction." *Id.* at 11.

As shown above, the array of options available to WRTL in 2004 are still available to it now. WRTL "is not precluded from forwarding its message, or even from exposing the public to the particular advertisements at issue." *WRTL v. FEC*, No. 04-1260, slip op. at 7. Now, as in 2004, WRTL can choose from an number of alternatives to disseminate its message, including funding its proposed advertisement with its PAC, avoiding a reference to Senator Kohl, using other media, or broadcasting its ads outside pre-election period covered by BCRA. As this Court has previously held, in light of the fact that BCRA "does not prohibit the sort of speech plaintiff would undertake"—and, at most, merely requires that it "channel" its "spending through [a]

political action committee[ ]"—"the harm established by plaintiff will not weigh much in the balance against potential harm to others . . . ." *Id.* at 7-8.

C. The Harm to the FEC In Enforcing BCRA and the Public Interest In BCRA's Application Continue to Counsel Against Injunctive Relief

WRTL's motion should also be denied because an injunction barring the FEC from enforcing BCRA's electioneering communications provision—even for a short time—would manifestly injure other parties, as well as the public interest. As the *CCL* court recently explained, "[t]he presumption of constitutionality which attaches to every Act of Congress is . . . an equity to be considered. . . in balancing hardships." *CCL v. FEC*, No. 06-0614, slip op. at 12 (citing *Walters v. Nat'l Assn' of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)). Moreover, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Id.* (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)).

Once again, this Court's previous consideration of this exact issue—without any reliance on the particular text of the ads—controls the analysis here. *WRTL v. FEC*, No. 04-1260, slip op. at 8. In its previous order, this Court explained:

> The harm to the opposing party, the Federal Election Commission, is evident. . . . If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission.

Id; see also CCL v. FEC, No. 06-0614, slip op. at 12 (citing *WRTL v. FEC*, No. 04-1260, slip op. at 7). The analysis is no different in this case, and WRTL has not suggested, and cannot suggest, a plausible distinction.

As to the public interest, this Court has previously concluded that WRTL "has not established that the public interest would be furthered by the injunction." *WRTL v. FEC*, No. 04-1260, slip op. at 8. This Court explained:

> The Supreme Court has already determined that the provisions of the [Bipartisan Campaign Reform Act of 2002] serve compelling government interests. To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

Id. at 8-9 (citation omitted); *see also CCL v. FEC*, No. 06-0614, slip op. at 13 (citing *WRTL v. FEC*, No. 04-1260, slip op. at 8-9). The analysis is no different here.

CONCLUSION

For the foregoing reasons, WRTL's Motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

Dated this 31st day of August, 2006.

Respectfully submitted,

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